

2012-404999-32-LPL958

INDIAN CASES

CONTAINING
FULL REPORTS OF DECISIONS
OF

The **Privy Council**, the High Courts of **Allahabad**,
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Courts of **Lower Burma** and the **Punjab**,
the Courts of the Judicial Commissioners of
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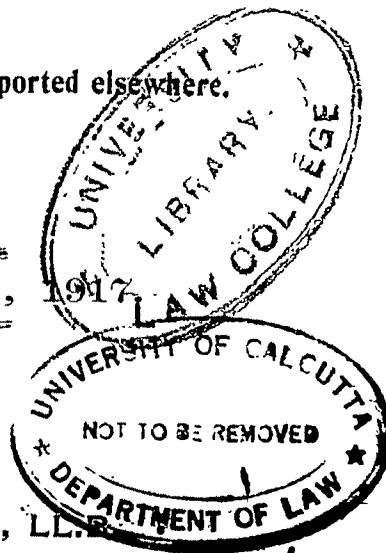
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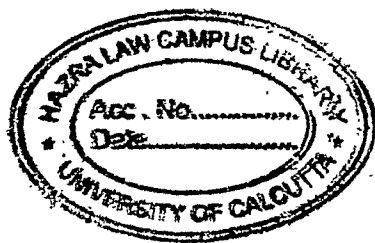
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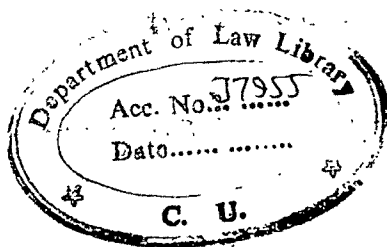
PLEADER, CHIEF COURT, PUNJAB, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.





LP 1958



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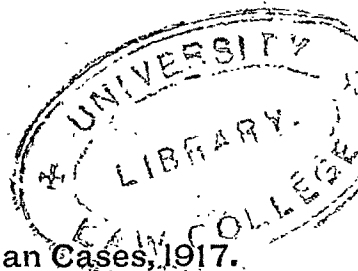
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VOLUME XXXVII.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1298 TO 1345
OF 1914.

July 18, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

MUTHU REDDI AND OTHERS—DEFENDANTS
—APPELLANTS
versus

MUTHU VENKATAPATHI REDDI

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 8, cls. 1, 2, s. 6, cl. 6, expl.—Occupancy ryot, subsequent acquisition of melvaram by—Rule of merger, whether applies—Appeal, second—Notice, insufficiency or invalidity of, if can be pleaded for first time in second appeal—Interpretation of Statutes—Estates Land Act explicit—Principles of general law, if applicable.

Section 8, clause (1), of the Madras Estates Land Act (I of 1908), simply enunciates the general law of merger, and the same is subject to qualifications to be found in other portions of the Act. [p. 3, col. 1.]

Section 8, clause (2), is an application of the general rule in clause (1) to the particular case where one amongst several co-landholders subsequently acquires the occupancy-right. [p. 3, col. 1.]

But where one out of several *mirasidars* or *ryots* becomes entitled to the rights of a landholder in respect of the same land, it is the converse of section 8, clause (2), and is specifically provided for by the explanation to clause 6 of section 6. [p. 3, col. 1.]

Where one of two persons, jointly entitled to the occupancy-right in a certain estate, becomes entitled by purchase to the *zemindari* or *melvaram* right also:

Held, (1) that he does not thereby lose his occupancy right; [p. 3, col. 2.]

Abul Hasan Khan v. Bhura, 28 A. 768; A. W. N. (1906) 226; 3 A. L. J. 763, referred to.

(2) that the restriction that such acquisition should be by inheritance or devise applies only to clause 6 of section 6 and not to the explanation to clause (6). [p. 3, col. 2.]

The Madras Estates Land Act is a comprehensive Tenancy Code and wherever it is explicit, a discussion of the general law is irrelevant. [p. 3, col. 2.]

In an ejectment suit where the defendants did not plead any want of notice in the first Court and there was no issue regarding it:

Held, that the plea of insufficiency or invalidity of notice could not be allowed to be raised for the first time in second appeal. [p. 4, col. 1.]

Second appeals against the decrees of the District Court, Chingleput, in Appeal Suits Nos. 165 to 218 of 1913, respectively, preferred against the decrees of the Court of the District Munsif, Chingleput, in Original Suits Nos. 713 to 773 of 1911, respectively.

FACTS of the case appear from the judgment.

Mr. T. R. Ramachandra Aiyar (with him Messrs. T. R. Krishnaswami Aiyar and N. A. Krishna Aiyar), for the Appellants.—The 1st plaintiff owns the *mirasi* as well as *zemin* rights in the suit lands. Section 8 of the Madras Estates Land Act applies in terms and there is merger. The 1st plaintiff shall have no right to hold the land as a *ryot* but shall only hold it as a land-holder.

It cannot be contended that, because the 1st plaintiff's *mirasi* right is not specific but is only an undivided moiety of the whole land, there can be no merger, for there can be occupancy-right even with respect to an undivided moiety. See *Periasami v. Periasami* (1).

The land is admittedly *ryoti* land. I am cultivating it from 1890. So I get occupancy-right. See section 5 (Act I of 1908).

Specific letting has not been proved. Hence plaintiffs cannot eject. *Venkatacharu v. Kandappa* (2) was referred to.

Messrs. L. A. Govindaraghava Aiyar and D. V. Neelamughachariar, for the Respondents.—It is unnecessary to decide the question of merger in this case. Even assuming that there is merger, it is only the 2nd plaintiff.

(1) 5 I. A. 61; 2 C. L. R. 81; 1 M. 312; 3 Sar. P. C. J. 795; 3 Suth. P. C. J. 508; 1 Ind. Dec. (N. S.) 203.

(2) 15 M. 95; 5 Ind. Dec. (N. S.) 415.

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the owner of the other moiety of the occupancy-right, that will become the *ryot* and in no case can the defendants (appellants herein) who are only tenants become *ryots*. For under section 6 the letting must be by a landholder of a person as a *ryot* (and not simply as a tenant).

As regards merger three classes of cases may arise. (1) There may be only one landholder and only one tenant with respect to a certain land. (2) There may be several landholders but only one tenant. (3) There may be only one landholder but several tenants.

Section 8, clause (1), provides for case (1) above where the entire interests of the landholder and *ryot* have become united in the same person. Section 8, clause (2), provides for case (2) above where one of several landholders acquires the occupancy-right in any land. Case (3) above is the converse of case (2) and there is no specific provision in the clauses of section 8 which could apply to this case. Hence section 8 cannot help the appellants.

But the explanation to clause 6 of section 6 is an explanation to the whole of the section and specifically provides for the present case. Hence the first plaintiff does not lose his occupancy-right by subsequently becoming interested in the land as landholder.

As to the application of the general law of merger, my submission is that it does not apply as the Act, which must be taken to be an exhaustive Code of the tenancy law of this Presidency, contains a specific provision applicable to this case.

Even assuming that the general law of merger applies, the conditions as to merger are not satisfied. See Encyclopædia of the Laws of England, Volume 9, page 193. Foa, (Landlord and Tenant) 5th Edition, page 628. Gour's Law of Transfer, section 111, clause (d), commentary. *Amatoo v. Muksud Ali* (3) and *Raja Kishen Datt Ram v. Rajah Mumtaz Ali Khan* (4). There is nothing to show which is the greater right, the *mirasi* or the *zemin* right.

The smaller alone merges in the larger. The landholder's right is, I submit, the smaller right.

(3) 28 Ind. Cas. 314; 16 C. W. N. 435.

(4) 5 C. 198 (P. C.); 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. s.) 737.

[SADASIVA AIYAR, J.—No. The landholder's right is the larger. You see it is called *melvaram*.]

Mr. L. A. Govindaraghava Aiyar.—The *mirasidar* is the owner of the land and hence his right would be the larger right.

Farther, the newly acquired right will merge in the older one. The landholder's right was newly acquired by me. Hence I shall continue to be a *ryot*.

[SADASIVA AIYAR, J.—Is there any authority for holding that it is always the later and newly acquired right that merges in the earlier one?]

Mr. L. A. Govindaraghava Aiyar.—There is no specific decision to that effect, but the general law of merger would lead to that.

I have also relied on notice. I have given six months' notice ending with the *fasti* to quit. In the absence of anything else the tenancy must be presumed to be a lease from year to year. Therefore the defendants' plea of absence of specific letting goes.

If, however, your Lordships be against me on the question of merger, your Lordships should at least give me joint possession. See *Subramaniam Ohettiar v. Periasami Thevar* (5) and *Muthu Ramakrishna Naicken v. Marimuthu Goundan* (6).

The case of *Periasami v. Periasami* (1) cited by the other side has no relevancy to this case.

Mr. T. R. Ramachandra Aiyar replied.

JUDGMENT.—The plaintiffs sue as *ryots* owning the occupancy-right in the suit lands, and the lower Courts have held that they gave defendants, their tenants, valid notice to quit and are entitled to recover possession, rent and profits.

Defendants' first and main contention before us depends on the following facts, which have been admitted or found:—The *mirasi* or occupancy-right in lands in the suit village belongs to 1st and 2nd plaintiffs, each owning an unascertained moiety of it. First plaintiff and his predecessors have owned their moiety from time immemorial. Second plaintiff acquired hers as *stridhanam* from her father in 1873. There is no connection between

(5) 24 Ind. Cas. 726; 26 M. L. J. 435.

(6) 24 Ind. Cas. 333; 26 M. L. J. 532 at p 537; M. 1086.

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their titles, though it is a fact that second plaintiff married a member of first plaintiff's family. The plaintiffs sue together, as tenants-in-common of the whole village and co-owners of the whole occupancy-right. First plaintiff's predecessor, however, became entitled to the *zemindari*, in which the suit lands are, by purchase about a hundred years back; and first plaintiff has succeeded to his rights, apparently (though nothing is alleged to turn on the fact) in respect of half the estate. Defendants, therefore, argue with reference to section 8 (1), Act 1 of 1908, that, the occupancy and landholder's rights having been united by transfer in the same person, first plaintiff's predecessor, the latter had and first plaintiff has a right to hold and sue only as a landholder, not as a *ryot*; and that, as first plaintiff cannot sue in the latter capacity, he and the second plaintiff cannot do so together. Plaintiffs, it is admitted, can succeed, only if their suits are, as the plaintiffs describe them, brought by *ryots* against non-occupancy-tenants, since it is not alleged that the conditions, in which a landholder can evict his *ryots*, are fulfilled.

Several answers, total or partial, to this contention have been attempted. But attention may be confined to one, which is decisive. Section 8, on which defendants rely, is no doubt, as its marginal note indicates, the portion of the Act devoted to the topic of merger; and the result of its clause (1) is that, when the interests of the landholder and the occupancy *ryot* have become united in the same person, the right of the latter is, subject to the rights of third persons, determined. This provision, the one relied on by defendants, is, no doubt, absolutely general and if it stood unqualified their argument could be sustained. Clause 2 of the same section deals with a particular case of the class covered by clause (1), the acquisition of the occupancy-right by one amongst several co-landholders, but assumes that the general rule is applicable in those circumstances also, and provides for the protection of the co-landholder's right to his share of the rent and for the revival of the *ryot's* right in favour of any future lessee of the land. It is in these

circumstances that, according to defendants, the case before us of the acquisition of the landholder's right by one of the co-*ryots*, the converse in some respects of the case dealt with in clause (2), must also be covered by clause (1). They, however, overlook another provision, the explanation printed after clause (6) of section 6. That clause prohibits acquisition otherwise than by inheritance or devise of occupancy-right by an *ijaradar*, or farmer, but the explanation following it is of wider scope, providing that a right of occupancy shall not be lost in consequence not only of its owner's subsequently holding the land as an *ijaradar*, or farmer, but also, what is unconnected with clause 6, of his becoming interested in it as landholder. Here, it is plain, we have what section 8 did not afford, provision for the particular case before us, and though its position in the explanation to a clause dealing with other matters and separated from section 8 by section 7, relating to mining rights, is anomalous, its unambiguous language cannot be deprived of effect. This being so, it is unnecessary to deal at length with the arguments based on the general doctrine of merger or the evidence found by the lower Courts to be in plaintiff's favour as to the manner in which the parties have understood their rights, especially as indicated by defendants' payment of *thunduvaram*, consistently with the payment being to a *ryot* owning occupancy-right. As regards the first point it may, however, be observed that, as the Act, a comprehensive tenancy code, is explicit, discussion of the general law is irrelevant; and that an exception to the general presumption of merger, similar to that allowed by the explanation after section 6, clause 6, though more logically placed, is to be found in the explanation to section 22 of the Bengal Tenancy Act (VIII of 1885). *Vide* also *Abul Hasan Khan v. Bhura* (7).

Defendants' remaining argument is that the lower Appellate Court should have dealt with their plea regarding a specific letting to them and the absence of any notice by which the tenancy thus created

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could be terminated. The plaint, paragraph 4, referred to their entering into arrangement with plaintiffs, which was subject to an obligation to surrender the land at the end of the *fasli*; and in paragraph 5 the giving of a registered notice in December 1911 to surrender before the end of the *fasli*, i.e., 30th June 1911, is mentioned. In the written statements the arrangement as denied and there was nothing regarding the notice, except a reference to it as "alleged". Issue No. 2 was framed regarding the arrangement. But there was no issue regarding the notice; and throughout defendants have never put forward any alternative contention that, if the arrangement was established, the lease under it was never terminated in a valid way by the notice alleged or otherwise. In these circumstances they cannot put forward such a contention for the first time in this Court at the hearing.

The second appeals, therefore, fail and are dismissed, Second Appeal No. 1293 with costs and the others without costs.

Appeals dismissed.

V. R. P.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 59 OF 1915.
July 11, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Lindsay.

Muasmma JAMNADEI—DEFENDANT—
APPELLANT
versus

Pandit LALA RAM AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 120, 132—
Moveable property—Mortgage decree, if moveable property—Mortgage of mortgage decree, suit on—Limitation—
Mortgaged property, purchase of portion of, by mortgagee—Mortgage, extinguishment—Intention.*

A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property and a suit to enforce a hypothecation of such a decree is governed by Article 120 of the Limitation Act. [p. 5, col. 2]

Gous Mahomed v. Khawas Ali Khan, 23 C. 750; 12 Ind. Dec. (N. S.) 300, *Jivan Ali Beg v. Basa Mal*, 9 A. 103; A. W. N. (1886) 310; 5 Ind. Dec. (N. S.) 503, followed.

Where, however, the decree has been converted into immoveable property, the mortgagee of such decree is entitled not only to the benefit of the new security but also to the benefit of the larger period of limitation under Article 132 of the Limitation Act. [p. 6, col. 1.]

Where a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage does not thereby become *pro tanto* extinguished, unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred. [p. 6, col. 2.]

First appeal from the decision of the Subordinate Judge, Agra, dated the 7th December 1914.

Mr. B. E. O'Connor and the Hon'ble Mr. Gokul Prasad, for the Appellant.

Mr. S. K. Dar and the Hon'ble Munshi Narain Prasad Asthana, for the Respondents.

JUDGMENT.—The facts of this case, so far as it is necessary to set them out for the purpose of determining the two questions which are before us in appeal, may be stated briefly as follows:—

On 29th November 1899 a decree was obtained by Daya Ram and others on the basis of a mortgage executed in their favour on the 23rd of May 1891. Daya Ram and others are now represented by the defendants in the present suit. The decree so obtained was a decree for sale of certain mortgaged property which was described as being a 20-biswa share in *Mouza Satta*. This *mouza*, it is admitted, was made up of 2 *mahals*, *Mahal Bhagwati Prasad* and *Mahal Madangopal*. After this decree had been passed, that is to say, on the 9th of September 1901, the decree-holders purchased a $\frac{1}{2}$ share in *Mahal Bhagwati Prasad* in satisfaction of half of the decretal debt. At this stage these decree-holders borrowed a sum of Rs. 8,000 from the plaintiff in the present suit, one Pandit Lala Ram. In order to secure the money so borrowed a mortgage-deed was executed by them in favour of Lala Ram on the 17th of December 1901. As security for the money borrowed from Lala Ram the mortgagors hypothecated two items of property. One of these was the half share in *Mahal Bhagwati Prasad* which has been mentioned above. The other item consisted of the outstanding interest of these decree-holders in the decree which had been obtained on the 29th of November 1899. After this mortgage had been executed, that is to say, on the 4th of September 1902 the decree-holders of the decree of 29th November 1899 purchased a half

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share in the other *mahal* of *Mouza Satta*, namely, *Mahal Madangopal*. The effect of this purchase was to entirely satisfy the decree which was in their favour. Later on, that is to say, on the 17th of October 1902 these decree-holders sold a portion of this *Mahal Madangopal* to the plaintiff-mortgagee *Lala Ram*. The consideration for this sale was the sum of Rs. 7,500. The suit out of which this appeal has arisen was brought by *Lala Ram* in order to enforce his claim under the mortgage executed in his favour on the 17th of December 1901, and he sought to have the mortgage-debt satisfied by sale not only of a half share in *Mahal Bhagwati Prasad* but also of a half share in *Mahal Madangopal*. Various defences were raised to the suit which it is not necessary to set out here in detail. The lower Court has decreed the plaintiff's claim in full. Here we have been asked to determine two questions, *viz.*, one of limitation; and another in connection with the plea raised by the defendants to the effect that the plaintiff's mortgage had to a certain extent become extinguished.

To deal first with the question of limitation, it arises in this way. The case for the appellant is that the mortgage made in favour of the plaintiff on the 17th of December 1901 was a mortgage both of moveable and immoveable property. It is contended that the hypothecation of the decree which had been obtained by the mortgagors in the year 1899 was a hypothecation of moveable property. The argument, therefore, is that any suit brought to enforce the charge against this portion of the property is governed by Article 120 of Schedule I of the Limitation Act, that is to say, the period for a suit against moveable property is six years. The point was raised in the Court of the Subordinate Judge, and his view was that for the purposes of hypothecation the decree mortgaged to the plaintiff being a mortgage decree, it ought to be treated as immoveable property, and, therefore, Article 132 of Schedule I of the Limitation Act applied, and he gave the plaintiff a period of twelve years within which to bring his suit. He remarks in his judgment that it is true that there are rulings in which it has been held that "for the purposes of

registration, sale in execution of decree, and jurisdiction a hypothecation is considered moveable property". But he observes that he has been unable to find a ruling as to whether for the purposes of hypothecation a hypothecation decree of this kind was moveable property or not. We have no doubt whatever that on the authorities a decree such as these mortgagors obtained on the 29th of November 1899 is to be treated as moveable property, and we may refer in this connection to the Calcutta High Court in *Gous Mahomed v. Khawas Ali Khan* (1) and the Full Bench ruling of this Court in *Jiwan Ali Beg v. Basa Mal* (2). We must hold, therefore, that the decree which was hypothecated under this document executed in the plaintiff's favour on the 17th of December 1901 was moveable and not immoveable property. However, this does not settle the question which we have to deal with. We have already mentioned that after this mortgage was executed in favour of the plaintiff the decree became satisfied by the purchase made by the decree-holders of a half share in *Mahal Madangopal*. It follows, therefore, that we must treat this case as being one in which one security has been substituted for another. The moveable property which was hypothecated to the plaintiff under the deed of December 1901 is now represented, and has been represented since 4th September 1902, by the immoveable property consisting of a half share in *Mahal Madangopal*. It is impossible to doubt that the mortgagee is entitled to the benefit of this substituted security, and this being so, we have to consider why it is urged that a shorter period of limitation than that laid down in Article 132, Schedule I, of the Limitation Act should be held to apply to the present case. It is quite true, as has been argued on behalf of the appellant, that limitation for a suit based upon a hypothecation of moveable property is governed by Article 120, Schedule I, of the Limitation Act; but it seems to us that, since it has been found that the moveable property which was mortgaged or charged in the first

(1) 23 C. 450; 12 Ind. Dec. (N. S.) 300.

(2) 9 A. 108; A. W. N. (1886) 310; 5 Ind. Dec. (N. S.) 503.

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instance has been converted into immoveable property, the mortgagee is entitled not only to the benefit of the new security, but also to the benefit of the larger period of limitation. In dealing with the question of limitation we have to take the facts as they stand at the date on which the suit was brought. There cannot be any doubt that by operation of law the property to which the property originally mortgaged has become converted is a security for the plaintiff's money. The only remedy which was left to the plaintiff, therefore, on the date on which the suit was brought was to bring a suit for recovery of money which was charged upon immoveable property. We are of opinion, therefore, that the argument that this portion of the plaintiff's claim is barred by limitation cannot be supported. We think that the proper Article to apply is Article 132 of Schedule I of the Limitation Act. We, therefore, hold that the suit was within time.

The 2nd question to be dealt with is raised in the 2nd and 3rd grounds of the memorandum of appeal. We have already mentioned that after this mortgage in suit had been executed, the mortgagors on the 17th of October 1902 executed a sale-deed in favour of the plaintiff Lala Ram. A translation of this document will be found at page 32 of the appellant's paper book. The property which was sold under this deed consisted of a $\frac{2}{3}$ rd share of a $\frac{1}{2}$ of holding No. 1 situated in *Mahal* Mandangopal, and a $\frac{2}{3}$ rd share in various items of *sir* and *khudkasht* land and also a similar share in a shop and the site of a house. The deed of sale sets out that the vendors are under the necessity of paying various sums of money to various creditors, including Lala Ram himself. It further recites that they require a sum of money for their own purposes. The document purports to transfer the entire property specified therein to Lala Ram for the sum of Rs. 7,500, the details of which are to be found at the bottom of the deed. In the body of the deed there is a recital to the effect that "up to the time of sale the property sold is not subject to any hypothecation or hypothecated by way of security to any one." There is a covenant in favour of the vendee

to the effect that if it is found that there is any hypothecation over this property and the purchaser has to discharge the amount of the incumbrance, the vendors are to be liable to him for that sum. One of the items of consideration specified at the bottom of this sale-deed is Rs. 2,727-1-0. With respect to this sum the entry in the deed is to the effect that credit for this amount is being allowed to the vendors in respect of a debt due by them under a mortgage-bond of 17th December 1901 for Rs. 8,000, which they executed in favour of the vendee. Now it is argued that as the plaintiff, who at the time of taking this sale-deed had a charge upon *Mahal* Madangopal, took a conveyance of a $\frac{2}{3}$ rd share of the *mahal*, it ought to be held that the mortgage *qua* $\frac{2}{3}$ rd share in this *mahal* has become extinguished, and in this connection stress is also laid upon the words which have already been mentioned, namely, the recital to the effect that the property was sold free of any hypothecation. It is quite true that there was no formal or written hypothecation of this property at the time of the sale to the plaintiff Lala Ram; but for the reasons we have already mentioned there can be no doubt that Lala Ram had a charge upon this property, the immoveable property which had been substituted for the moveable property which was originally hypothecated to him. It does not necessarily follow that because a person in the position of a mortgagee purchases a portion of the mortgaged property that the mortgage thereby becomes *pro tanto* extinguished. Everything depends upon the terms of the sale, and unless it is stipulated that the mortgage is to be extinguished, or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred, it cannot be held that the mortgage merges in the purchase. It is to be noted that the language of the sale-deed is very clear. The vendors owed considerable sums of money to various persons under bonds executed at different times, and under the terms of the sale deed the purchaser was to discharge those various debts detailed at the foot of the sale-deed. The vendors at the time of registration received a

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sum of Rs. 1,300. It seems quite clear from the recital of the various items contained in this list of debts that the mortgagee had no intention of merging his mortgage security in his purchase to the extent of a $\frac{2}{3}$ rd share. All that we find is that a portion of the purchase-money, namely, Rs. 2,727-1-0 is to be applied by the mortgagee in reduction of the mortgage-debt and not in extinction of any portion of the mortgage security, and that is what the plaintiff himself deposed in the witness-box. He has in the present suit given credit for Rs. 2,727-1-0 and the Subordinate Judge in these circumstances thought he was entitled to a decree for the balance. The defendants, even if it was open to them to do so, never put forward any evidence to show that there was any agreement that the mortgage should be extinguished to the extent of $\frac{2}{3}$ rd in so far as it affected *Mahal* Madangopal, nor did they show, as they might have done, that at the time this sale-deed was executed Rs. 2,727-1-0 represented the proportionate amount of the mortgage-debt which was chargeable on a $\frac{2}{3}$ rd share out of $\frac{1}{2}$ of the *Mahal* Madangopal. We must take it that under the terms of this sale-deed all that was intended was to reduce the amount of the mortgage-debt due to the plaintiff. This being so, we are unable to entertain the plea that the mortgage has become extinguished *qua* a $\frac{2}{3}$ rd share out of *Mahal* Madangopal.

A reference is made in the 3rd ground of appeal to the fact that after the plaintiff had purchased this property it was pre-empted, and that the fact of its having been pre-empted did not make any difference. We agree with this proposition, but we have said enough to show that the appellant is not in a position to maintain the plea that any portion of this mortgage in suit has merged in the purchase made by the plaintiff. We think, therefore, that the decree of the lower Court is right. The appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 157 OF 1914.

March 27, 1916.

Present:—Mr. Hayward, A. J. C.

KARACHI STEAM ROLLER FLOUR MILLS—PLAINTIFFS

versus

INDO CONTINENTAL AGENCY

AND ANOTHER—DEFENDANTS.

Contract Act (IX of 1872), ss. 73, 79, 82, 83, 84, 107—Contract for sale of goods on C. I. F. terms, passing of property to buyer under—Damages for breach of contract—Remoteness.

Where goods are sold on C. I. F. terms, the property in them passes to the buyer upon their shipment by the seller, and any subsequent damage to them must be borne by the former. [p. 8, col. 2.]

Biddell Bros. v. Clemens Horst Co., (1911) 1 K. B. 934; 16 Com. Cas. 197; *Clemens Horst Co. v. Biddell Brothers*, (1912) A. C. 18; 81 L. J. K. B. 42; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42, referred to.

Travelling expenses of the seller to the place where a breach of contract occurs, to have the goods re-sold under section 107 of the Contract Act, are too remote and cannot be recovered as damages under section 73 of the Contract Act. [p. 8, col. 2.]

Mr. *Nadirshah Naoroji*, for the Plaintiffs.

Mr. *L. P. Ferro*, for the Defendants.

JUDGMENT.—The plaintiff sued the defendants Nos. 1 and 2 to recover certain sums of money alleged to have been due on three contracts. The plaintiff has, however, given up his case against defendant No. 1, and agreed to consider that defendant No. 1 had paid off the amount alleged to have been due on the first of these contracts. Plaintiff has accordingly continued the proceedings against defendant No. 2, solely and in respect of the amounts alleged to be due only upon the second and third contracts. The plaintiff has throughout not been precise in stating the grounds of his claims against defendant No. 2 either upon the 2nd or 3rd contract, and this has led to considerable discussion whether they have been based upon breach of contract, or upon the drafts accepted by the second defendant upon those contracts. The plaintiffs' claims as appearing in the plaint were to recover the sums of Rs. 657-11-0 and Rs. 439 in respect of the loss on re-sale of the goods under the 2nd contract dated 1st of July 1913, and to recover the sum of Rs. 177 as the balance due for the goods delivered under the 3rd contract of the 23rd Sep.

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tember 1913, and it was admitted after a careful examination of the plaint that these claims were based on breach of the contracts and not, as might have been supposed from several of the allegations in the plaint, on the drafts accepted by the second defendant upon those contracts.

The defendant No. 2 has pleaded that he was not bound to take delivery of the goods under the 2nd contract of the 1st July 1913, owing to delay through the documents of title having been sent by mistake to the wrong Bank. He has also questioned the amount of damages and in particular objects to the inclusion therein of the travelling expenses of his opponents. He has also pleaded non-liability to pay the sum of Rs. 158-4-0, demurrage charges on the goods sent under the 3rd contract of the 23rd September 1913, as here again the demurrage was due to the delay caused by the documents of title having been sent to the wrong Bank. He has lastly objected to pay any overdue interest on the drafts either under the second or third contract.

With regard to the first plea it does not appear that there was any definite agreement between the parties that the documents of title should be sent to any particular Bank. No doubt there was such a proposal in condition 4 of the conditions contained in the letter of the 28th February 1913 (Exhibit 40). But that particular condition does not appear to have been accepted in the reply of the 6th March 1913 (Exhibit 41). And no other suggestion of such a condition appears to have been made prior to the 2nd contract of the 1st July 1913. Moreover, whether there had or had not been such a condition, it would appear to have been waived by the unconditional acceptance of the drafts drawn upon the Chartered Bank of India, Australia and China.

With regard to the amount of damages, these have been amply proved by the evidence and documents put in on commission by the witness Latif Karim, the Manager of Messrs. Ganpathy Pillay and Co., and the Agent, Bank of Madras (Exhibits 42 and 56 to 60). It was suggested with regard to their evidence that it indicated the sale of 90 bags of *soojee* and 110 bags of

flour as specified in the 2nd contract of the 1st July 1913. But it was explained that this was due to mistake in delivery by steamship agents and argued that the damage, if any, caused thereby must be borne by the second defendant. There seems no reason to doubt that the mistake was so caused upon the evidence of Hormusji and it is quite clear that the damage, if any, caused thereby must be borne by the second defendant, as the goods had passed to him upon their shipment in the steamer under the terms of this C. I. F. contract. The effect of such a contract has been pointed out by Kennedy, L. J., at page 956 of his judgment in the case of *Biddell Bros. v. Clemens Horst Co.* (1); that judgment was accepted as correct by the House of Lords on appeal in *Clemens Horst Co. v. Biddell Brothers* (2). That is also the legal position to be deduced from sections 79 and 82 to 84 of the Indian Contract Act. But it does not appear to me that the claim to include travelling expenses as part of the loss caused by the breach of contract can be sustained. The Assistant Manager Hormusji went, it is true, in connection with these contracts to Negapatam in the Madras Presidency, but it is open to doubt whether this was the sole object of his journey looking to his other interests and the time spent by him in that Presidency. Such expenses are common in the ordinary prosecution of business and are not usually attributed directly to breaches of contract. They are, in my opinion, too remote in any case for recovery under section 73 of the Indian Contract Act. And they cannot be said to be part of the necessary expenses of re-sale, as such re-sale could and ordinarily would have been effected by the agents, the Chartered Bank of India in Madras. They could not, therefore, be recovered either under section 107 of the Indian Contract Act.

With regard to demurrage on the goods under the 3rd contract of the 23rd September 1913, it appears to me that the amount was properly payable by the second defend-

(1) (1911) 1 K. B. 934; 16 Com. Cas. 117.

(2) (1912) A. C. 18; 81 L. J. K. B. 42; 135 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.

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ant. It is true that it was suggested in the letter of the 25th August 1913 and again in the letter of the 5th September 1913 (Exhibits 32 and 35) that the documents of title in all contracts should be sent to the Bank of Madras at Negapatam and that the documents in connection with this subsequent contract, the 3rd contract of the 23rd September 1913 (Exhibit 37), were sent instead to the Chartered Bank of India. But this fact was duly stated in the forwarding letter of the 20th September 1913 (Exhibit 45), and no exception was taken thereto, and the drafts were nevertheless duly accepted in the Chartered Bank of India. Again the subsequent correspondence between the parties referred merely to objections on account of the late arrival of the steamer and made no reference to the mistake in sending the documents of title to the Chartered Bank of India (Exhibits 46 to 54).

With regard to the objection to the payment of overdue interest in the drafts it appears to me that this objection must be allowed. As already indicated, this suit has been based not upon the drafts but upon breach of the contracts. No good reason has been shown why interest should be allowed on the amount of loss due to the breach of contract, and we are not concerned in this suit with any claim of interest on the drafts which might have been made in a properly constituted suit under section 80 of the Negotiable Instruments Act.

The issues for decision must, therefore, be re-settled as follows, and thus decided:

Issue No. 1. Was defendant No. 2 justified in not taking delivery of the goods under the 2nd contract of the 1st July 1913? Finding: No.

Issue No. 2. Have the damages claimed been proved in respect of the 2nd contract of the 1st July 1913? Finding: Yes.

But the two sums of Rs. 115 each on account of travelling expenses must be excluded.

Issue No. 3. Was defendant No. 2 liable for the demurrage charges on the goods under the 3rd contract of the 23rd September 1913? Finding: Yes.

Issue No. 4. Is defendant No. 2 liable for overdue interest on the drafts under the

2nd and 3rd contracts? Finding: No.

Issue No. 5. General issues.

The defendant No. 2 is liable to pay Rs. 657-11-0 less Rs. 115 and less Rs. 67 plus the sum of Rs. 439 less Rs. 115 and less Rs. 55-3-7, that is to say, Rs. 475-11-0 plus Rs. 268-12-5 or a total of Rs. 744-7-5 on the 2nd contract and the sum of Rs. 177 less Rs. 26-7-8 or the sum of Rs. 150-8-4 in respect of the 3rd contract.

There should, therefore, be a decree against the second defendant for a total sum of Rs. 894-15-9 with interest at 6 per cent. per annum from the date of the suit to date of payment with proportionate costs.

Suit decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1695 OF 1915.

July 13, 1916.

*Present:—*Sir Henry Richards, Kt.,

Chief Justice, and Mr. Justice Rafique.

NANNU LAL AND OTHERS—DEFENDANTS—

APPELLANTS

versus

BHAGWAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1903), O. XXI, r. 93—Auction sale—Return of purchase-money when allowed.

Under the provisions of the Civil Procedure Code, 1908, it is only when an execution sale has been set aside that the purchase-money can be returned to the purchaser. [p. 10, col. 2.]

Munna Singh v. Gajadhar Singh, 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491; *Muhammad Najib Ullah v. Jai Narain*, 26 Ind. Cas. 59; 12 A. L. J. 908; 36 A. 529; *Shanto Chandar Mukerji v. Nain Sukh*, 23 A. 355; A. W. N. (1901) 101; *Dorab Ally Khan v. Abdool Azeez*, 5 I. A. 116; 3 C. 806; 2 C. L. R. 529; 3 Sath. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097, referred to.

Second appeal from a decree of the District Judge, Aligarh, dated the 4th October 1915, modifying that of the Munsif, Jalesar, dated the 22nd July 1915.

The Hon'ble Mr. Narain Prasad Asthana, for the Appellants.

Baru Benoy Kumar Mukerji, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed the sum of Rs. 705-2-6. The plaintiff alleged that he had purchased certain property at an auction-sale in which the defendants first party were

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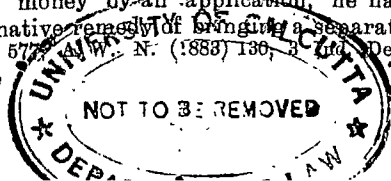
decree-holders, and defendants second party, judgment-debtors. He alleged that after he had purchased this property a suit was brought by a third party against the judgment-debtor for possession, which was successful. It appears that the plaintiff in the present suit applied to be brought on to the record of that suit. He was not brought on to the record and the suit was finally decided against the judgment-debtor after purchase by the plaintiff. Under these circumstances the plaintiff alleges that he is entitled to get back the purchase-money and interest from the decree-holders and the judgment-debtor. The Court below has decreed the claim against the decree-holders only. The latter have appealed.

The plaintiff has never had the sale set aside nor taken steps to do so. Order XXI, rule 91, provides that a purchaser at any sale in execution of a decree "may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold". Order XXI, rule 92, provides for the setting aside or confirmation of the sale and further provides that no suit shall lie to set aside the sale. Order XXI, rule 93, provides for the return of the purchase-money when the sale has been set aside. It is, therefore, quite clear that under the provisions of the present Code, the purchase-money can only be got back where the sale has been set aside. To allow the purchaser to get back the price without having the sale set aside, perhaps long after the sale, would obviously open the door to much fraud and would place the decree-holder at a very great disadvantage. Reliance has been placed on behalf of the respondent on the Full Bench case of this Court in *Munna Singh v. Gajadhar Singh* (1). In that case the point was whether a plaintiff could recover the purchase-money he had paid on the ground that the judgment-debtor had no saleable interest in the property sold and that he had for that reason been deprived of it by a regular suit or whether he was confined to the remedy provided by the then Code of Civil Procedure. The Court held that, notwithstanding that he might have got back his money by an application, he had the alternative remedy of bringing a separate

(1) 5 A. 572, 41 M. N. (1883) 136, 3 Ind. Dec. (N. S.) 491.

suit. It is only necessary to point out that there is a marked difference in the terms of the present Code of Civil Procedure and the Civil Procedure Code of 1882. Section 315 of the latter Act provided that the purchaser might get back the purchase-money when a sale had been set aside under sections 310 (a), 312 or 313, or when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser was for that reason deprived of it. We have already pointed out that under the provisions of the present Code, it is only when the sale has been set aside, that the purchase-money can be returned. In the case of *Muhammad Najib Ullah v. Jai Narain* (2) a somewhat similar question arose. The learned Judges who decided that case expressed great doubts as to the correctness of the decision in the Full Bench case of *Munna Singh v. Gajadhar Singh* (1) above referred to. The case was not finally decided at the time, an issue being referred to the Court below as to whether or not the judgment-debtor had a "saleable interest". It does not appear what the final order of the Court was. Possibly there was a finding that the judgment-debtor had a saleable interest. The learned Vakil for the respondent points out that that case arose after the alterations in the Code. It is quite clear from the judgment that the attention of the Court was not called to the change in the law. It, therefore, seems to us to be clear that the plaintiff is not entitled to get back the purchase-money by virtue of the provisions of the Code. We think it cannot be argued that he has a right to get back his purchase-money under the circumstances of the present case, irrespective of the provisions of the Code. In the case of *Shanto Chandar Mukerji v. Nain Sukh* (3) the learned Judges say at page 356: "We think that a purchaser is only entitled to receive back his purchase-money under the conditions stated in section 315, whether by application under that section or by suit. As regards private sales, there is under section 55 (2) of the Transfer of Property Act, in the absence of a contract

(2) 26 Ind. Cas. 59; 12 A. L. J. 908; 36 A. 529,
(3) 23 A. 355; A. W. N. (1901) 101.



to the contrary, an implied covenant for title by the vendor. As regards sales under decree of a Court, there is no warranty of title either by the decree-holder or by the Court". In the case of *Dorab Ally Khan v. Abdool Azeez* (4) their Lordships remarked: "Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor".

The result is that the appeal is allowed, the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored with costs in all Courts.

Appeal allowed.

(4) 5 I. A. 116; 3 C. 806; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 397
OF 1915.

RULE No. 929 OF 1915.

January 11, 1916.

Present:—Mr. Justice Holmwood and
Mr. Justice Imam.

DALCHAND SINGHI—
APPELLANT

versus

SECRETARY OF STATE FOR INDIA
—RESPONDENT.

*Land Acquisition Act (I of 1894), ss. 49 (1), 54—
House, godowns used as servants' quarters whether form
part of—Award—Appeal.*

Godowns attached to a house which are used as servants' residence, form part and parcel of the house within the meaning of section 49 (1) of the Land Acquisition Act. [p. 12, col. 1.]

An appeal lies against an order passed under that section. [p. 12, col. 1.]

Hasun Molla v. Tasiruddin, 15 Ind. Cas. 925; 39 C. 393, distinguished.

Appeal against the decree of the Special Land Acquisition Judge, 24 Pergannas, dated the 29th June 1915.

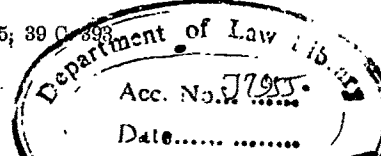
Babu Provas Chandra Mitra (with him Babus Jnanendra Nath Sarkar and Uma Charan Luha), for the Appellant.

Babu Ram Oharan Mitra, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Special Land Acquisition Judge, 24 Pergannas, on a reference made by the Collector under section 49 (1) of the Land Acquisition Act. It appears that the owner of the house demanded a reference on the point, on the ground that the cutting of the corner of his compound with the whole of one and part of a second godown near the gate would be the acquisition of a part of his house contrary to the provisions of the Act. The learned Collector in making the reference drew attention to the question of what would be reasonably required for the full and unimpaired use of the house, but he very properly made the reference in terms of the section for the determination of the question whether the land proposed to be acquired does or does not form part of the house. The learned Special Land Acquisition Judge appears to have entirely ignored this question, which is the only question he had to decide, and to have based his decision on a clause in section 49 which allows him to take into consideration the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of a house, manufactory or building. That such a question should be taken into consideration where the circumstances allow, there can be no doubt. But it cannot be held that that is the only question, or indeed the main question to be decided.

In appeal before us a preliminary objection is taken that no appeal lies, and the authority of *Hasun Molla v. Tasiruddin* (1) is cited. That is direct authority only for the proposition that an order of the Special Land Acquisition Judge refusing to restore a claim case by setting aside a decree passed *ex parte* for default of the claimant, is not an award and does not come within section 54 of the Land Acquisition Act, but the learned Judges who decided that case pointed out that in every case the order complained of must be considered and the Court has to see whether that order is an award or any part of an award. An order of this nature has been dealt with in appeal on several occasions by the Allahabad Court and by

(1) 15 Ind. Cas. 925; 39 C. 393.



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the Madras Court, and it has never been doubted that an appeal would lie. But assuming that it did not lie, we should certainly have to interfere in this case in the exercise of our powers of revision, which we have been asked to exercise by a petition upon which a Rule has been issued.

We have already noted that the learned Judge's judgment had altogether missed the point for adjudication; and the only point for consideration is whether these godowns do or do not form part of the premises which consist of a gentleman's house and the necessary outbuildings attached to it, or whether they are separate pieces of land which can be taken away without detriment to the reasonable requirements for the full and unimpaired use of the house. In deciding the latter point the learned Judge makes use of a somewhat curious argument. He says that because the accommodation for servants is already extremely defective it cannot injure the owner to make it still more defective. This is an argument to which we cannot accede. The fact is that these two godowns which the learned Judge calls "*durwan's* godowns" are the only servants' house, properly speaking, in the whole of the premises. The premises have been let in flats apparently for many years and there are two kitchens one on each side of the house which, of course, cannot be used as residences for the servants. There is a stable and there is a very small hut by the side of the stable, which is said to be the residence of the sweeper. Where the superior servants of the two tenants live we are at a loss to conceive, unless they live in these *durwan's* lodges. The Judge himself shows that no *durwan* is required, because he says no carriages ever enter the compound. It seems to us that these two godowns are necessarily part and parcel of the building and a most important part of that building for the purpose of letting it out to gentlemen as a place of residence.

We must, therefore, set aside the order made by the learned Judge and direct that this portion of the building be not acquired unless the whole premises are acquired by the Land Acquisition Collector. The costs given against the claimant in the lower Court must be refunded, if paid,

and there will be costs of this hearing in favour of the appellant.

The Rule will be made absolute for the same reasons without costs.

Appeal allowed; Rule made absolute.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 478
OF 1913.

May 23, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Kingsford.

Musammatt JANAKBATI THAKURAIN—
DEFENDANT—APPELLANT

versus

Babu GAJANAND THAKUR—PLAINTIFF
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Probate and Administration Act (V of 1881), s. 83—Probate proceedings—Compromise, effect of—Form of decree—Will, necessity of proof of—Right of objector to withdraw from compromise.

The main issue in a Probate case is whether or not the Will has been proved, and the only effect of a compromise in such a case is to reduce a contentious proceeding into one which is not contentious and a Court is not absolved from the task of either granting Probate or refusing it. [p. 13, col. 2.]

If a compromise has been made in a Probate case and the objector withdraws from the contest, a Court will grant Probate in common form; but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him. [p. 13, col. 2.]

Where during a Probate proceeding an objector has agreed to a compromise it is open to him to subsequently resile from it and insist upon the trial of the issue whether the Will was duly executed. [p. 14, col. 1.]

Order XXIII, rule 3, of the Civil Procedure Code, read with section 83 of the Probate and Administration Act, do not say that it is competent to the Courts to allow the parties to divide the testator's property without proving the Will. [p. 13, col. 2.]

Appeal from a decision of the District Judge, Purnea, dated the 19th August 1913.

Mr. *Lakshmi Narain Sinha*, for the Appellant.

Mr. *Abani Bhushan Mukerjee*, for the Respondent.

JUDGMENT.

MULLICK, J.—Rudra Nand, Kula Nand and Tirtha Nand were three brothers of a

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Mitakshara family living joint in food and worship. It is alleged that Kula Nand separated from the joint family about twenty years before the Will, which is the subject of the case before us.

Rudra Nand died on the 11th of June 1911, leaving a Will alleged to have been executed on the 9th of June 1911. Probate of the Will was applied for by Gira Nand, and Gaja Nand, sons of Tirtha Nand, on the 6th of December 1911. On the 18th May 1912, Janakbati the widow of Rudra Nand filed an objection attacking the Will as forgery. On the 18th of August 1912 a petition alleged to have been signed by Janakbati was filed before the Court, stating that she and the propounders had agreed to divide the testator's property and praying that the application for Probate might be dismissed on compromise without decision. It appears that on the same day another petition purporting to have been signed by Janakbati was filed before the Court, stating that the petition of compromise had not in fact been signed by her.

On the 25th of May 1912 the learned District Judge framed the following issues for determination:—

1. Is the Will propounded by the plaintiffs genuine?

2. Was the testator Rudra Nand Thakur in a sound disposing state of mind when he is alleged to have executed the said Will?

3. Are the plaintiffs entitled to Probate as prayed?

But on the 19th of May 1913 he disregarded the issues framed on the 25th of May 1912 and addressed himself only to the two following issues:—

1. Can this case be disposed of in terms of the petition of compromise?

2. Did *Musammat* Janakbati sign the petition of compromise with full knowledge of its contents after it was written?

The learned District Judge took evidence upon the two issues abovementioned and found that inasmuch as the objectrix had with full knowledge signed the petition of compromise, she was no longer competent to resile from the same. He accordingly ordered the case to be dismissed in terms of the petition of compromise. The learned District Judge's

decree is to the same effect and after reciting that the case is dismissed in accordance with the petition of compromise, it proceeds to embody in it the full terms of that compromise. The present appeal before us is preferred by the objectrix, who asks that the case should be remanded in order that the execution of the Will may be proved in solemn form.

It is quite clear, and the learned Vakil for the respondent admits, that the learned District Judge's order, as it stands, cannot be supported. In a Probate case a decree such as that passed by him is meaningless. There can be no dismissal of a Probate case in accordance with the terms of a petition of compromise. The main issue in such a case is, whether or not the Will has been proved, and as has been pointed out in several decisions in the Courts, the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious; but this does not absolve the Court from the task of either granting Probate or refusing it. If a compromise has been made and the objector withdraws from the contest the Court will grant Probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him.

The learned Vakil for the respondent relies upon Order XXIII, rule 3, of the Civil Procedure Code, read with section 83 of the Indian Probate and Administration Act. But these sections merely mean that in a Probate case the Civil Procedure Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the Will.

The cases of *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1) and *Sarada Kanta Das v. Gobinda Mchan Das* (2) carry the case of the respondent no further. In the first of these two cases it was, no doubt, laid down that when Probate has been given in common form upon the

(1) 7 Ind. Cas. 740; 14 C. W. N. 1063.

(2) 6 Ind. Cas. 912; 12 C. L. J. 91.

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filing of a petition of compromise by the objector it will no longer be open to the same objector to re-open the proceedings by way of revocation. But the learned Vakil for the respondent has been unable to show any case which goes so far as to say that before Probate is given by the Court it is not open to the objector to insist upon the proof of the Will. The view of the learned lower Court appears to have been that as on the 28th of August 1912 the objectrix had agreed to a compromise, it was no longer open to her to resile from it except upon proof of fraud. In my opinion that is an erroneous proposition of law. It must always be a question of fact whether the proceedings are contentious or not. It may be that on the 28th of August 1912 the objectrix had consented to withdraw her objection, but it is quite clear that on the 19th of August 1913 she had withdrawn that petition and that she was insisting upon the trial of the issue whether the Will had been duly executed. She was not estopped from withdrawing her objection and from asking that the Will should be proved in solemn form. This being so, the order and decree of the lower Court must be set aside and the case remanded for disposal according to law. The objectrix will have a chance of contesting the genuineness of the Will and if she fails, Probate must be given in solemn form. If she withdraws her objection Probate must be given in common form, but the Court must do either one or the other of these two things. If she succeeds the application of the propounders will be dismissed. As regards the compromise alleged to have been made by the objectrix, the Court has no greater power to enforce it than any other contract made out of Court.

The appeal is decreed with costs, which will be according to scale.

KINGSFORD, J.—I agree.

Appeal decreed; Case remanded.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 222 OF 1915.

April 19, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.

LACHHMAN PRASAD AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

DURGA PRASAD AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Custom—Hindu Law—Succession, collateral—Distribution among sons according to number of their mothers, effect of.

In a case governed by custom, where property is distributed among the sons of a person according to the number of their mothers, the descendants of the sons of one of them cannot succeed collaterally to the property left by the descendants of another of them so long as other descendants, though lower in degree, of the same stock are alive. [p. 14, col. 2.]

The effect of such a custom is to constitute brothers by the same father and mother and their descendants persons of one stock for purposes of inheritance, and as a logical result of the custom, persons who are descended from a different mother, though nearer in degree, are not entitled to preference over descendants of the same mother. [p. 15, col. 1.]

Appeal against the decree of the Additional Judge, Lucknow, dated the 9th April 1915, upholding that of the Subordinate Judge, Unao, dated the 20th February 1915.

Mr. St. G. Jackson, for the Appellants.

Babu Ram Chandra, for Respondent No. 3.

JUDGMENT.—The question for consideration in this appeal is whether in a case governed by custom, where property is distributed among the sons of a person according to the number of their mothers, the descendants of the sons of one of them can succeed collaterally to the property left by the descendants of another of them, so long as the other descendants, though lower in degree, of the same stock are alive. The Courts below held that the differentiation made by the custom between the sons of different mothers cannot be extended to their descendants. The *wajib-ul-arz* embodying the custom, is silent on the question of collateral succession, but on the finding that a custom exists by which the distribution is made according to the mothers, it does not seem equitable that the property of the descendants of one of those mothers should be allowed to go to the descendants of another, so long as the descendants of the

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former are alive. Hari Kishun, the common ancestor of the parties of this case, had three wives, and it is common ground that by his first wife, he had two sons, Panna and Gaini, who together got a one-third share of the estate on the death of their father. By the second wife, he had two sons, Siva and Prasad, who similarly got one-third of the estate left by their father. By the third wife, he had a son, Ichhai, who got the remaining one-third. Gur Prasad and Gaya Prasad, the sole surviving descendants of Siva, died of plague in September 1911 or thereabout. Their property is in the possession of Lachhman and Baladin, the descendants of Prasad, the full brother of Siva. The descendants of Panna, Gaini and Ichhai seek to oust them on the ground that they are higher in relationship to the deceased, Gur Prasad and Gaya Prasad. The Courts below, applying the Hindu Law, gave them a decree, but the effect of that decree is to render the above custom absolutely nugatory, for it does not allow the benefit of that custom to the descendants of the persons who derived title in pursuance of it. The effect of such a custom is to constitute brothers by the same father and mother and their descendants persons of one stock for purposes of inheritance, and as a logical result of the custom, the plaintiffs who are descended from a different mother are not entitled to preference.

The appeal is, therefore, allowed and the plaintiffs' claim dismissed with costs throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE NO. 5 OF 1916.

August 7, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Twomey.

MAUNG BA THAUNG AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MA SHIN MIN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Cause of action, meaning of—Suit for possession, after suit for declaration dismissed, whether barred—Specific Relief Act (I of 1877), s. 42—Declaration, suit for—Plaint, allegations in.

A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief or some part of the relief prayed for, and is to be sought for within the four corners of the plaint. [p. 19, col. 1.]

Jibunti Nath Khan v. Shib Nath Chuckerbutty, 10 C. L. R. 537; 8 C. 819; 4 Ind. Dec. (N. S.) 529, referred to.

A plaintiff whose suit for a declaration of title to land has been dismissed on the ground that he was not in possession at the time of filing the suit, is not debarred by Order II, rule 2 (3), Civil Procedure Code, from bringing a subsequent suit on the same title for recovery of possession of the same land. [p. 18, col. 1.]

Before admitting a plaint for a mere declaratory decree a Court should take particular care to see that the plaint contains the allegation that the plaintiff is in possession of the property. [p. 18, col. 2.]

Bandey Ali v. Gokul Misur, 12 Ind. Cas. 154; 34 A. 172; 9 A. L. J. 111; *Siliman Sahib v. Bontala Haman Sahib*, 20 Ind. Cas. 418; 38 M. 247; (1913) M. W. N. 554; 25 M. L. J. 125; *Jibunti Nath Khan v. Shib Nath Chuckerbutty*, 10 C. L. R. 537; 8 C. 819; 4 Ind. Dec. (N. S.) 529, referred to.

FACTS of the case appear from the following Order of Reference by Parlett, J.:—

In Civil Regular Suit No. 54 of 1912 U Zo sued his wife, his daughter and his son-in-law for a declaration that he was the owner of a piece of paddy land and of a house and its site, which his wife had sold to his daughter and son-in-law by registered deed on the 29th June 1910. He admitted that he had been turned out of the house three years before the suit by his daughter, who a few months before the suit had also taken possession of the paddy land. He was granted a declaration but upon appeal his suit was on the 27th October 1913 dismissed under the proviso to section 42 of the Specific Relief Act, because he omitted to sue for possession. On the 9th January 1914 he filed the present

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suit against the same defendants to eject them from the paddy land and house and site. One of the defences raised was that the suit was barred by Order II, rule 2, of the Civil Procedure Code, but the Sub-Divisional Judge held that it was not barred on the authority of *Ram Sewak Singh v. Nakched Singh* (1), remarking that the defendant could not show any Burma ruling on the point, notwithstanding that he produced a certified copy of the judgment of this Court in *Maung Shwe Tun v. Ma Me* (2), which is to the contrary effect. On appeal the Divisional Judge held the suit to be barred under Order II, rule 2, but he gave no reasons and quoted no authority. The plaintiff's representatives have appealed against the decision.

There appear to be authorities that such a suit is not barred. In *Jibunti Nath Khan v. Shib Nath Chuckerbuty* (3), where a previous suit for a declaration of title and confirmation of possession of land had been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession was held not to be barred under section 43 of the Code of 1882, corresponding to Order II, rule 2, of the present Code. The decision rested upon the principle that the causes of action in the two suits were not the same, as is set out in the following passage:—"In deciding the question whether this suit is barred by the former suit, we must see if the cause of action is the same in both suits. A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. The allegations in the plaint in the former suit were the death of Promotho Nath, the alleged heirship of the plaintiff to his estate, the possession by the plaintiff of that estate, and the proceedings under the Criminal Code and in the Registration Court which threatened to result in a disturbance by the defendants of the rights enjoyed by the plaintiff. These constituted the cause of action in that

suit and the relief asked for was a decree declaring the plaintiff's title as heir, the effect of which would have been to quiet him in the possession of his estate. Upon such a cause of action a declaratory decree was the only remedy he could sue for. How then can it be said that he omitted to sue for any remedy in respect of that cause of action when he was entitled to no other?" In the case now under consideration there was no allegation in the plaint in the earlier suit that the plaintiff was in possession of the property: admittedly he was not and it appears to me that plaintiff having been dispossessed, the cause of action in the second suit had already arisen when the first suit was filed, and that the cause of action in the two suits was the same.

The Allahabad case referred to above [*Ram Sewak Singh v. Nakched Singh* (1)] also proceeded upon the lines that the causes of action in the two suits were not the same and that when the first suit was brought the plaintiff was not entitled to the remedy asked for in the second suit. At page 267 occurs the following passage:—"It only remains to be seen whether section 43 was rightly held by the lower Court to bar the claim. Now it is to be observed that the basis upon which the appellants rested their former prayer for relief was the execution of the deed of gift of the 10th December 1878, by which they declared their rights had been interfered with. They made no claim for possession of their shares, because at that time no act had been done by the respondent amounting to the assertion of a possession adverse to their title and, indeed, as will be seen from their plaint they plainly intimated that, as regards one of the villages in which they claimed a share, it was in the possession of the respondent under a lease to which they took no objection, and as to the other, that they were in joint possession with him. It is obvious, therefore, that, while at the time of the institution of the former litigation their cause of action was the deed of gift, when the present suit was brought something more had accrued by reason of the obstruction offered by the respondent to their exercising the right of proprietorship over their shares. In the one case, no possession having been asserted by the

(1) 4 A. 261; 2 Ind. Dec. (N. S.) 830.

(2) Second Civil Appeal No. 224 of 1903.

(3) 8 C. 819; 10 C. L. R. 537; 4 Ind. Dec. (N. S.) 529.

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respondent, the appellants were not entitled to sue him for possession; in the other case an additional cause of action had arisen, which gave them the right to the further remedy. Under these circumstances it does not appear to me that the appellants have laid themselves under the prohibition of the third paragraph of section 43 of the Civil Procedure Code". This shows that the circumstances were different from those of the present case. As regards the remedy open to the plaintiff in the first suit, the reasons of the learned Judge for his view are to be found at pages 269 to 271 and amount, so far as I can understand, to this—section 42 of the Specific Relief Act empowers a Court to grant a mere declaratory decree, only when that is the sole relief to which the plaintiff is entitled. If the plaintiff is able to seek further relief than a mere declaration of title and omits to do so, he is not entitled to a bare declaration. If, therefore, he sues for a mere declaration when he is able to seek further relief, he is not entitled to the relief of a declaration. But Order II, rule 2 (3), applies only where, there being identity of causes of action in the two suits, the plaintiff is entitled in the first suit to more than one relief; and it has no application to a case where in the first suit he is entitled to no relief at all. I find it difficult to hold that, in a case like the present, the plaintiff is not entitled at all to the relief of a declaration of his title to the property. It appears to me that if his case was true he was entitled to that relief, but he was only allowed to obtain it in a suit in which he asked also for the further relief of possession to which his cause of action also entitled him. It is significant that the word "relief" has been substituted in Order II, rule 2 (3), for the word "remedy" which appeared in section 43 of the Civil Procedure Code of 1882, thereby assimilating the wording more nearly to that of the proviso to section 42 of the Specific Relief Act. *Nonoo Singh Monda v. Anand Singh Monda* (4) also proceeded on the ground that the causes of action in the two suits were dissimilar. In *Ambu v. Kettilamma* (5) a plaintiff was held

not to be debarred from filing a second suit on grounds of action of the occurrence of which the plaintiff was ignorant when the first suit was filed. This does not apply to the present case, where the plaintiff was fully aware of his dispossession when he filed his first suit.

Mohan Lal v. Bilaso (6) merely followed the earlier Calcutta case. *Nathu valad Pandu v. Budhu valad Bhika* (7) was also decided on the ground that the second suit was on a different cause of action from the first.

Bandey Ali v. Gokul Misir (8) followed the earlier Calcutta and Allahabad cases.

No reported decision from Burma has been quoted but the ruling in *Maung Shwe Tun v. Ma Me* (2) of this Court seems to be applicable to the present case. The point is important, and I think it is desirable that it should be authoritatively decided in this Province. I, therefore, refer to a Bench the question, whether a plaintiff whose suit for a declaration of title to land has been dismissed on the ground that he was not in possession at the time of filing the suit, is debarred by Order II, rule 2 (3), of the Code of Civil Procedure from bringing a subsequent suit on the same title for recovery of possession of the same land?

Mr. Doctor, for the Applicant.

Mr. May Oung, for the Respondent.

JUDGMENT.

FOX, C. J.—The question referred is elaborately discussed in the judgment of Karamat Husain, J., in *Bandey Ali v. Gokul Misir* (8). He held that a plaintiff who had sued for a permanent injunction restraining the defendants from cutting down the trees in a grove, and whose suit had been dismissed on the ground that he had failed to prove his possession of the grove, could not subsequently sue for possession of the property. He founded his decision on the principle of section 43 of the Civil Procedure Code, 1882, which is repeated in rule 2 of Order II in the 1st Schedule of the present Code. The Appellate Bench, however, reversed the decision in view of

(6) 14 A. 512; A. W. N. (1892) 80; 7 Ind. Dec. (N. S.) 696

(7) 18 B. 537; 9 Ind. Dec. (N. S.) 867.

(8) 13 Ind. Cas. 154; 34 A. 172; 9 A. L. J. 111.

(4) 12 C. 291; 6 Ind. Dec. (N. S.) 197.

(5) 14 M. 23; 1 M. L. J. 28; 5 Ind. Dec. (N. S.) 16.

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that Court and other High Courts having for a long time accepted the view that the dismissal of a suit for a declaratory decree on the ground that the plaintiff is not, or has not proved that he is, in possession is no bar to a subsequent suit by him for possession. In *Silimar Sahib v. Bontala Haman Sahib* (9) a Bench of the Madras High Court has recently adopted the same view.

The case of *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (3) is a prominent case, in which it was held that a similar section in the Civil Procedure Code of 1877 did not bar a subsequent suit for possession. It is to be noted that in that case the plaintiff in his first suit for a declaratory decree alleged that he was in possession of the property. That suit was dismissed on the ground that the plaintiff was not in possession and consequently was not entitled to a declaratory decree. If he could have proved his possession a declaratory decree was all he need have asked for, so on the allegations in his plaint he did not omit to sue for any relief that he was entitled to. It is difficult to resist the reasons given for holding that in such a case the principle of rule 2 of Order II does not preclude a plaintiff from bringing a suit for possession. In order to obtain a mere declaratory decree under section 42 of the Specific Relief Act a plaintiff must allege and prove that he is in possession of the property in respect of which he seeks the declaration he asks, for if he does not do so the proviso to the section precludes the Court from making the declaration, it being manifest that if he is not in possession it is open to him to seek the further relief of a decree for possession.

White, J.'s remarks upon the difficulty in some cases of proving possession are cogent, and it certainly might work hardship to a party entitled to property who believed himself to be in possession of it, if by reason of an adverse decision on the question of possession only he were debarred from taking any further action to assert his title to the property.

It seems that in most of the cases in the Indian Courts the plaintiffs in their suits for declaratory decrees alleged that they were in possession.

In the case before this Court the plaintiff in the suit for a declaratory decree contains no allegation as to the plaintiff being in possession. In the course of his evidence he made admissions which shewed that he was not in possession, and the suit had necessarily to be dismissed. The question is, whether in such a case the plaintiff is debarred from bringing a suit for possession.

It would be anomalous if he could bring such a suit after making an untrue allegation about being in possession, but could not do so because he had said nothing at all about the possession of the property. His first suit for a declaratory decree was in fact defective, and should have been rejected under rule 2 of Order VII, because without an allegation that he was in possession it did not disclose a sufficient cause of action entitling him to the relief he claimed. The rejection of the plaint would not have precluded him from presenting a fresh plaint containing the necessary allegation that he was in possession of the property. The suit on such a plaint would have had to be dismissed at the hearing because he could not prove possession, but according to the rulings of the Indian High Courts, it would have been open to him to have brought a subsequent suit for possession.

Under the circumstances I would hold that the plaintiff was not debarred from bringing the subsequent suit for possession by reason of his not having made any allegation as to possession in his suit for a declaratory decree, and I would answer the question referred in the negative.

Before admitting a plaint for a mere declaratory decree a Court should take particular care to see that the plaint contains the allegations which must be proved before such a decree can be given. As above stated, it is necessary for a plaint for a mere declaratory decree as to any right to property to contain an allegation that the plaintiff is in possession of the property.

The costs of this reference will follow the result of the suit, three gold *mohurs* allowed as Advocate's fee.

(9) 20 Ind. Cas. 418; 38 M. 247; (1913) M. W. N. 554; 25 M. L. J. 125.

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TWOMEY, J.—The answer to the question referred turns on the meaning of the term "cause of action" in Order II, rule 2. It is only if the cause of action in the two suits is the same that the rule bars the second suit.

In England the term has been defined authoritatively as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court": *Read v Brown* (10). The wide definition given by White, J., in the Calcutta case of *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (3) is in conformity with the above. "A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint". The opinion that the cause of action is to be sought for within the four corners of the plaint has been generally followed by the Courts in India.

It would appear, therefore, that Order II, rule 2, bars a second suit only where the essential allegations in the two plaints are identical. If in one suit in respect of land the plaint is silent as to possession or if it states that the plaintiff is in possession, while in the other suit the defendant is alleged to be in possession, the two suits are to that extent based upon different causes of action. Such is the case as regards the two suits which Parlett, J., had before him and I am unable to concur in his view that the cause of action in the two suits was the same.

I agree with the learned Chief Judge in answering the question in the negative.

TWOMEY, J.—In conformity with the finding of the Bench the decree of the Divisional Court is set aside and the case is remanded to that Court for decision on the merits.

A certificate will be granted entitling the appellant to a refund of the amount of Court-fee on the memorandum of appeal to this Court.

The other costs of the appeal in this Court will follow the final result.

Appeal accepted; Case remanded.

(10) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 33 OF 1916.

March 28, 1916.

*Present:—*Mr. Lindsay, J. C.

DIWAN SINGH AND ANOTHER—PLAINTIFFS—
APPLICANTS

versus

BALDEO SINGH AND ANOTHER—

DEFENDANTS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—
Revision—Error of law.*

An error of law committed by the lower Court does not furnish any ground for interference in revision under section 115, Civil Procedure Code.

Application against the order of the District Judge, Hardoi, dated the 18th December 1915, reversing that of the Bench of the Honorary Munsifs, Hardoi, dated the 30th July 1915.

Babu Gopal Sahai Bhargava and Pandit Brij Narain Tankha, for the Applicants.

Babu Raghuvir Sahai, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed in appeal by the District Judge of Hardoi. I have perused the application and I am at a loss to understand how it can be treated as an application for revision. There is no reference in any of the grounds set out in the application to the matters which are referred to in clauses (a), (b) and (c) of section 115 of the Code of Civil Procedure. What is asserted in the petition is that the learned Judge has been guilty of an error in law in coming to his decision. That may very well be, but an error of law committed by the lower Court does not furnish any ground for interference in revision under section 115 of the Code. No ground for interference has been disclosed. I dismiss the application with costs.

Application dismissed.

SAN HLA BAW v. HLA PAW.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 36 OF 1914.

March 5, 1915.

Present:—Mr. Justice Parlett.

SAN HLA BAW.—PLAINTIFF—APPLICANT

versus

HLA PAW AND OTHERS—DEFENDANTS—

RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Possession, physical, whether necessary, for maintainability of suit—Landlord, possession of, nature of.

When a tenant quits land the landlord's possession revives and he retains it till he passes it on to the next tenant, and if during the interval he is dispossessed by a third person he can eject the latter by means of a suit under section 9 of the Specific Relief Act.

Mr. S. C. Guha, for the Applicant.

Mr. May Aung, for the Respondents.

JUDGMENT.—Plaintiff let out the land in suit to tenants on yearly leases for a number of years in succession. The last tenancy expired about the beginning of March 1913, when the tenant quitted the land. In June 1913 the first respondent entered upon the land and leased it to second respondent as his tenant. The plaintiff in July filed a suit under section 9 of the Specific Relief Act to recover possession. The third respondent's name was struck off the record, and should not have appeared in the judgment and decree nor in this application. His name will be again struck off the record.

The District Court dismissed the suit on the grounds that while plaintiff's tenant was still in possession, plaintiff could not maintain a suit under section 9 of the Specific Relief Act, and that after he relinquished possession and before the plaintiff put a fresh tenant in possession the plaintiff himself had not possession and could not maintain the suit. As to the first point there is authority for it: *Sonaton Shome v. Sheikh Helim* (1), but it does not arise as the dispossession was after the tenancy expired. As to the second it appears to me that the District Judge did not apply his mind to the law applicable, nor to the correct state of facts. The plaintiff had for several years been in possession of the land, usually no doubt through tenants whose leases ran roughly from June till March. During

(1) 6 C. W. N. 616.

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the currency of the leases the tenants were in actual possession, which they derived from the plaintiff. Each March when the tenant quitted the land the plaintiff's possession revived and he retained it till he passed it on to the next tenant in June. See *Jagannatha Charry v. Rama Rayer* (2). In this case before he so passed it on, the defendants entered upon the land and dispossessed the plaintiff, and he was entitled to a decree under section 9 of the Specific Relief Act.

The decree of the District Court is set aside, and plaintiff is granted a decree as prayed for with costs in both Courts against the defendants. Advocate's fees in this Court two gold mohurs.

Revision accepted.

(2) 28 M. 238.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 66 OF 1915.

March 22, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.

HRIDAY BIHARI—PLAINTIFF—

APPELLANT

versus

Musammat RAM RANI KUNWAR

AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1982), s. 54—Sale-deed, unregistered—Property of value of less than Rs. 100—Vendee, position of—Possession, title by delivery of, whether can be relied upon.

If in the case of a sale of tangible immoveable property of a value of less than Rs. 100, the transaction is evidenced by a document which is unregistered, the vendee may fall back upon his title by delivery of possession. [p. 21, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated the 4th December 1914, upholding the order of the Munsif, Gonda, dated the 27th October 1914.

Babu Surendra Nath Roy, for the Appellant.

Babu Aditya Prasad, for the Respondents.

JUDGMENT.—Musammat Ram Rani Kunwar, one of the defendants-respondents, took a lease of certain plots of land from the plaintiff for a period of twenty years for the purpose of constructing a house on an agreement to pay a rental of Rs. 3 per year. The allegation of the plaintiff was that he had a right to eject the lessee

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from the premises after the expiry of twenty years without the payment of any compensation, and he sued accordingly for possession of the said house with the site occupied by it and claimed Rs. 140 on account of arrears of rent for the entire period. The defence, so far as it is material for the purpose of this appeal, was that the plaintiff had agreed to pay Rs. 100 on account of the costs of the construction of the house besides the costs of the annual repairs, in case he wanted to take possession of the house, and that by virtue of a sale, subsequently effected by the plaintiff in respect of the site occupied by the house in 1901, the lessee became the full proprietor of the site and was not liable to ejectment. In regard to arrears of rent claimed, the defence was that the plaintiff had been paid the rent up to the date of the said sale. The house is occupied by *Musammam* Ram Rani Kunwar and her father Jai Gobind Lal. The Court of first instance found in favour of the defendants-respondents and the lower Appellate Court took the same view.

The main question urged on behalf of the plaintiff-appellant is that the sale set up on behalf of the defendants was unenforceable, inasmuch as the sale-deed relied on by them as evidence of the transaction was unregistered and inadmissible in evidence so as to affect immoveable property of any value within the meaning of section 54 of the Transfer of Property Act.

It is unquestionably true that under that section every sale-deed is required to be registered in order that it may be operative. But in cases of tangible immoveable property of a value of less than Rs. 100 no sale-deed is required at all, and a transaction of sale can be completed, if it is accompanied by the delivery of possession. In other words, if in the case of a sale of a value below Rs. 100, the transaction is evidenced by a document which is unregistered, the vendee may fall back upon his title by delivery of possession. That title has been found in this case by both the Courts below, and the defendants are entitled to take advantage of the contract of sale in their favour, in accordance with which they continued in proprietary possession, irrespective of the sale-deed which was unregistered

and insufficient to pass any title. From the date of the sale, no rent was paid to the plaintiff for a period of nearly 13 years. The statement of Jai Gobind Lal, who was acting on behalf of *Musammam* Ram Rani Kunwar, was believed by the Court below and that of the plaintiff disbelieved.

On behalf of the plaintiff certain statements of Jai Gobind Lal in other cases, in which he was summoned as a witness in connection with mortgages effected by the lessors, were produced to prove that Jai Gobind Lal did not set up any such purchase in the statements he made at the time. Certain judgments and decrees passed in cases to which the defendants-respondents were no parties were also produced to show that the conduct of Jai Gobind Lal was inconsistent with his having purchased the site. Those documents were rejected as irrelevant by the Court of first instance and, though the lower Appellate Court does not expressly say so, they were excluded from consideration by that Court too. The mortgages to which those documents, judgments and decrees relate were, however, made prior to 1901, and the inference which the learned Counsel for the plaintiff-appellant suggests should be drawn from the omission of Jai Gobind Lal to refer to his purchase cannot be regarded as legitimate. The Courts below rightly refused to consider the said documents as having any relevant bearing on the question at issue.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

KASHINATH KRISHNA JOSHI v. DHONDSHET BHAWANSHET.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1118 OF 1915.

August 14, 1916.

Present:—Mr. Justice Beaman and
Mr. Justice Heaton.

KASHINATH KRISHNA JOSHI—

DEFENDANT—APPELLANT

versus

DHONDSHET BHAWANSHET SHETYE

—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Execution—Sale of khoti lands—Suit by judgment-debtor to recover possession of lands sold on ground of non-transferability, whether barred—Khoti Settlement Act (Bom. Act I of 1890), s. 9.

Certain khoti lands belonging to plaintiff were sold in execution of a decree obtained by defendant against plaintiff and were purchased by the former. Plaintiff subsequently sued to recover possession of the lands on the ground that they were occupancy lands and were not transferable under section 2 of the Khoti Settlement Act:

Held, that, as the sale in execution decided as between the plaintiff and defendant that the lands sold were not occupancy lands, the plaintiff could not be allowed to re-open that question. [p. 22, col. 2.]

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 238 of 1914, confirming the decree passed by the second class Subordinate Judge at Chiplun, in Civil Suit No. 587 of 1913.

Mr. V. B. Virkar, for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.

BEAMAN, J.—We have had a very full and interesting argument upon the two points raised in this appeal, *viz.*, whether the plaintiff's contention, which succeeded in the Courts below, is not *res judicata* against him, and whether his prayer to have the sale of 1912 set aside is not time-barred.

We are of opinion that this is not a case of an alleged *res judicata* against a Statute, and we are, therefore, not called upon to examine certain cases which have been cited to us and which, on a first view, may appear to be in conflict. What we think clearly was *res judicata* here was the question of fact raised again by the plaintiff in this suit and decided in his favour, *viz.*, whether or not the lands sold at the Court-sale of 1912 were occupancy lands within the prohibition of section 9 of the Khoti Settlement Act. That was a point which the plaintiff, if he meant to rely upon it at all, was bound to take, we think, at the time the Court proposed to sell the land in suit. It is not as though it was

then admitted that the lands to be sold were occupancy lands. Had that been so, no Court could have been found to sell them in the face of the direct prohibition of the Legislature. When, therefore, we find the Court selling these lands without any challenge by, or protest on behalf of, the judgment-debtor, we take it that they must have been sold on the basis of the judgment debtor having a saleable interest in them. *Omnia præsumuntur rite esse acta*. Inferentially, then, the sale of 1912 decided as between the plaintiff and the defendant, that is to say, the judgment-debtor and judgment-creditor, that the lands sold were not occupancy lands. Here the plaintiff has brought the suit to have it established that they were, and he was allowed to raise that question of fact and the whole case has turned upon the answer to it. It is precisely that part of the plaintiff's present suit which, in our opinion, was *res judicata* within the language and spirit of section 11 of the Civil Procedure Code.

Much has been said here upon the applicability of certain rules in Order XXI to the case of a judgment-debtor. Mr. Shingne argued that part of the respondent's case with very great thoroughness and ability, and for my part I am very clearly of opinion that none of those rules were ever intended to apply to the judgment-debtor himself.

It is not upon that ground that we think the plea of *res judicata* is here established so much as upon general principle and having regard to what is in controversy, what was and is to be inquired into and what has in fact been finally determined in this case by the executing Court between the executing creditor and judgment-debtor. The present suit is really a continuation of that execution proceeding or at any rate has been treated as such in both the lower Courts. The parties are, therefore, the same and what has resulted is that a question of fact, which, as we have shown, was decided, if not explicitly yet by necessary implication, between them in 1910, has been allowed to be re-opened and investigated and adjudicated upon a second time.

That being so, we have little hesitation in coming to the conclusion that the appellant's contention upon this point is sound and must prevail. It becomes, therefore, unnecessary to go into the second equally interesting point

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of limitation upon which the appellant has relied.

We think that the appeal must be allowed and the plaintiff's suit dismissed with all costs on him throughout.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 316 OF 1915.

April 17, 1916.

Present: - Mr. Stuart, J. C.

MIR MUHAMMAD HUSAIN AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

Saiyid MUHAMMAD ASGHAR—

PLAINTIFF, AND ANOTHER—DEFENDANT No. 3—

RESPONDENTS.

Evidence Act (I of 1872), s. 92—Mortgage-deed, separate arrangement in contravention of terms of, whether can be proved—Lease executed by mortgagor, possession of mortgagee under, effect of—Interest—Pleadings, untenable, of one party, whether can be availed of by other party in support of his case—Transfer of Property Act (IV of 1882), s. 76 (h), applicability of—Possession of mortgagee not as such, effect of.

In view of section 92 of the Evidence Act, proof of a separate arrangement in direct contravention of the terms of a mortgage-deed is inadmissible. [p. 24, col. 2.]

Where a mortgage-deed expressly states that no interest is to be charged for the mortgage money and the mortgagee is put in possession of the mortgaged property under a lease executed simultaneously with the mortgage-deed, evidence cannot be admitted to show that the mortgagee was put in possession of the property to provide for interest on the principal amount. [p. 24, col. 2.]

Kamla Sahai v. Babu Nandan Mian, 2 Ind. Cas. 13; 11 C. L. J. 39; *Kedar Singh v. Sumer Singh*, 10 Ind. Cas. 196; *Nagardas v. Moses S. Arokee*, 12 Ind. Cas. 896; 4 Bur. L. T. 136; *Sheo Ratan Singh v. Balkishan*, 6 O. C. 18; *Saiyed Muhammad Bakar v. Kedar Nath*, 11 O. C. 89, distinguished.

A party cannot be allowed to extract from the other party's plea something in support of his own case when that plea in itself is a bad plea that cannot be admitted. [p. 25, col. 2.]

Section 76 (h) of the Transfer of Property Act does not apply where it does not appear that the mortgagee is in possession of the mortgaged property *qua* mortgagee, although he pays no rent for its use. [p. 25, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 29th May 1915, upholding the order of the Subordinate Judge, Babraich, dated the 31st March 1915.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellants.

Syed Shahenshah Husain Rizwi, for Respondent No. 1.

JUDGMENT.—On 16th April 1896 *Musammal Umat-us-Sughra* executed a deed of simple mortgage in favour of Saiyid Muhammad Asghar for Rs. 2,000 hypothecating 71 *bighas*, 4 *biswas*, 13 *biswanis* in the villages of Jarwal and Rasulpur. The principal money carried no interest. On the same day *Musammal Umat-us-Sughra* executed a registered lease in favour of Muhammad Asghar, by which she transferred to him the whole of the property mortgaged for a rent of Rs. 180. The mortgage-deed contained a condition to the effect that, if before the expiration of six years from the date of execution the mortgagor repaid any portion of the principal money to the mortgagee, the mortgagee was to pay to the mortgagor interest at 11-1/16 per cent. per annum on the amount so repaid. Thus, while the mortgagee was to receive no interest on the principal money secured by the deed, the mortgagor was to receive interest on anything that she might choose to repay. The profits of the property hypothecated are Rs. 400 a year. The learned District Judge has concluded from the terms of the deed of mortgage and the lease and the amount of the profits of the hypothecated property that, in spite of the fact that the deed declares absolutely that no interest is to be paid on the principal money, the intention of the parties was that the principal money should bear interest and that property had been transferred in order that the profits therefrom might be enjoyed in lieu of interest.

His calculation is as follows. Rs. 2,000 had been advanced. Property producing Rs. 400 a year had been transferred. Out of Rs. 400 a year Rs. 180 were to be repaid to the mortgagor, and the remaining Rs. 220 were left to be enjoyed by the mortgagee, who thus obtained a return of Rs. 220 a year on Rs. 2,000 advanced—that is to say, a return of 11 per cent., and, as the mortgagee was obtaining 11 per cent. secured for six years, the mortgagor, if she repaid any

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portion of the principal money, was entitled to get an amount of practically 11 per cent. on her repayments. *Musammam Umat-us-Sughra* died in August 1904. When the six years for which the mortgaged property was leased by the lease of 1896 had expired, the lessee (that is to say, the mortgagee under the mortgage-deed) was ejected from the property. Subsequently, however, he was re-admitted into possession of a portion of the property.

The present suit has been brought for the recovery of Rs. 2,000. The deed, as has been stated, was executed on 16th April 1896 and the period of repayment was fixed at six years. The suit being brought on 15th April 1914 is thus within time.

The defendants' main contention was that the subsequent restoration of the mortgagee to possession of a portion of the property mortgaged constituted what is known as a *patotan* transaction, that is to say, that the arrangement between the parties was that the mortgagee should remain in possession of that property and enjoy the profits, crediting them to the repayment of the principal amount secured by the original deed of mortgage. The Courts below have found that it was not open to the defendants under the terms of section 92 of the Indian Evidence Act to prove an oral agreement of this nature and they found that the evidence adduced to prove it was unreliable. The latter finding is a finding of fact which cannot be impugned in second appeal. The Courts further found that the deed of mortgage and the lease had together constituted one transaction, that transaction being a transaction of usufructuary mortgage, and that in those circumstances the profits of the mortgaged property which was transferred to the mortgagee by the lease must be considered to be enjoyed in lieu of interest on the principal amount, and on that finding they decreed the plaintiff's claim for Rs. 2,000.

The learned Counsel for the appellants contests the proposition that section 92 applies to the case. He has argued that it was open to his clients to prove the *patotan* transaction which they assert. The point is somewhat academic, as the further conclu-

sion that the evidence in support of the *patotan* transaction is unreliable is a final conclusion of fact. But, in the alternative, he has urged a plea that, if section 92 stands in the way of the production of evidence by his clients to prove a transaction varying the terms of the original deed of mortgage, it also stands in the way of the plaintiff producing evidence to prove that the transaction was other than the transaction stated in the deed of mortgage, and that as a matter of fact interest was allowed although the deed itself asserts that no interest was chargeable. I am of opinion that this contention must prevail although (as I shall show later) its acceptance does not involve the success of the appeal. The Courts below were right in holding that it was not open to the defendants to prove an arrangement that varied the conditions to which the parties agreed under the original deed of mortgage. At the same time, however, they admitted proof of an arrangement in favour of the plaintiff which undoubtedly varied the terms of the deed of mortgage. The deed of mortgage must be taken as it stands. It is a deed of simple mortgage and not a deed of usufructuary mortgage. The cases on which the lower Courts relied in support of their view do not afford authority for its acceptance. In *Kamla Sahai v. Babu Nandan Mian* (1) a deed of mortgage was executed which apparently carried interest. The mortgagor placed the mortgagee in possession of the property under a separate lease. The Calcutta High Court found that the intention of the parties in executing the lease was to provide for the satisfaction of the amount due under the mortgage. That was undoubtedly a correct conclusion in that particular case. But here the case is quite different. The mortgage-deed stated that no interest should be paid. The plaintiff argues that there was an agreement that interest should be paid, and that the property was handed over to him in order that he might enjoy the profits in lieu of that interest. Thus there is direct contradiction between the terms of the deed and the terms of the arrangement which he endeavoured to set up. Again in *Kedar Singh*

(1) 2 Ind. Cas. 13; 11 C. L. J. 39.

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v. *Sumer Singh* (2) it was held that, in the case of a mortgage that carried interest, a separate agreement by which rents were assigned to provide for payment of the interest due could be proved. This is no authority for the proposition asserted on behalf of the plaintiff. The case of *D. Nagardas v. Moses S. Arokee* (3) is on a different point. There a transaction was made up of two parts, one of which was recorded in the form of a promissory note and the other of which was recorded in the form of an agreement allowing repayments by instalments. That case provides no authority either. The case of *Sheo Ratan Singh v. Balkishan* (4) referred to a transaction composed of two parts. *Saiyed Muhammad Bakar v. Kedar Nath* (5) refers to a similar arrangement. The same is the case in *Altaf Ali Khan v. Lalta Prasad* (6). The distinction is clear. In all these cases the arrangement was one for satisfaction of the terms of the deed of mortgage, not as here an arrangement in direct contravention of the terms of the deed of mortgage, and further the position of the plaintiff under the lease was only that of a lessee for six years. The case would be slightly stronger if the lease had been up till the time of the redemption of the mortgage.

The appellants' appeal must fail, however, on another point. There is nothing to show that possession was obtained after ejection of a portion of the mortgaged property, on any understanding that the mortgagee was to hold possession of the mortgaged property as a mortgagee. The evidence as to the terms under which possession was delivered is practically nil, and the learned Counsel for the appellants has relied in the main on the pleadings to establish this point. I do not consider that the pleadings afford any assistance in the matter. The plaintiff in his replication undoubtedly alleged that he had obtained possession of this property in lieu of interest due under the mortgage. As I have already decided, it was not open to him to prove that interest was

due to him under the mortgage. The defendants, on the other hand, asserted that possession had been delivered in order that the profits of the property should be credited to the amount due as principal money under the deed. The lower Courts have found, and I agree with them, that it was not open to them to prove any such transactions. Thus each side put up an untenable plea, and it was not open to the defendants to try and extract from the plaintiff's plea something in support of their own case when the plea in itself is a bad plea that cannot be admitted. It is true that the plaintiff is in possession of the defendants' property. But it is not clear how he obtained possession of the property, though he apparently pays no rent for its use. That latter fact does not affect the case. The defendants rely on the provisions of section 76, Act IV of 1882, and their learned Counsel argues that this is a clear case of a mortgagee taking possession of the mortgaged property during the continuance of the mortgage and asks that sub-section (h) of that section should be applied. But in order that the provisions of this section can have application in this matter, it is necessary to find in the first instance that the mortgagee is in possession *qua* mortgagee, and there is absolutely no evidence to show that possession was obtained by him *qua* mortgagee. I am not in a position to say how possession was obtained, or what were the terms of the transaction. But there is nothing to justify a finding to the effect that the mortgagee obtained possession *qua* mortgagee, and in the circumstances the provisions of section 76 do not apply. In other words, the transaction by which possession was given over a portion of the mortgaged property after the mortgagee *qua* lessee had been ejected from the whole on the expiration of the lease, is a transaction which is completely out of the purview of this case. I can express no opinion on the materials before me as to what that transaction was or what the parties intended when they made it, and I am left with the original deed of mortgage which allows Rs. 2,000 to be recovered after a certain period. That period having elapsed, the money has become due.

(2) 10 Ind. Cas. 196.

(3) 12 Ind. Cas. 896; 4 Bur. L. T. 136.

(4) 6 O. C. 18.

(5) 11 O. C. 89.

(6) 19 A. 496; A. W. N., (1897) 128; 9 Ind. Dec. (N. S.) 320.

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I, therefore, uphold the decision of the Courts below and dismiss this appeal. The appellants will pay their own costs and those of the contesting respondent.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 167 OF 1913.

March 10, 1915.

Present:—Mr. Justice Ormond and
Mr. Justice Twomey.

A. M. V. CHETTY FIRM—PLAINTIFFS

—APPELLANTS

versus

SUBAYA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Registration Act (XVI of 1908), ss. 32, 33—Presentation of documents for registration by agent of executant or claimant—Agent, authority of—Registration, certificate of—Presumption.

The certificate of registration raises a strong presumption that a document was duly registered, but when on the face of the endorsement it is apparent that a different man presented it for registration from the person who signed the endorsement, the presumption that it was duly presented is very much weakened. [p. 26, col. 2.]

Although a person who can present a document for registration is present and acquiesces in the presentation yet if he is not the person who presents the document for registration, and it is presented by a person who has no authority to present it, the registration is invalid. [p. 26, col. 2.]

Jambu Parhad v. Muhammad Nawab Aftab Ali Khan, 28 Ind. Cas. 422; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 143; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 23 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592 (P. C.); 42 I. A. 22, followed.

When a document is presented by an agent, it is for the principal to prove that such agent held a power-of-attorney duly authenticated by the Registrar within whose district the principal resides, or that the power-of-attorney was otherwise recognizable under section 33 of the Registration Act. [p. 27, col. 1]

Mr. Coltman, for the Appellants.

Mr. Aiyar, for Respondents Nos 1 and 2.

Mr. Doctor, for Respondent No. 3.

JUDGMENT.—The question in this appeal is, whether a mortgage dated the 28th September 1905 which purports to be a registered document was in fact duly registered. The plaintiffs are the Chetty firm of A. M. V. and are the assignees from the mortgagees C. P. M. Their assignment is dated the 21st March 1912,

and their suit on the mortgage was instituted on the 23rd March 1912. The mortgagors in their written statement, paragraph II, deny that the document was duly registered inasmuch as it was not presented for registration by C. P. M. Ramen Chetty but by some other person named Chitambaram who personated him. The endorsement on the document shows that C. P. M. Ramen Chetty presented the document for registration and that endorsement is signed by Mutu Ramen. Mutu Ramen is a clerk in the firm of C. P. M. One of the mortgagors, Reddiar, at least was at the registration office and Ramen Chetty states that he was there when the document was attested. It appears to have been written and attested at the registration office. The signatures to the document were admitted before the Registrar, and the mortgagors and the mortgagees acquiesced in the presentation for registration. Ramen Chetty, however, in his evidence on commission taken out by the plaintiffs, stated in answer to cross-interrogatories that he did not present the document for registration and that Mutu Ramen did it under a power-of-attorney from him. The Privy Council decision in *Jambu Parhad v. Muhammad Nawab Aftab Ali Khan* (1) shows that, although a person who can present the document for registration is present and acquiesces in the presentation, yet if he is not the person who presents the document for registration and if it is presented by a person who has no authority to do so, the registration is invalid. The question, therefore, is, are we to presume or is it proved that Mutu Ramen had an authenticated power-of-attorney authorising him to present the document for registration? The certificate of registration, no doubt, raises a strong presumption that the document was duly registered; but when on the face of the endorsement it is apparent that a different man presented it for registration from the person who signed the endorsement, the presumption that it was duly presented is very much weakened. If Mutu Ramen had an authenticated power-of-attorney that

(1) 28 Ind. Cas. 422; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 143; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 23 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592; 42 I. A. 22 (P. C.).

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fact is a matter which would be specially within the knowledge of the plaintiffs or rather of their assignors under whom they claim; but the defendants have produced the Sub-Registrar of Toungoo Registration Office who gave evidence, which shows that no such power was authenticated in that office since 1899. The power must be authenticated at the registry where the principal resides. It is contended for the plaintiffs that there is nothing to show that the principal resides at Toungoo, but the Exhibit A (the mortgage) refers to Ramen Chetty as of Kaladan Quarter, Toungoo, and Exhibit B (the assignment) refers to Ramen Chetty as carrying on business as C. P. M. at Toungoo. The defendants could have done no more, though it is urged for the plaintiffs that the defendants should have asked Ramen Chetty where he resides and where an authenticated power-of-attorney could be found. It was an affirmative matter which, in the circumstances, lay upon the plaintiffs to prove.

Under the rules if a document is presented by an attorney the Registrar is bound to set out that fact in an endorsement, which he has not done in this case. There is, therefore, the strongest presumption that Mutu Ramen did not present a power-of-attorney to the Registrar at the time this document was presented for registration. Therefore although the plaintiffs started with the presumption arising from the certificate that it was duly registered, the endorsement on the face of it shows that there was some irregularity in its presentation which the plaintiff has to explain. He has, moreover, to overcome a very strong presumption that no power-of-attorney was produced to the Sub-Registrar at the time and the consequent presumption that there was no authenticated power-of-attorney in favour of Mutu Ramen. The statement by Ramen in his evidence on commission, that he had given a power-of-attorney to Mutu Ramen, is not enough. We dismiss the appeal with costs as against the first two respondents in their representative capacity. Mr. Aiyer appears for the minors who are the representatives of Kristna Amal deceased, one of the two mortgagors, and Mr. Doctor appears for the other mortgagor Raja Ram Reddiar. The interests of all are identical, therefore only one set of costs is

allowed. As between themselves, they will share the costs equally, that is to say, the representatives of Kristna Amal and Raja Reddiar in two equal shares.

Appeal dismissed.

RENT APPEAL No 88 OF 1914.

May 31, 1916.

Present:—Mr. Stuart, J. C.

SARABJIT SINGH, DEAD AND AFTER HIS
DEATH SANGAM SINGH—DEFENDANT—
APPELLANT
versus

THE SPECIAL MANAGER, COURT OF
WARDS, RAMPUR MATHRA ESTATE
—PLAINTIFF—RESPONDENT.

Appeal, second—Findings of fact, whether can be questioned—Revenue papers, entries in, construction of—Rent, fixation of, proof as to—Land held without payment of rent—Occupation rent, whether can be charged—Landlord, position of—Oudh Rent Act (XXII of 1886)—Ex parte case—Evidence, otherwise unreliable, not to be relied upon—Court, duty of.

Findings of fact can be questioned in second appeal if they are not clear. [p. 28, col. 2.]

Where entries of a very old date in the revenue papers assert that certain plots of land are held by ordinary tenants and, in some instances, that a certain rate of rent is payable by the tenants, such entries, in the absence of anything to show how they came to be made, are not evidence as to the fixing of rent either by a competent authority or by action of parties, nor do they raise a presumption to that effect. [p. 28, col. 2.]

Where it is found that certain persons were permitted to hold land without payment of rent and without there being any agreement to pay rent or a fixation of its amount, the landlord is not entitled to claim from them a fair occupation rent. [p. 29, col. 2.]

Ram-Dulare v. Haidar Ali, 10 Ind. Cas. 2; *Musamat Raj. Kuar v. Nabi Bakhsh*, 9 O. C. 296 and *Mohammed Hasan v. Deputy Commissioner, Buhraich*, 9 O. C. 36, distinguished from.

Suraj Bakhsh Singh v. Sitla Bakhsh Singh, 33 Ind. Cas. 770; 3 O. L. J. 5, followed.

A Court ought not to rely in an *ex parte* case on evidence otherwise unreliable, simply because the case is *ex parte*. [p. 29, col. 2.]

Appeal from the decree of the District Judge, Sitapur, dated the 7th March 1914, upholding the order of the Assistant Collector, Sitapur, dated the 30th June 1913,

SARABJIT SINGH v. RAMPUR MATHRA ESTATE.

The Hon'ble Pandit Gokaran Nath Misra (holding brief of Mr. G. H. Thomas), for the Appellant.

The Government Pleader and Babu Gaya Prasad, for the Respondent.

JUDGMENT.—The appeals under decision are Nos. 88, 90, 91, 92, 93, 94, 95 and 96 Second Rent Appeals of 1914. They have been heard together and can be decided in one judgment. They are appeals in eight suits, in which decrees for arrears of rent have been passed by the Courts below in favour of the Court of Wards in charge of the estate of the *talukdars* of Rampur Mathra in respect of holdings situated in the village of Gonda Deoria. The suits in question were suits for arrears of rent for the years 1317, 1313 and 1319 *Fasli*. These suits were brought as though they were against ordinary tenants whose rent had been fixed and had not been paid. The case for the defendants-appellants is that they are *Thakurs* belonging to the same family as the *talukdar* of Rampur Mathra and related to him, that they had been given the lands by way of maintenance, that there had never been any contract of tenancy between the *talukdar* and themselves, that they had neither agreed to pay nor had paid any rent, and that they had always held the land rent-free. They asserted that no suits for arrears of rent with respect to those plots could lie against them and that the Court of Wards had as a condition precedent to realising rent to resume the holdings and to have the rents fixed.

The Courts below have found against the appellants on some of these points. They have decided that the appellants have failed in each instance to prove an exact relationship with the *talukdar* or to prove that the land was given in any case by way of maintenance. The foregoing findings are not questioned in second appeal. The Courts have not, however, found (except in one instance and in that instance only in respect of a portion of a holding) that rent has ever been fixed between the parties or by a competent authority or that rent has ever been paid. The finding with respect to the origin of the possession of the appellants (except with regard to one

small portion of the land in question) is that they obtained possession of these holdings as trespassers and were permitted to remain in possession without rent being demanded or paid owing to previous lax management on the part of the estate. The Courts did not apply the provisions of section 127 of Act XXII of 1886, but considered that under the principles laid down in *Ram Dulare v. Haidar Ali* (1) they were entitled to fix a fair occupation rent and pass a decree on the basis of the rent so fixed.

Before I proceed to discuss the applicability of the principle on which they have relied, it is necessary to arrive at a finding as to whether rent has ever been fixed or not. The Courts below have decided that no such rent was fixed, but it is contested on behalf of the Court of Wards that on the evidence they should have arrived at a finding that rent was fixed. I am precluded to a considerable extent from considering this plea of the Court of Wards by the circumstance that the finding that rent was not fixed would ordinarily be a finding of fact, but I am not altogether precluded for the reason that the findings of the Courts below upon this point are far from clear. I can, however, dispose of this point very shortly upon the merits. With the exception of the portion of the plot to which I have already adverted, the only evidence as to the fixing of rent is contained in entries of a very old date in the revenue papers. These entries assert that the plots are held by ordinary tenants and in some instances that a certain rate of rent is payable by the tenants. These entries, however, afford no evidence as to whether rent was or was not fixed. They do not even raise a presumption that rent was fixed. They are of a very old date. There is nothing to show how they came to be made, and the Courts below were right in deciding that these entries in themselves are not evidence as to the fixing of rent either by a competent authority or by the action of the parties, and the Courts below have

(1) 10 Ind. Cas. 2.

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in no way acted under these entries and have not passed the decrees on the basis of the rates entered in those papers. They have assessed what they considered to be a fair occupation rent and have passed a decree on the basis of rent so fixed. Thus I find that as a matter of fact no rent was ever fixed and that the appellants have been in possession of these holdings all along without paying rent (except in one instance) and without there being an agreement to pay rent. The estate originally agreed to permit them to hold the land without payment of rent. I do not say that anything of the nature of a *muafi* was created. I do not intend to express an opinion on that point, as the exact status of the appellants will have to be decided in subsequent proceedings. In fact it is only for the sake of argument that I can describe the appellants as tenants. They may or may not be tenants. That is a point which has to be subsequently decided, except in the case of Dhir Singh and in his case only with regard to a portion of his holding. But, assuming that they are tenants, they are tenants who were permitted to hold the land without payment of rent and no agreement was ever arrived at as to the amount of rent that they should pay. In these circumstances I do not find that the decision in *Ram Dulare v. Hardar Ali* (1) and in the two connected decisions in *Musammatt Raj Kuar v. Nabi Bakhsh* (2) and *Mohammed Hasan v. Deputy Commissioner, Bahariach* (3) have any application. I discussed the effect of those rulings in a recent decision, *Suraj Bakhsh Singh v. Silla Bakhsh Singh* (4). There I said: "The purport of those decisions may be stated in the following words:—'Where the relationship of landholder and tenant exists and there has been an agreement to pay rent, whether the amount payable has been fixed or not, it is open to the Court to allow arrears of rent according to the rate originally fixed even if the agreement has terminated or in the case where the rent has not been fixed, to assess fair occupation rent and award arrears on

that basis.' But there is nothing in those cases to support the assessment of a fair occupation rent and the awarding of arrears on that basis, where there has been no agreement to pay rent at all and where the agreement has been that the land should be held rent-free." In the same judgment I had previously noted that there is nothing in the provisions of Act XXII of 1886 to support the principle upon which the learned Counsel for the respondents relies. In these circumstances, in so far as the appellants may be tenants whose rent has never been fixed, as they were permitted to enter on the occupation of the land without payment of rent, the decree for arrears against them cannot stand. It is open to the respondent, if he desires to discontinue the indulgence and to charge rent, to avail himself of the provisions of Act XXII of 1886, Chapter VII A. I have to note, however, that in the case of Dhir Singh there is a finding of fact with which I cannot interfere, to the effect that he is a tenant of plots Nos. 327, 350, 351, 352, 353, 354, 359, 721, 876, and 900 at a fixed rental of Rs. 45 and the decision of his appeal will be in accordance with that finding. I have further to note with reference to Appeal No. 92 that the suit was decided against Bajrang Singh *ex parte*. This, however, does not prevent the success of his appeal in this Court, because it was decided against him on the basis of no evidence at all. The lower Courts conceived themselves bound to accept the evidence of entries in revenue papers because Bajrang Singh was absent, when they refused to accept similar evidence against the persons who were present. They were, of course, in error in accepting that evidence. The so-called evidence on which the *ex parte* decree is based is no evidence at all.

As a result I decree Appeals Nos. 88, 90, 91, 92, 93, 94 and 96. The suit against those appellants will be dismissed and the respondent will pay his own costs and those of the appellants in all Courts.

With regard to Appeal No. 95 I modify the decree by awarding Rs. 45 for each year under dispute with the usual interest and future interest. As the parties have succeeded roughly with respect to one-half

(2) 9 O. C. 296.

(3) 9 O. C. 362.

(4) 33 Ind. Cas. 770; 3 O. L. J. 5.

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and failed with respect to one-half in this case, Dhir Singh and the respondent will pay their own costs in all Courts.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2301 OF 1914.

May 23, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad
HARIHAR MISSIR—PLAINTIFF—
APPELLANT
versus

SYED MOHAMMAD, MINOR UNDER THE
GUARDIANSHIP OF Musammat AZIZANNESSA,
MOTHER AND GUARDIAN, AND OTHERS

—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 62—Money paid to one for use of another, suit for—Limitation.

Money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Article 62 of Schedule I of the Limitation Act, paid to that party for the use of the actual person in whom the right to receive it vests and, therefore, a suit to recover such money must be brought within three years of the date of its payment. [p. 31, col. 1.]

Lachmi Narain v. Dhanukdhari Prasad Singh, 17 Ind. Cas. 351, followed.

Mahomed Wahib v. Mahomed Ameer, 32 C. 527; 1 C. L. J. 167, referred to.

Appeal from a decision of the District Judge, Muzaffarpur, dated the 20th May 1914.

Mr. Saroshi Chandra Mitter, for the Appellant.

Mr. Baikunth Nath Mitter, for the Respondents.

JUDGMENT.—In this case a preliminary objection is taken that the appeal has abated, and no order has been passed under Order XXII, rule 11, read with rule 9 setting aside that abatement. The appellant died on the 29th August 1915, and the application made for substitution before the Registrar was filed on the 6th March. It is patent, therefore, that when that application was made to the Registrar the appeal had actually abated and should have been struck off the file, to be restored only after proceedings in due form under rule 9 of Order XXII. The application for substitution was, therefore, made in wrong form. It appears to have been treated however, by the Registrar as an

application for the restoration of the appeal upon the file; notices were issued to the respondents, and they did not put in any objection before the Registrar to the hearing of the appeal. We have, therefore, in considering this application, dealt with it as an application to set aside an order of abatement, and having regard to all the facts of the case, are satisfied that the appellant was prevented by reasonable cause from making the substitution in due time. We, therefore, direct that the abatement be set aside and the appeal heard upon its merits.

The facts of the case upon the merits are, that the appellant was the purchaser in auction-sale of a revenue-paying estate. He defaulted in payment of the revenue, and almost immediately after his purchase the estate was again brought to sale. The original owner remained on Register D as the proprietor of the estate, no attempt being made by the plaintiff to obtain substitution of his name. Taking advantage of this fact, the defendant withdrew the sale-proceeds lying in the Collectorate. The plaintiff, therefore, instituted this suit for the recovery of the money paid to the defendant by the Collector.

The plaintiff instituted his suit more than three and less than six years from the date of the payment. There has been a definite finding of fact by the lower Courts that the position of the plaintiff was such that he could not possibly have been kept out of knowledge of the payment to the defendant, and his right to sue thereon, by any fraud of the defendant. The sole question for decision is—Does Article 62 or Article 120 of the Limitation Act apply? The argument of the learned Vakil for the appellant is, that it cannot be said that money has been paid to the defendant for the use of the plaintiff, unless there was a deliberate intention on the part of the defendant to accept the money for the plaintiff's use. He contends that Article 62 is inapplicable. In putting forward this argument the learned Vakil has the whole case-law of India against him. It is not a question of the defendant's intention in taking the money. He undoubtedly intended to rob the plaintiff and intended to keep the money for his

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own use. But this is not the point. The point is, for whose use did the party making the payment intend the money? The greater number of the cases before us are suits upon mortgage-deeds, in which the right of the plaintiffs was known to the mortgagor paying money in redemption, and this, in fact, was the position in the case of *Mahomed Wahib v. Mahomed Anwer* (1). An attempt is made to distinguish that case and the analogous cases from the present case, on the ground that the Collector, who paid the money to the defendant, neither knew nor cared anything about the plaintiff's rights. A case actually in point is before us in *Lachmi Narain v. Dhanukdhari Prasad Singh* (2). This was a decision by a Division Bench of the Calcutta High Court, and it is binding upon this Court until dissented from by a Full Bench. We are in entire agreement with the conclusions arrived at in that case. The Collector, though he may have been ignorant of the plaintiff's rights, paid the money to the defendant, not because he was the owner, but because under section 31, Act XI of 1859, he was bound by law to pay the money to the recorded proprietor or his heirs or representatives. The Collector must have been fully aware of the right of the owner to ultimately recover and enjoy the money. We must take it as reasonable to suppose that he handed the money to the defendant with the intention that it should be made over to the real owner, if indeed that real owner was other than the recorded proprietor.

We are of opinion, therefore, that not only is the case governed by the case that we have quoted, but also that that case is in accordance with the whole trend of case-law throughout the Courts of India, that money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Article 62, paid to that party for the use of the actual person in whom the right to receive it vests.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 32 O. 527; 1 C. L. J. 167.

(2) 17 Ind. Cas. 351.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 139 OF 1915.

April 5, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.
LACHHMAN PRASAD AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

HARDEO BAKHSH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Burden of proof—*Consideration, non-receipt of, plea as to*—*Bond, recital in, as to receipt of consideration, whether evidence of such receipt.*

Ordinarily where a plaintiff sues for the recovery of money due on a bond and proves the execution of that bond, the onus lies on the executant to establish that he executed the bond without receipt of the consideration money. [p. 32, col. 1.]

Mohammad Amir Mirza Beg v. Kedar Nath, 15 Ind. Cas. 202; 15 O. C. 58, referred to.

The recital in a bond as to receipt of the consideration money is admissible in evidence to prove such receipt. [p. 32, col. 2.]

Behari Lal v. Makhdam Bakhsh, 18 Ind. Cas. 744; 11 A. L. J. 221; 35 A. 194; *Bakhshi Ram v. Liladhar*, 21 Ind. Cas. 619; 11 A. L. J. 371; 35 A. 353, referred to.

Appeal from the decree of the District Judge, Sitapur, dated the 27th January 1915, reversing the order of the Munsif, Sitapur, dated the 12th January 1914.

Babu *Ishuri Prasad*, for the Appellant.

Babu *Puttoo Lal*, for Respondent No 4.

JUDGMENT.—This was a suit for the recovery of moneys due on certain bonds alleged to have been executed by Kalka Prasad, the father of the defendants-respondents, in favour of Ram Dayal and Kashi Prasad, the predecessors of the plaintiffs-appellants. It appears that Ram Dayal and Kashi Prasad held a possessory mortgage of the property of Kalka Prasad and these bonds were executed to obtain further advances and were repayable at the time of the redemption of the possessory mortgage. In 1912 the defendants-respondents obtained a decree for redemption of the possessory mortgage without paying the moneys due on the bonds in suit. It was there held that the execution of these bonds was proved, but the persons seeking redemption could not be required to pay the money due on them as a condition precedent to redemption, because the bonds contained no covenant creating a charge on the mortgaged property. In the present suit, the defendants denied that Kalka Prasad had executed the bonds in suit and pleaded that

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the conditions and rates of interest entered therein were hard and penal and were exacted in bad faith. They further pleaded that the claim was barred by time and by Order II, rule 2, of the Code of Civil Procedure. Both the Courts below found that the execution of the bonds in suit was proved, inasmuch as the finding in the previous suit on that point operated as *res judicata*. In regard to the question of consideration the Court of first instance held that the payment of the consideration in regard to two of the bonds in question was proved, while the lower Appellate Court held that the payment of the consideration was not proved in regard to any of the bonds. With reference to the rate of interest claimed, the Court of first instance allowed the stipulated rate of interest but the lower Appellate Court held that it was hard and unconscionable, and that the consent of Kalka Prasad to pay that rate was obtained by undue influence. On the question of limitation, the finding of both the Courts was that the claim was not barred by limitation. As regards the applicability of Order II, rule 2, of the Code of Civil Procedure, the finding of the Court of first instance was that it did not bar the suit, and before the lower Appellate Court that point was not pressed.

The only questions pressed for consideration in these appeals are whether the onus was rightly thrown on the plaintiffs to prove the payment of the consideration moneys and whether the plaintiffs appellants were entitled to interest at the rates stipulated in the bonds in suit.

Ordinarily where a plaintiff sues for the recovery of money due on a bond and proves the execution of that bond, the onus lies on the executant to establish that he executed the bond without receipt of the consideration money: *Mohammad Amir Mirza Beg v. Kedar Nath* (1). The executant in this case is dead. The defendants are his sons and surviving members of the family to which he belonged. The bonds in suit have been produced by the plaintiffs, and there is no reason to think that Kalka Prasad would have executed them and handed them over to the creditors without receiving the consideration moneys specified

therein. In *Behari Lal v. Makhdum Bakhsh* (2) it was held that the admission of the receipt of consideration contained in a mortgage-deed was admissible in evidence against a subsequent purchaser by private treaty of the interest of the original mortgagors. This case was followed in *Bakhshi Ram v. Liladhar* (3), where a suit was brought on a mortgage against the mortgagor, his sons who were members of the joint Hindu family with him but were not parties to the mortgage, and the purchaser at an auction sale of the equity of redemption of the interests of the mortgagor; and it was held that the admission made in the mortgage-deed and before the registering officer by the mortgagor as to the passing of the consideration was admissible in evidence. In this case no evidence was produced on behalf of the defendants to explain how the bonds in suit were made over to the creditors by Kalka Prasad without the consideration moneys, recited therein, having been paid to him. The bonds in suit were properly stamped as such. The plaintiffs are, therefore, entitled to the recovery of the moneys due on the said bonds.

As regards the rate of interest, it is not disputed that Kalka Prasad was indebted to Ram Dayal and Kashi Prasad at the time he executed the bonds in suit, and there is no reason for differing from the opinion arrived at by the learned District Judge that the creditors used that position in exacting a heavy rate of interest from Kalka Prasad on the occasion of the subsequent advances made to him from time to time. It will be proper, therefore, to reduce the rate of interest to 1 per cent. per mensem on the principal moneys specified in the bonds. The plaintiffs are thus entitled to a decree for Rs. 115 principal and Rs. 410-5-6 on account of interest.

The appeals are, therefore, allowed and the plaintiffs' claim decreed for the recovery of Rs. 525-5-6 with proportionate costs here and hitherto and future interest at 6 per cent per annum from the date of the suit till payment against the joint family property belonging to Kalka Prasad and the defendants-respondents. The defendants-respondents will, in the circumstances, bear their own costs throughout.

Appeal allowed.

(1) 15 Ind. Cas. 202; 15 O. C. 58.

(2) 18 Ind. Cas. 744; 11 A. L. J. 221; 35 A. 194.
(3) 21 Ind. Cas. 619; 11 A. L. J. 371; 35 A. 353.

KADIR MOHAMED v. EMPEROR.

SIND JUDICIAL COMMISSIONER'S
COURT.CRIMINAL REVISION APPLICATIONS NOS. 54 AND
55 OF 1916.

May 26, 1916.

Present:—Mr. Hayward, J. C., and
Mr. Fawcett, A. J. C.KADIR MOHAMED AND OTHERS—
APPLICANTS
versus

EMPEROR—OPPONENT.

*Bombay Prevention of Gambling Act (Bom. IV of 1887),
s. 6—Criminal Procedure Code (Act V of 1898), s. 103
—Search of gaming house by Police without mashirs,
legality of—Evidence discovered in illegal search,
admissibility of*

A search conducted under section 6 of the Bombay
Prevention of Gambling Act, is not rendered illegal
by the mere non-presence of *mashirs* as required
by section 103 of the Criminal Procedure Code.
[p. 34, col 1.]

Emperor v. Aslum, 27 Ind. Cas. 910; 8 S. L. R. 213;
16 Cr. L. J. 238, referred to.

But such an omission in case of searches con-
ducted under the provisions of the Criminal Pro-
cedure Code would render them illegal, although the
illegality would be no bar to the consideration of
the evidence discovered by the search. [p. 34, col 1.]

Nazir Khan v. Proladh Dutta, 4 C. 659, 2 Ind. Dec.
(N. S.) 419, referred to.

Applications against the order of the
Additional City Magistrate, Karachi.

Mr. Wadhmal Oodharam, for the Appli-
cants.

Mr. E. Raymond (Public Prosecutor for
Sind), for the Crown.

JUDGMENT.—These are applications for
revision of a judgment of the Additional
City Magistrate, Karachi, convicting the
applicants Nos. 1 and 2 of keeping a common
gaming house and gambling therein, and
the remaining applicants of gambling in that
common gaming house.

Mr. Wadhmal has argued the case fully
on behalf of applicants Nos. 1 and 2, and
those arguments have been adopted on behalf
of the other applicants by Mr. De Verteuil.

Mr. Wadhmal has, in the first place,
brought to our notice that there was an
irregularity in the search warrant issued
under section 6 of the Gambling Act.
It would appear that the informers Ahmad
and Dewasing alleged that gambling was
going on in the room described as No. 53
but that when the search party went there
armed with their warrant to search that
room they found the room empty, and the

gambling going on not in the room No. 53
but in the adjoining room No. 52.
They accordingly searched room No. 52
and took in custody the persons there found
and the instruments of gambling, purporting
to be acting under the warrant issued under
section 6 of the Gambling Act. It has
been argued on the other side, however,
that the entry of room No. 53 in the
warrant was merely a false demonstration for
room No. 52. But it is impossible for us
to hold that that is so, as it is not a
case of one room described by two different
addresses as in a previous case cited, but
a case of two distinct rooms with separate
entrances. The search, therefore, cannot
be held to have been conducted under section
6 and it is not, therefore, open to us to apply
in this case the presumption which would
otherwise have arisen under the Gambling
Act.

Mr. Wadhmal next devoted himself to the
consideration of the merits, and endeavoured
to convince us that apart from the technical
presumption there was no evidence justifying
the conviction of the applicants. We
find, on reference to the proceedings, that
the direct evidence consisted of the state-
ments of the two informers Ahmad and
Dewasing, to the effect that both rooms
No. 53 mentioned in the search warrant and
No. 52 actually searched were habitually
used as common gaming houses by the
applicants Nos. 1 and 2 who habitually took
fees, generally known as "*nal*", from gamblers
frequenting the premises.

The other evidence was that of Inspector
Sutton, Sub-Inspector Bhagwandas and
Head Constable Umraosingh to the effect
that when they searched the room No. 52,
they found all the accused sitting there in
a circle with money and dice in front of
them. Mr. Wadhmal has urged us to
reject the evidence of Ahmad and Dewasing
because, among other reasons, their names
were not mentioned in the Police *challan*.
But that omission would appear to us to be
explained by the fact that they were informers
whose names would naturally not be publish-
ed unless it was absolutely necessary to
do so, and by the fact that that necessity
appears to have subsequently arisen upon
the discovery of the imperfection of the

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warrant under section 6 of the Gambling Act. Mr. Wadhmal has asked us to reject the evidence of the Police officers on the ground that they took no *mashirs* with them to assist them in the search. That no doubt is a circumstance to be considered but it is not necessarily fatal to the acceptance of their evidence. Mr. Wadhmal has also suggested that their evidence ought to be excluded owing to illegality in the search. Now the omission to take *mashirs* would not have been an illegality if the search had actually been conducted under section 6 of the Gambling Act, for it would not then have been a search under Chapter 7 contemplated by the provisions of section 103 of the Criminal Procedure Code, as was pointed out in the case of *Emperor v. Ashum* (1). But the omission was no doubt an illegality in the present case, as the search cannot be supported under the Gambling Act, but only under the Criminal Procedure Code. That illegality would, however, be no bar to the consideration of the evidence discovered by the search, as was pointed out by the Calcutta High Court in the case of *Nazir Khan v. Proladh Dutta* (2). We find on the other hand that the evidence of Ahmed and Dewasing was accepted as "perfectly true" by the learned Additional City Magistrate, who was also decidedly of opinion that there was no ground for disbelieving the evidence of the Police Officers Inspector Sutton and Sub-Inspector Bhagwandas. We do not find sufficient reasons from the arguments advanced to us or from the record for taking a different view from that of the learned Magistrate.

Mr. Wadhmal has lastly urged that the sentences passed upon the applicants Nos. 1 and 2 were unduly severe. We find, however, that applicants Nos. 1 and 2 have been stated to be notorious gamblers and the premises to be notorious gaming houses. We do not think, therefore, that, though the sentences were severe, sufficient ground has been shown to justify our interfering in this matter with the discretion of the learned Magistrate.

We reject all the applications and cancel

the bail-bonds of applicants Nos. 1 and 2 and direct that they be recommitted to jail to serve the remainder of their sentence.

Applications rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 379 OF 1913.

April 28, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

NRISHINHA KUMAR MUKHERJEE—
ACCUSED—PETITIONER

versus

KUMUDENDU MUKHERJEE—

COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 417—Cheating proceedings for, quashed, as no prima facie case made out—Process, issue of, against accused—Revision by High Court—Criminal Procedure Code (Act V of 1898), s. 439.

In a proceeding under section 107, Criminal Code, the Pleader of the 1st party having agreed to persuade his client to give an undertaking for the protection of the property in dispute in that proceeding, the opposite party withdrew from the property. The Pleader's client was willing to give the requisite undertaking but the opposite party did not accept it and filed a complaint against the Pleader under section 417, Indian Penal Code. The Magistrate issued process against the Pleader:—

Held, that no *prima facie* case of cheating was made out against the Pleader, and the proceedings against him should be quashed. [p. 35, col. 1.]

Rule against the order of the Deputy Magistrate, Howrah, dated the 27th March 1916.

FACTS.—In proceedings under section 107, Criminal Procedure Code, the petitioner was the Pleader of one party. The opposite party offered to withdraw from the property in dispute in the proceedings if the petitioner's client would give an undertaking to protect the property from sale. The petitioner having agreed to persuade his client to give the requisite undertaking, the opposite party withdrew from the property and the petitioner withdrew the proceedings under section 107. Upon petitioner's persuasion his client was willing to file the requisite undertaking but the opposite party did not accept it and consequently it was not filed. Upon this the opposite party filed a complaint against the petitioner under section 417, Indian Penal Code, for having induced him dishonestly to act in the section 107 proceedings as he had done. The Magis-

(1) 27 Ind. Cas. 910; 8 S. L. R. 213; 16 Cr. L. J. 233.

(2) 4 C 659; 2 Ind. Dec. (N. S.) 419.

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trate who entertained the complaint issued process against the petitioner. The petitioner moved the High Court in revision.

Babus Manmotho Nath Mukherjee and Mrityunjay Chatterjee, for the Petitioner.

JUDGMENT.—In this case we have read the explanation of the Magistrate, but we are of opinion that no *prima facie* case of cheating has been made out against the petitioner. The proceedings against the petitioner are accordingly quashed and his bail-bond will be discharged.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 87
OF 1916.

June 29, 1916.

Present:—Mr. Hayward, J. C.

EMPEROR—APPLICANT

versus

JUMO AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss 269, 526—“Trial...shall be by Jury in any district”, meaning of—High Court, power of, to transfer a Sessions case from a Jury district to a non-Jury district.

In section 269, Criminal Procedure Code, the words “trial...shall be by Jury in any district” mean that the trial shall be by Jury in any district when so ordered by a Notification and not that the trial shall be by Jury of offences ‘committed’ in any district.

There being no legal prohibition against the trial being otherwise than by Jury if held in any other district not affected by a Notification under section 269, the High Court has power under section 526 to transfer a Sessions case from a Jury district to a non-Jury district.

Durga Charan Sanyal v. Emperor, 8 C. L. J. 59; 4 M. L. T. 148; 8 Cr. L. J. 121, referred to.

Criminal application for transfer to Kotri of the case committed by the Sub-Divisional Magistrate, Kotri, for trial in Karachi.

Mr. F. J. De Verteuil, for the Accused.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

ORDER.—This case has been committed for trial by the Sub-Divisional Magistrate of Kotri and the question has arisen whether it could not be more conveniently tried by the Sessions Court at Hyderabad than here in Karachi.

It appears that the scene of offence was only 14 miles or so from Kotri, which is itself within easy communication of Hyderabad and all the accused come from Hyderabad. Moreover all the accused including No. 3 Khairo represented by Mr. De Verteuil have expressed the desire that the trial should be before the Sessions Court at Hyderabad. The Public Prosecutor for Sind has no objection on the score of convenience of the parties, but has suggested for consideration the important question whether accused who would ordinarily be tried in a Jury district created by a Notification under section 269 of the Criminal Procedure Code could properly be transferred for trial in a non-Jury district by an order under section 526, Criminal Procedure Code.

It seems to me that the question must be decided by the words actually used by the Legislature, which are that the trial of offences before any Court of Session shall be “by Jury in any district when so ordered by Notification duly issued under section 269”, Criminal Procedure Code. The words are thus to the effect that the trial of the offences shall be by a Jury in any district, and not that the trial shall be by Jury of offences “committed” in any district. So there would appear to be no prohibition against the trial being otherwise than by Jury if held in any other district not affected by a Notification under section 269, Criminal Procedure Code. If that be the correct interpretation of the section, as it appears to me to be, then that section in no way limits the powers of transfer conferred on this Court by section 526, Criminal Procedure Code. My conclusion is fortified by the remarks of the learned Judges in the case of *Durga Charan Sanyal v. Emperor* (1) decided by the Calcutta High Court.

The particular case now before me clearly falling within clause (d) must, therefore, be transferred for trial by the Sessions Court of Hyderabad under that clause of section 526, Criminal Procedure Code.

Case transferred.

(1) 8 C. L. J. 59; 4 M. L. T. 148; 8 Cr. L. J. 121.

BAIJ NATH SINGH v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 215 OF 1916.

August 7, 1916.

Present:—Mr. Justice Atkinson and
Mr. Justice Kingsford.

BAIJ NATH SINGH—ACCUSED—
PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 537—Enquiry, order directing—Delay—Jurisdiction—Procedure—Irregularity, effect of—Penal Code (Act XLV of 1860), ss. 182, 211.

Accused lodged a complaint against certain Police Officers before a Magistrate who, after examining the accused, recorded that the complaint was false and ordered the latter to show cause why he should not be prosecuted under section 182, Indian Penal Code. The Magistrate was then transferred and his successor sent the case to another Magistrate for enquiry. Subsequently, on 6th December, the complaint was dismissed under section 203, Criminal Procedure Code. On the 4th of February following, the Magistrate, on the application of a Police Officer, ordered the prosecution of the accused under section 211, Indian Penal Code:

Held, (1) that the delay which occurred in making an order under section 476 did not deprive the Magistrate of jurisdiction to proceed under the section; [p. 36, col. 2; p. 37, col. 2.]

Rahimadulla Sahib v. Emperor, 31 M. L. 140, 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54 and *Aiyakanna Pillai v. Emperor*, 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41, disapproved.

Shaikh Bahadur v. Shaikh Eradatullah Mallick, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 47; *Baidya Nath Singh v. Muspratt*, 14 C. 141; 11 Ind. Jur. 226; 7 Ind. Dec. (N. S.) 93 and *Ganesh Narayan Sathe, In re*, 13 B. 600; 7 Ind. Dec. (N. S.) 397, referred to.

(2) that if the procedure adopted by the Magistrate in sending the case to another Magistrate for enquiry and report was irregular, the irregularity was cured under section 537, Criminal Procedure Code. [p. 37, col. 2.]

Hari Charan Gorai v. Srish Chandra Sadhukhan, 7 Ind. Cas. 747; 38 C. 68; 11 Cr. L. J. 525; 13 C. L. J. 43, referred to.

Per Atkinson, J.—If in a criminal proceeding an irregularity takes place and is allowed to pass unheeded and unnoticed, and fresh prosecution follows founded upon the irregularity and conviction follows, then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction. [p. 38, col. 1.]

Criminal Revision against the order of the Sessions Judge, Muzaffarpore, dated the 19th May 1916.

Mr. Nersu N. Singh, for the Petitioner.

The Deputy Government Advocate, for the Crown.

JUDGMENT.

KINGSFORD, J.—The petitioner on the 11th October 1915 preferred a complaint before the Sub-Divisional Magistrate against certain Police Officers. The Sub-Divisional Magistrate after examining the petitioner on the same date recorded an order to the effect that the complaint was false, and called on the petitioner to show cause why he should not be prosecuted under section 182. This officer was then transferred and his successor, when the petitioner appeared before him with his witnesses, referred the matter to a Subordinate Magistrate "for hearing complainant and witnesses and report." Subsequently on receipt of the report, the Sub-Divisional Magistrate recorded an order dismissing the complaint under section 203 of the Criminal Procedure Code. That order was passed on the 6th December. On the 4th February upon an application made by one of the Police officers the Sub-Divisional Magistrate passed an order under section 476 of the Code of Criminal Procedure, as a result of which the petitioner has been put on his trial under section 211 and sentenced to six months' rigorous imprisonment.

It is contended, in the first place, by the learned Vakil on his behalf that the order under section 476 is bad and without jurisdiction, because it was not passed at the time when the complaint was formally dismissed or shortly thereafter. In support of his contention he relies upon the rulings in *Rahimadulla Sahib v. Emperor* (1) and *Aiyakanna Pillai v. Emperor* (2). There is, however, a later case, that of *Shaikh Bahadur v. Shaikh Eradatullah Mallick* (3), in which a much broader view was taken as regards the delay that might elapse before the order under section 476 was passed.

The present case must be dealt with upon its merits, and, in my opinion, having regard to the effect of the order of the 11th October, it cannot be said that the two months' delay which occurred deprived

(1) 31 M. L. 140; 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54.

(2) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

(3) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

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the Sub-Divisional Magistrate of jurisdiction.

The second contention advanced on behalf of the petitioner is, that the order of the Magistrate under section 476 was without jurisdiction, because the matter was not brought to his knowledge in a stage of a judicial proceeding. The basis for this contention is, that the inquiry into the case was made by another officer.

I am quite prepared to accept the contention of the learned Vakil for the petitioner to the effect that the order passed by the Sub-Divisional Magistrate who received the original complaint was, in fact, an order of dismissal. The order was in the following terms:

"The story sounds highly improbable. If the *daroga* wished to beat him I do not see why he should have tied him up first in this manner. No motive is alleged except the ordinary one of ill-temper. I regard the complaint as false and call upon the complainant to show cause by the production of witnesses or otherwise why he should not be prosecuted under section 192."

Now if the Magistrate was unwilling to issue a process on the complaint, there were the following courses open to him under the provisions of sections 202 and 203. If he was not satisfied that the complaint was true, he might either make inquiry into it himself or direct a local investigation by some other person. On the other hand if he was satisfied that the complaint was false he might, after examining the complainant and recording his reasons, dismiss it upon the spot [*Baidya Nath Singh v. Muspratt* (4) and *Ganesh Narayan Sathe, In re* (5)]. I have no doubt at all that it was the latter of these courses which was adopted by the Magistrate. Having examined the complainant he recorded reasons for his conclusion that the complaint was false; he refused to issue process and he called upon the complainant to show cause against his prosecution. This order undoubtedly operated, and was intended to operate, as dismissal of the com-

plaint. The subsequent order of the 6th December purporting to dismiss the complaint was a superfluity.

Thus by the order of the 11th October the Magistrate in the first place dismissed the complaint and in the second place instituted proceedings under section 476. His order calling upon the complainant to show cause obviously contemplated the preliminary inquiry referred to in that section. It may be that the procedure of his successor in referring the matter to a Subordinate Magistrate for the purpose of hearing the witnesses and for report was irregular, and that the Magistrate should have held this inquiry himself. But if this was an irregularity, it was cured by the provisions of section 537 and no prejudice was caused to the petitioner thereby.

The Magistrate did not transfer the case under the provisions of section 192. He retained seisin of it throughout. He was in the same position as his predecessor; that is to say, he constituted the Court before which the offence was committed, and he, therefore, had jurisdiction to pass the order, under section 476, of the 4th February.

In my opinion the Rule must be discharged. The petitioner should now be called on to surrender to his bail and be committed to jail to undergo the unexpired portion of his sentence.

ATKINSON, J.—I am of the same opinion. However, I desire to add that in my view the second Sub-Divisional Officer had on the 1st November seisin of the case in a judicial proceeding then pending before him, within the meaning of the case reported as *Shaikh Bahadur v. Shaikh Eradatullah Mallick* (3). The order of this Sub-Divisional Officer of the 1st November directing the inquiry by the Sub-Deputy Magistrate as to the validity of the cause shown by the original complainant as to why he should not be prosecuted was an error in form, but not an error going to the essence of jurisdiction; and consequently it was a mere intermediate irregularity, which, on the authority of the case reported as *Hari Charan Gorai v. Srish Chandra Sadhukhan* (6),

(4) 14 C. 141; 11 Ind. Jur. 226; 7 Ind. Dec. (N. s.) 93.

(5) 13 B. 600; 7 Ind. Dec. (N. s.) 397.

(6) 7 Ind. Cas. 747; 38 C. 68; 11 Cr. L. J. 525; 13 C. L. J. 43.

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could not vitiate the jurisdiction vested in the Sub-Divisional Officer to make the order he did under section 476.

The order of the 1st November directing the said inquiry was never challenged or impeached; the irregularity was allowed to pass, and a new prosecution was permitted to take place on the assumption that the order was valid; and now after conviction it is sought to rely upon the irregularity as a ground for setting aside the conviction. In my view section 537 of the Criminal Procedure Code renders this argument quite untenable; and I am further of opinion that if an irregularity takes place and is allowed to pass unheeded and unnoticed, and a fresh prosecution follows founded upon the irregularity and conviction follows, then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction.

I agree that the order of the 6th December was a superfluity, in so far as it was intended, and did operate, as a dismissal of the original complaint. In my view it was only a judicial pronouncement that the cause shown against his prosecution by the original complaint was disallowed; and I am, therefore, clearly of opinion that the Sub-Divisional Officer had jurisdiction to make the order he did under section 476, and for the reasons stated the conviction cannot now be challenged.

Revision rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 7
OF 1916.

June 28, 1916.

Present.—Mr. Hayward, J. C.

JEHANGIR PEROZSHAH—

o APPLICANT

versus

GANGARAM NAUMAL AND OTHERS—

OPPONENTS.

*Sind Courts Criminal Circulars, Chap. V, r. 22—
Procedure—Practice—Protracted examination of
witnesses and frequent lengthy adjournments in*

criminal trial, effect of—Adjournments, frequent, practice of granting, condemnation of—Court, inherent power of, to prevent abuse of its process.

Protracted examinations of witnesses and frequent lengthy adjournments merely for the convenience of Counsel, causing inordinate delay of a criminal trial may practically amount to a denial of justice, and ought not to be permitted. Protracted examinations of witnesses should be stopped by a strict regard to the provisions of the Evidence Act and the rules of procedure and, where necessary, by the exercise of the inherent powers vested in every Magistrate to prevent the abuse of the process, *i.e.*, the proceedings of his Court. [p. 41, col. 1.]

Granting of frequent and lengthy adjournments in disregard of rule 22, Chapter V, of the Sind Courts Criminal Circulars condemned. [p. 41, col. 1.]

Application against the order of the first class Magistrate, Karachi.

Mr. T. G. Elphinston, for the Applicant.

Mr. P. V. MacInerny, for the Opponents.

Mr. Partabrai D. Punwani, 3rd Assistant Public Prosecutor, for the Crown.

JUDGMENT.—The complainant Jehangir Perozshah took a mortgage in respect of a loan of Rs. 30,000 on the 7th. September 1912 from the eight accused Gangaram, Devidas, Bhojmal, sons of Naomal, Asanmal and Parsram, sons of Gangaram, Utumal, Devidas and Lilaram Asanmal of their joint family property. He took a further mortgage from them in consideration of a further loan of Rs. 61,000 on the 19th of November 1912 of the same and some other joint family property. On the 7th of February 1914, the joint family was declared insolvent and the enquiries made into the mortgage securities disclosed the unpleasant fact that out of the properties mortgaged one had never been owned by the family, two had been sold before the mortgages, and two were only owned in part by the joint family. It also appeared that other properties had been sold after the mortgages. The complainant thereupon filed a complaint on the 10th of February 1914 of criminal breach of trust against the accused. But that complaint was ultimately dismissed on the ground that the subsequent sales did not amount to criminal acts but only gave cause of action for a civil suit.

The complainant, however, filed another complaint, here under consideration, on the 11th of August 1914 of cheating in respect of the other properties discovered not to have been the absolute property of the

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joint family. The complainant was examined on the 10th and 24th of September and cross-examined on the 16th and 27th of October. The cross-examination and re-examination were concluded on the 28th November. Other witnesses were examined on the 30th November and on 9th, 11th and 12th of December. The case was called on again for argument on the 25th January 1915. It was, however, not heard on that date, as a *de novo* trial was claimed owing to the departure on leave of the trying Magistrate. It was on the 11th of February adjourned *sine die* for his return and then there issued a lull of nearly two months in the already sufficiently leisurely proceedings, ending only on the 6th of April 1915 in the transfer of the case from the file of the Additional City Magistrate to that of the 1st class Magistrate and City Deputy Collector.

The complainant's case was called on again after another lull of nearly two months and he was further examined on the 4th of June. He was again subjected to cross-examination on the 9th and 23rd June and on the 4th August. The accused were examined on the 9th of August. The complainant was the same day for some obscure reason once more subjected to cross-examination which was continued on the 17th of August. He was once more re-examined on the 20th of September and the same day his Counsel submitted arguments to the Magistrate. Then the complainant after some further examination of one of his witnesses on the 23rd September was himself further examined on the 15th October by the Magistrate. That at least should have been the end of these unfortunate proceedings, but on the 20th of October and the 25th of November his further cross-examination and on the 12th of December his further re-examination was permitted by the Magistrate. The complainant's Counsel at last on the 19th January 1916 submitted further arguments and the following day the accused's Counsel, who had previously threatened to apply for transfer on the ground of insufficient opportunity for cross-examination, submitted his arguments to the Magistrate. Finally on the 3rd February 1916, after a trial protracted over one year and four months,

the accused were all discharged by the learned Magistrate. It is this order of discharge of which revision is now sought in this Court.

Now the complainant Jehangir's evidence which was permitted to extend nearly to two thousand lines has proved upon perusal to contain remarkably little substance directly bearing upon the essential issue, whether deliberate misrepresentations for the purpose of dishonestly obtaining the loans were actually made as to their interests in the property by each and all of the accused. (The learned Judicial Commissioner then proceeded to discuss the evidence.) His evidence amounts practically only to this that he negotiated with the accused Pamanmal alone up to the execution of the 1st mortgage, though he was careful to put categorical questions to all the other accused as to their right in the mortgaged properties on the occasion of the formal execution of the 1st mortgage; that in addition to the negotiations with the accused Pamanmal, the accused Gangaram, Utumal and apparently also Asanmal on two occasions pointed out some of the properties and that all the accused frequently came to him in connection with the 2nd mortgage and were all present at the execution of the 2nd mortgage. He called his brother-in-law Rustomji, a cashier in the Mercantile Bank, to corroborate his assertions as to these representations generally, but he refrained from calling either Munchershab, an accountant in the Punjab Banking Co. who had assisted him in bringing about the mortgage, or his Pleader Nadirshah. Several other witnesses were examined but their evidence did not bear practically on the question of the representations. The account given on the other hand by the accused No. 1 Gangaram, an old man of 61 years of age, was that he left everything to Pamanmal though he had pointed out to Pamanmal that some of the properties did not belong to the joint family which fact Pamanmal assured him had been communicated to the mortgagees. The accused No. 2 Devidas, an old man of 64 years of age, stated that he knew nothing about the transaction and that the whole matter was left in the hands of Pamanmal. The accused No. 3

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Bhojmal, a man of 50 years, was not examined having become paralytic; and the accused No. 4 Pamanmal, whose age was given as 26, was not examined as he had died during the proceedings. The accused No. 5 Utumal, a man of 33 years of age, who was a son of accused Devidas stated that he also knew nothing as he had left the whole matter to Pamanmal. The accused Nos. 6 and 7 Asanmal and Parsram, whose ages were given as about 25, were sons of accused Gangaram and similarly stated that everything had been left to Pamanmal. So also said accused Lilaram, a young man of 20 years of age, son of accused Asanmal. The learned Magistrate made severe remarks upon the evidence of the complainant and his witness Rustomji and held that the first mortgage had been taken entirely on accused Pamanmal's representation and that no direct representations had been proved on the part of the other accused, either with regard to the 1st or 2nd mortgage. He came to the conclusion that reliance had been placed not so much on the representation of the accused as upon the advice of Rustomji, Munchershah and the Pleader Nadirshah. Mr. Elphinston has argued on behalf of the complainant that the comments on the evidence adduced did disclose representations of absolute ownership by all the accused, that in any case the accused were bound by the recitals in the mortgage-deeds which they had signed regarding their absolute ownership and that their responsibility for their representations was in no way affected by the fact that the advice had been taken also from Munchershah, Rustomji and the Pleader Nadirshah. The Assistant Public Prosecutor has, on the other hand, urged that there was no sufficient evidence to warrant a charge being framed against the accused. And Mr. MacInerny has also been heard to the same effect on behalf of the accused.

It appears to me certainly that the comments on the evidence of the complainant and his witness Rustomji were unfair and that due consideration was not paid to the inordinately prolonged examination of the witnesses in making those comments. But even after making due allowance for this, the fact remains

that all the evidence established was that the 1st mortgage was negotiated entirely with accused Pamanmal and that the 2nd mortgage was discussed also with the accused Gangaram, Utumal and Asanmal. There was nothing but somewhat vague suggestions as to any direct representations of ownership made by these other accused before the execution of the 2nd mortgage. The only other evidence was as to what happened at the execution, the allegation being that all the accused were then categorically questioned as to their absolute ownership of the properties. If that were certainly true there would, no doubt, be ground for charging the accused. But the probabilities seem to me to be against it. There may have been some causal questions put at the time of the execution, but the evidence indicated that no time was allowed by the busy mortgagee for detailed enquiries into the complicated schedules of properties. He merely came in for the formal execution of the 1st mortgage. He had left all the formalities to his friends Rustomji and Munchershah and to his Pleader Nadirshah. It is equally improbable that there was any detailed discussion of the complicated schedules at the time of execution of the 2nd mortgage. It is significant that he did not dare to call as witnesses on these matters either Munchershah or his Pleader Nadirshah. On the other hand it does not appear to me at all improbable that the negotiations were left throughout to Pamanmal, looking to the ages and relationship of the accused and to the fact that they formed a joint Hindu family. There was also evidence to show that the complicated schedules of properties had been copied from those contained in previous mortgages and might possibly through oversight have perpetuated previous errors or failed to take account of alterations since these mortgages. At all events, all these circumstances materially weaken the presumption which would otherwise properly have arisen against all the accused from their executing mortgages for large sums of money including properties not actually belonging to the joint family. Whatever might be their civil liability, sufficient evidence was, in my opinion, not forthcoming to establish

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criminal intention. Had there been such evidence their criminal liability would, of course, not have been affected by the fact that advice had also been taken from Rustomji, Manchershah and the Pleader Nadirshah.

No doubt there is much force in the criticisms that the case was not properly treated at the trial. Attention was not sufficiently focussed on the essential issue, whether deliberate misrepresentation had been established against each of the accused. Nor was adequate consideration given to the grave presumptions arising against all the accused by the mere execution of the mortgage-deeds. This resulted in wholly unnecessary and lengthy examination of the witnesses particularly in cross-examination, which proved upon perusal to contain many repetitions and also much irrelevant matter as to the amount of reliance placed on the advice of Rustomji, Manchershah and the Pleader Nadirshah. There were also frequent and wholly unjustifiable postponements granted merely for the convenience of the Counsel. Such protracted examinations of the witnesses and frequent adjournments amount practically to a denial of justice, and it is much regretted that such inordinate delay was permitted, delay which reflects credit neither upon the Counsel engaged nor upon the Magistrate. The protracted examinations ought to have been stopped by stricter regard to the provisions of the Evidence Act and the rules of procedure and by the exercise, where necessary, of the inherent powers vested in every Magistrate to prevent abuse of the process, *i. e.*, the proceedings of his Court. The granting of the frequent and lengthy adjournments was a grave disregard of rule 22, Chapter V, Sind Courts Criminal Circulars, and the result was a travesty of the prompt procedure contemplated by the Criminal Procedure Code.

Nevertheless for the reasons already indicated no useful purpose would, in my opinion, be served by directing further enquiry or taking steps for a re-trial under section 437 or 439, Criminal Procedure Code.

Application rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 487 of 1916.
CRIMINAL REVISION PETITION No. 400 of 1916.
November 17, 1916.

Present:—Mr. Justice Coutts Trotter.

NARAYANASAMY AIYAR—

PETITIONER

versus

KUPPUSAMY AIYAR—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer of case by Magistrates of co-ordinate jurisdiction—Procedure.

Where a Magistrate acts on his own initiative in transferring a case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority had refused it; but if he examines the reasons given by the co-ordinate authority and finds that that authority is wrong, his interference must be deemed to be by way of appeal which he has no jurisdiction to entertain, and the order of transfer must be set aside.

Raghunatha Pandaram v. Emperor, 26 M. 130; 2 Weir 689; *Thaman Chetti v. Alagiri Chetti*, 14 M. 399; 2 Weir 688; 5 Ind. Dec. (N. S.) 280, followed.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate, Tanjore, in D. Dis. No. 523 Magtl. of 1916.

Mr. K. S. Jayarama Aiyar, for the Petitioner.

Mr. S. K. Parthasaradhi Aiyangar (for Mr. S. T. Srinivasa Gopalachariar), for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—I must set aside the order of the District Magistrate. Unfortunately it is clearly inconsistent with the ruling in *Raghunatha Pandaram v. Emperor* (1). I think it is obviously an inconvenient thing that Magistrates of co-ordinate jurisdiction should interfere with each other's jurisdiction. *Thaman Chetti v. Alagiri Chetti* (2) points out the distinction. Where a Magistrate acts on his own initiative in transferring a case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority has refused it. But if he examines the reasons given by the co-ordinate

(1) 26 M. 130; 2 Weir 689.

(2) 14 M. 399; 2 Weir 688; 5 Ind. Dec. (N. S.) 280.

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authority and finds that that authority is wrong, that is interfering by way of appeal. This case is clearly within the mischief referred to in *Raghunatha Pandaram v. Emperor* (1).

I must set aside the order of the Magistrate and the case will be remanded for trial to the second class Bench Court of Kumbakonam.

Petition allowed; Order set aside.

V.R.P.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 33 OF 1916.

CONFIRMATION CASE No. 1 OF 1916.

June 8, 1916.

Present:—Mr. Hayward, J. C., and

Mr. Fawcett, A. J. C

LOUNG walad RASHID AND ANOTHER

—APPELLANTS

versus

EMPEROR OPPONENT.

Evidence Act (I of 1972), ss. 24, 25, 28—'Person in authority', meaning of—Zemindar, whether is 'person in authority.'

Section 24 of the Evidence Act refers not to a person whom the accused may regard as being in authority but to a person who actually is in authority. [p. 46, col. 1.]

The main test as to when a person is deemed to be a 'person in authority' within the meaning of the section is, whether he stands in such relations to the accused as imply some power of control or interference in regard to his prosecution. [p. 46, col. 1.]

Reg. v. Navroji Dadabhai, 9 B. H. C. R. 358; *Emperor v. Rama Dhan Powar*, 31 Ind. Cas. 340; 17 Bom. L. R. 898 16 Cr. L. J. 740, referred to.

Zemindars qua zemindars are not necessarily 'persons in authority'. The question must be decided in each case upon its particular circumstances; but whenever *zemindars* are directly concerned in an investigation by the direction of the Police then they clearly are 'persons in authority' within the meaning of section 24 of the Evidence Act. [p. 44, col. 1.]

Emperor v. Rama Dhan Powar, 31 Ind. Cas. 340; 17 Bom. L. R. 898; 16 Cr. L. J. 740, *Imperator v. Dabud*, 9 Ind. Cas. 718; 4 S. L. R. 209; 12 Cr. L. J. 119, *Emperor v. Saini*, 1905) 2 Sind Sadar Court Selected Decisions 417, *Emperor v. Samandar Rahimdad*, (1905) 2 Sind Sadar Court Selected Decisions, 6-4 at p 621, referred to.

Co-villagers of an accused person cannot be regarded as 'persons in authority' from the mere fact of their being the principal residents of the village. [p. 44, col. 1.]

Appeal against the decision of the Sessions Judge, Hyderabad.

Mr. Kodumal Lekhraji, for the Appellants.

Mr. E. Raymond (for the Public Prosecutor for Sind), for the Crown.

JUDGMENT.

HAYWARD, J. C.—These are appeals against the decision of the Sessions Judge, Hyderabad, convicting the appellant No. 1 of murder and sentencing him to death under section 302, Indian Penal Code, and convicting the appellant No. 2 of causing the disappearance of evidence of the murder and sentencing her to seven years' rigorous imprisonment under section 201, Indian Penal Code.

The appellant No. 1 Loung was a neighbour of the deceased man Gul Mahomed who lived with his wife Sabhai, the appellant No. 2, in a small village in the desert of Thar and Parkur.

It would appear that the appellant No. 1 had a long-standing intrigue with the appellant No. 2. That has been admitted by the appellant No. 1 and has not been seriously disputed before us. It has also been amply established by the evidence recorded at the trial. The witness Jumo was the first person to receive information about the disappearance of his brother, the deceased Gul Mahomed. He was at that time absent from his village and returned to make enquiries. He disclosed his suspicions against the two appellants to the principal men of the small village, *viz.*, Valio and Tagio who, together with two other residents Sultan and Mahomed Khan, all four of whom appear to have been related to the appellants, proceeded to make enquiries about the disappearance of the deceased Gul Mahomed from the two appellants. It would appear from the evidence that thereupon the two appellants admitted to them that they had murdered the deceased Gul Mahomed, and indicated that the body of the unfortunate man was buried in his own house. These four men satisfied themselves by the indications on the spot that that was the case and information was then sent to the Police. Subsequently the appellants are alleged to have again pointed out the spot where the deceased man was buried and

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again to have confessed to the witness Ahmed and another man Sanhio that they had been concerned in the murder. Those confessions, however, appear to have been made in the presence of and in direct answers to the questions from the Policeman Jumo. Subsequently the body was dug up from the deceased's house and appellant No. 1 produced an axe and appellant No. 2 a spade and handed them over to the Police *jamadar* Khan Mahomed. The body was identified as the body of the deceased Gul Mahomed and was sent for examination to the Sub-Assistant Surgeon. The appellants, after further investigation, were formally arrested on the 10th of October by the Police.

Now it has been contended on behalf of the appellant No. 1, who alone has been represented in these appeals, and the same contention might equally well have been raised on behalf of the appellant No. 2, that the alleged confessions before the villagers Valio, Tagio, Mahomed Khan and Sultan were rightly rejected as irrelevant on account of their having been caused by a promise made to them by persons in authority under section 24 of the Indian Evidence Act, as actually held by the learned Sessions Judge. It has also been contended that the subsequent confessions to Ahmed and Sanhio ought to have been rejected as irrelevant on account of their having been made directly to a Police Officer, and that they ought to have been excluded under section 25 of the Indian Evidence Act, and ought not to have been admitted under section 28 of the Indian Evidence Act by the learned Sessions Judge. We have had to carefully consider both these confessions, as the material facts bearing upon them and the relevant authoritative decisions have not been as clearly set forth in the judgment as might have been desired. It would appear that the village in which these events took place was only a small settlement occupied at that time by no more than 8 or 10 inhabitants, though the census had previously indicated a population of a hundred. That appeared from the evidence of the Tapedar. The villagers Tagio and Valio have given their occupation as cultivation, but there is no indication in the evidence that they were

particularly influential *zemindars*. Sultan and Mahomed Khan appear to have occupied the same position except that they, unlike the former two, have been referred to as headmen and the whole argument has been based to show that they were persons in authority. There does not, however, appear to me to be anything in the evidence to show that either of the appellants was in any way under the authority of these four witnesses. The appellants were, on the other hand, their relations and it would appear that after confessing to Valio and Tagio they repeated their confessions in the presence of all the four witnesses, and then and only then asked the four witnesses to do what they could to get them out of their difficulties. Thereupon ensued an endeavour to settle the matter by a gift of a woman to the injured party. But the negotiations were unsuccessful. It is difficult to understand in these circumstances how any one could have reasonably supposed that these four witnesses had any authority whatever in respect of the prosecution.

Certain decided cases have been referred to in support of the view of the learned Sessions Judge that *zemindars* must always be regarded as persons in authority in reference to prosecutions. But those authorities do not support that wide view. The first authority which we have considered is that of the *Emperor v. Saini* (1) in which the relevant remarks were made by Jacob, J., at page 422, where he said: "It is impossible perhaps to lay down as a proposition of law that every *zemindar* is a person in authority in relation to his '*hari*' in respect of any offence the latter may be charged with". Then Jacob, J., proceeded to consider the particular facts of that case and held that the *zemindars* in that case were persons in authority inasmuch as they had been charged with the investigation by the Police. The next case is that of *Emperor v. Samandar Rahimdad* (2), the relevant remarks being at page 622 where Beaman, J., said: "It has been

(1) (1905) 2 Selected Decisions of the Sind Sadar Court 417.

(2) (1905) 2 Selected Decisions of the Sind Sadar Court 614 at p. 621.

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held by this Court that *zamindars* are persons in authority within the meaning of the section, and although in a subsequent decision of this Court some doubt has been thrown upon the soundness of that as a general proposition universally true, and it was held that *zamindars qua zamindars* are not persons in authority, still as a rule it is easy for the defence to show that the relations between the particular *zamindar* or *zamindars* concerned are of a kind to satisfy the ordinary definition of the term", i.e., the terms "persons in authority". And in the case of *Imperator v. Dabud* (3) Leggatt, A. J. C. said "The Additional Sessions Judge has rightly rejected the confession made to the *zamindars*. They were told by the Sub-Inspector to go and make accused confess and it seems clear that they were investigating the offence just as if they were Policemen and, therefore, they must be considered persons in authority." So that it would appear that the decisions of this Court amount to this that *zamindars qua zamindars* are not necessarily persons in authority and that the question must be decided in each case upon the particular circumstances; but wherever *zamindars* are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of section 24 of the Indian Evidence Act. And the view is confirmed by a similar decision in the case of village Police Patels in the Presidency proper in the case, of *Emperor v. Rama Dhum Powar* (4).

Now the particular circumstances of this case are that the appellant No. 1 was a *grazier* and not a *hari* and that the four witnesses were villagers with no particular authority, so far as could be gathered, over either of the appellants; though two of them being the principal residents of the small village have been loosely termed headmen. In such circumstances there could, in my opinion, be no justification for regarding them as persons in authority. Their position differed materially from that of *zamindars* directly concerned in the investigation under the directions of the Police, referred

to in the various authorities holding that such *zamindars* were persons in authority within the meaning of section 24 of the Indian Evidence Act. It is in this view unnecessary to consider whether the negotiations for settlement of the case would or would not amount to an inducement within the meaning of section 24, Indian Evidence Act. For these reasons the confessions to the four villagers ought, in my opinion, to have been held relevant, and to have been considered by the learned Sessions Judge. It is, on the other hand, clear to me that the subsequent confessions or so-called confessions made to the witnesses Ahmed and Sanbio in the presence of the Policeman Jumo ought to have been rejected as irrelevant. They were, in my opinion, to all intents and purposes confessions made to the Policeman, and on that account irrelevant under section 25 of the Indian Evidence Act. In that view of the case recourse ought not to have been had to the provisions of section 28 by the learned Sessions Judge.

There were, besides the confessions, the following facts corroborative of them, namely, the production by appellant No. 1 of an axe and the production of a spade by appellant No. 2, the inference being that the axe was the axe with which the deceased Gul Mahomed was murdered, and the spade was the spade with which his body was buried, and the discovery of the corpse of the deceased man at the place indicated by the two appellants. It has been suggested on behalf of the appellants that the investigation should be regarded with suspicion owing to delay in their arrest, but it would appear that the investigating Police *jamadar*, Khan Mahomed, did not arrive at the scene until the 9th of October and lost no reasonable time after making such investigations as were possible in arresting the appellants on the 16th.

It appears, therefore, that apart from the grave suspicions under which the appellants laboured owing to the clear proof of intrigue between them, there was the evidence of their own confessions to the villagers corroborated by their production of the axe and the spade and the discovery of the corpse with the head severed from the body at the spot indicated by them. There was in addition as against the appellant No. 2 Sanbai the evidence of her

(3) 9 Ind. Cas. 718; 4 S. L. R. 209; 12 Cr. L. J. 119.

(4) 31 Ind. Cas. 340; 17 Bom. L. R. 893; 16 Cr. L. J. 740.

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subsequent conduct in misinforming the witness Tagio that her husband had left his house, whereas she well knew according to her own admission to the Committing Magistrate that the body of her unfortunate husband was at that very moment lying buried in his house. The appellant No. 1 Loung was, in my opinion, clearly proved by this evidence to have been guilty of the murder of Gul Mahomed and there can be no question that the proper sentence upon him was a sentence of death under section 302, Indian Penal Code. The evidence against the appellant No. 2 Sabbhai pointed to her also having taken part in the murder, but she has been given the benefit of the doubt as to the exact part taken by her, a woman, in this transaction and also has been found guilty of the lesser offence of assisting in burying the body of the deceased Gul Mahomed and so causing the disappearance of the evidence of the murder. It is not for us to consider now whether or not she did take an active part in the murder. It is sufficient to decide that she was at least proved guilty of causing the disappearance of evidence of the murder, and that she was rightly convicted under section 201, Indian Penal Code. For these reasons these appeals ought, in my opinion, to be dismissed and the convictions and sentences of both the appellants confirmed including the sentence of death under section 302, Indian Penal Code, passed by the Sessions Court.

FAWCETT, A. J. C.—I concur. In my opinion the confessions made by the two accused to Valio and Tagio when they made the first inquiry in the matter, and the circumstantial evidence which corroborates these confessions, amply suffices to prove the guilt of the accused. The learned Sessions Judge held those confessions irrelevant under section 24 of the Indian Evidence Act, but the reasons which he gave are very cursory and, in my opinion, entirely unsound. He says: "There is no doubt that Valio and Tagio held out a prospect of impunity in return for a full confession." Valio, however, distinctly says that he and Tagio said to the two suspects, "Do not tell us lies; tell us truth." They made no denial in my hearing. There was nothing said about giving

Loung's daughter to Jumo. And in another passage he says: "We told them Gul Mahomed has disappeared. Suspicion is upon you. Both of them replied: 'We have murdered Gul Mahomed, let us now have pardon'." Neither in his cross-examination, nor elsewhere is there a single word about their having held out such a prospect of impunity as the learned Sessions Judge says they did. Tagio, who it may be noted is an uncle of the two accused as well as of Valio, says on this point that "we asked the two what they knew. The woman was the first to confess. 'This thing has been done by us', she said. Loung said the same, and they asked us, as we were their relations, to save them." In his cross-examination it is true that he qualifies this to some extent by saying that at first the two accused made denial, but then they said: "they should make a clean breast and we should not expose them". But he does not distinctly say that this is really what occurred, for he says, "It is so long ago that I cannot exactly remember". And from his reference to the offer to Jumo to take a woman in exchange it seems not unlikely that he was really referring to the subsequent occasion when these confessions are alleged to have been repeated before them and the other two villagers Sultan and Mahomed Khan. In any case his statement on the point is open to some suspicion, inasmuch as he is closely related to the two accused and would, therefore, be not disinclined to do what he could to help them. So far as the evidence of Valio and Tagio goes, it is quite clear that there is no sufficient reason for holding that, when the accused made their first confessions, any inducement of the kind referred to in section 24 of the Indian Evidence Act was made by them to the accused. Even as regards the subsequent occasion when the accused repeated their confessions, there is no clear evidence that the confessions were made under any such inducement. Sultan and Tagio no doubt admit that a proposal was made to Jumo that he should not report the matter to the Police and that he should in compensation take the girl offered to him by accused No. 1. But both at the same time admit that Jumo refused the offer,

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though they tried to dissuade him from reporting the matter to the Police and Sultan clearly says that Jumo gave no encouragement to the accused to expect his forgiveness. The learned Sessions Judge then says that there is no doubt that Valio and Tagio were regarded as persons in some authority. It may, however, be noted that section 24 refers not to a person whom the accused may regard as being in authority, but to a person who actually is in authority. So even if the accused did regard Valio and Tagio as persons in some authority, that would not of itself bring the case under this section. I entirely concur with my learned colleague in holding that in this case Valio and Tagio were clearly not persons in authority. It has been pointed out in the case of *Reg. v. Navroji Dadubhai* (5) and the subsequent case of *Emperor v. Rama Dhan Powar* (4) that the main test as to when a person is deemed to be a person in authority within the meaning of that section is whether he stands in such relations to the accused as imply some power of control or interference in regard to his prosecution. From this standpoint if any of these persons were persons in authority, it would be the prosecutor Jumo rather than any of the others. And the evidence distinctly shows not only that the confessions were not made in presence of Jumo, but that he never held out any inducement to the accused which could lead them to suppose that by confessing they could gain any advantage.

I concur in holding that the two accused have been rightly convicted, that no sufficient reasons have been given for our interfering in appeal, and that in the circumstances of the case the sentence of death on 1st appellant must be confirmed.

Convictions and sentences confirmed and appeals dismissed.

(5) 9 B. H. R. C. 358.

Appeals dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION 277 OF 1916.

March 31, 1916.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

NISHI KANTA PAL AND OTHERS—ACCUSED
— PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 186—Obstructing Munsif to pass through accused's own property for making local inspection, whether offence.

The accused, who were no parties to a suit in which a public right of way was claimed, did not allow a Munsif, in whose Court the suit was pending, to pass in a boat through a ditch which was their private property, when the Munsif wanted to pass through it for the purpose of making a local inspection in connection with the suit:

Held, that the accused did not commit any offence under section 83, Indian Penal Code. [p. 48, col. 1.]

Rule against the order of the Sessions Judge of Dacca, dated the 14th February 1916.

FACTS appear from the following petition of the accused and from the extracts from the judgment of the Sessions Judge:—

“1. That in connection with title suit No. 805 of 1914, in which a public right of way was the subject in dispute, pending in the 4th Munsif's Court at Munshigunge, the trying Munsif went to make a local enquiry on the 22nd June 1915.

2. That in the course of his local inspection the learned Munsif came in his boat with other persons following him at a place which is the private property of your petitioners.

3. That your petitioners, not being party to the aforesaid civil suit, nor having any concern either with the plaintiffs or the defendants or any interest in the subject-matter of the said suit, objected to the boat passage of the learned Munsif and his suit through the *gar* (ditch), which is the private property of the petitioners and is solely used by them.

4. That your petitioner No. 1 Nishi Kanta Pal plainly told the learned Munsif that the said petitioner would have no objection to the passage of the learned Munsif alone that way, but he would not allow either of the parties to the suit to go by that way, lest it might be construed in future as a way through which the general public have a right to pass.

5. That upon these facts the said learned

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Munsif drew up proceedings under section 476 of the Code of Criminal Procedure against your petitioners on the ground that they have committed an offence punishable under section 186 of the Indian Penal Code.

6. That your petitioners were, therefore, put on their trial before Mr. S. Klingenstein, the Sub-Divisional Magistrate of Munshigunge, who convicted your petitioners under section 186 of the Indian Penal Code, and sentenced your petitioner Nishi Kanta Pal to undergo rigorous imprisonment for three months and three other petitioners to undergo rigorous imprisonment for six weeks by his order, dated the 11th December 1915.

7. That on appeal against the said order the learned Sessions Judge of Dacca upheld the conviction of your petitioners under section 186 of the Indian Penal Code, but reduced the sentence passed on Nishi Kanta Pal to one of fine of Rs. 50 only, and the sentences on the other three petitioners were reduced to fines of Rs. 100 each, and in default of the payment of their fines, each of the accused was to undergo rigorous imprisonment for three weeks, by his order dated the 14th February 1916.

8. That being aggrieved by the said order of the learned Sub-Divisional Magistrate of Munshigunge, dated the 11th December 1915, and affirmed on appeal by the learned Sessions Judge of Dacca, by his order dated the 14th February 1916, your petitioners beg to move your Lordships for setting aside the same on the following amongst other:

Grounds. 1. For that the orders of the Courts below are not in accordance with law and liable to be set aside, inasmuch as the facts found do not constitute an offence under section 186 of the Indian Penal Code.

2. For that the whole proceeding under section 476 of the Criminal Procedure Code is illegal and void *ab initio*.

3. For that the order of the Court of Appeal below is bad in law, inasmuch as the construction put upon Order XVIII, rule 18, of the Code of Civil Procedure is entirely erroneous.

5. For that the act of the Munsif in encroaching upon the private passage or property of the petitioners, who were not

parties to the civil suit in question, was not justifiable in law, and the petitioners in obstructing his boat passage acted in the *bona fide* belief of their right of private defence of their own property.

5. For that at all events the sentences passed on the petitioners are unduly severe."

The Sessions Judge of Dacca made the following observation on the question of law involved in the case in his judgment by which he upheld the conviction of the accused but reduced their sentences:—

"In a suit in which a public right of way was claimed, there was a dispute not only as to whether the public right of way claimed existed but also as to whether there were not certain other public ways, the existence of which would discredit the plaintiffs' allegations in the suit. The Munsif trying the case decided to inspect the ways in dispute.

* * * *

"The difficult questions in this case are of law. I have no doubt that the main object of the appellants and their partisans was to make it appear rightly or wrongly that there was no right of way. It has been argued that they acted in good faith, and committed no offence. None of the appellants were parties to the suit.

"It is not suggested that any kind of damage would have been done by the passage of people that way. The defence evidence itself is that it is a way for the people of a certain quarter (*para*), not that it is not a way at all, or that the use of it as a way was in any respect harmful to property or privacy. The only suggestion of undesirable effect or result is that if passage had been allowed, from the very fact it would have seemed or been argued that it was a public way. There was a question, about that way, and under Order XVIII, rule 18, the Munsif could "inspect anything" concerning which any question arose. In my opinion the Munsif was a public servant, and was engaged in the discharge of his public function. Also the accused did voluntarily interrupt him in his discharge of that function, and obstruct him. I do not find that they had any right to do it. He was doing nothing that he was not right to do. The accused Nishi Pal obstructed, or rather completely stopped him, most effectively by constructing a fence

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specially for the purpose, and then standing there with the other accused, and with them stopping the boat, and telling the Munsif that they would not let him go on. It is true that after the Munsif had taken the names of the men, and gone some distance back, Nishi Pal sought to put himself right, but he had already committed the offence. The gist of the offence lies in the interruption caused to a public servant whilst in the execution of his duties. It is clear that such interruption was caused. It was open to the accused to take the position that because the Munsif wished to inspect, they allowed the party to pass, but did not admit that there was a public way. But though they knew that he was a Munsif and merely wanted to inspect, they forcibly stopped him from doing it, because it did not suit them that he should. Either they were afraid, in their own or their friend's interests, that he would see things telling against those interests or they thought that some inference would be drawn from the fact of the people passing. * * *

* *. It, therefore, having been proved that the accused did forcibly prevent the Munsif from inspecting that way, openly and clearly saying that they would not allow him to do it and it not being shown that they acted in good faith, but rather the reverse appearing, I hold that the convictions are good. * * *

The petitioners moved the High Court for setting aside the conviction and sentence and a Rule was issued by the High Court on grounds Nos. 1, 3, 4 of the grounds set forth in the petition of the accused under sections 435 and 439, Criminal Procedure Code.

Babus Manmatha Nath Mukherjee and Ashitranjan Ghose, for the Petitioners.

JUDGMENT.—In this case we have read the explanation of the Magistrate, but we still adhere to our opinion that the conviction and sentences on the petitioners cannot stand on the grounds on which the Rule was granted. No offence under section 186, Indian Penal Code, appears to have been committed. The Rule is made absolute. The fines, if paid, will be refunded.

Rule made absolute.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CRIMINAL JURISDICTION.

July 20, 1916.*

Present:—Mr. Justice Chaudhuri.

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OTHERS—PETITIONERS

Emergency Legislation Continuance Act (I of 1915), whether ultra vires—Ordinances III and V of 1914—Governor-General-in-Council, power of, to pass Act embodying provisions of Ordinances—Ordinance III of 1914, s. 11, effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act—Indian Councils Act, 1861 (24 & 25 Vict. c. 67), ss. 22, 23.

Under section 23 of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), no Ordinance can have any force of law for more than six months from its promulgation, but the power of the Governor-General-in-Council to pass an Act embodying the provisions of an Ordinance is in no manner controlled or taken away by that section. The Governor-General-in-Council has power to pass an Act like the Emergency Legislation Continuance Act (I of 1915) which embodies the provisions of Ordinances 3 and 5 of 1914. [p. 51, col. 1.]

Held, (as to the contention that inasmuch as section 11 of Ordinance No. III of 1914 which is embodied in the Emergency Legislation Continuance Act of 1915 seeks to oust the jurisdiction of the Courts, it offends against section 22 of the Indian Councils Act, 1861), that the Emergency Legislation Continuance Act of 1915 is not *ultra vires* of the Governor-General-in-Council and the High Court has not power to call in question orders passed thereunder. It is for the Governor-General-in-Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them. [p. 54, col. 1.]

In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests no intention that the first shall continue repealed, the repeal of the second Act revives the first, does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them. The same principle or rule of law applies to this country. Section 3 of the General Clauses Act (I of 1868) expressly provided that for the purpose of reviving either wholly or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose, and the same is the effect of sections 6 and 7 of the General Clauses Act (X of 1897). [p. 51, col. 2.]

FACTS material for the purpose of this report will appear from Counsel's argument as also from the judgment of the Court.

Mr. Norton (with him Mr. A. A. Avetoom), for the Petitioners.—The petitioners were residents of Surat. They used to carry on business in South Africa. They were coming from South Africa by "S. S. Kathiawar" which

*The head-note, facts and arguments have been taken from the C. W. N. with permission—*Ed.*

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arrived in Calcutta on the 19th June 1916 when they were arrested. No attempt has been made to place them before the Magistrate. No warrant was produced nor was any order shown to them. They were informed by the Commissioner of Police that they were arrested under section 54 of the Criminal Procedure Code and under Indian Ordinances which were not specifically mentioned. It appears that five orders were made on the 26th June 1916 by the Governor of Bengal in Council under the Foreigners Ordinance, 1914 (III of 1914), and the Ingress into India Ordinance, 1914 (V of 1914), the power to make such order having been conferred on the Governor of Bengal in Council by the Notification of the Government of India, Home Department, No. 1374, dated 12th September 1914. The orders stated that the Governor-in-Council was satisfied that in order to protect the State from acts prejudicial to its interests, it was desirable to exercise the power in question in respect of those persons and directed that they should be interned temporarily to the Alipur Central Jail, 24-Parganās.

After stating the facts, Counsel argued that in the first place the Ordinances III and V of 1914 were not in force at the time of arrest. By section 23 of the Indian Councils Act (24 and 25 Vict., c. 67) we cannot have an Ordinance for more than six months. Act I of 1915, section 2, says that the said Ordinances should remain in force for the period of war and for six months thereafter. This was clearly *ultra vires*. An Act cannot keep an Ordinance in operation for more than six months.

My next point is that the Governor-General-in-Council had no power to make any Ordinance or provide any legislation which was in conflict with section 22 of the Indian Councils Act (24 and 25 Vict., c. 67). The legislation infringed the constitution of the East India Company, the allegiance of the subjects and the sovereignty of the Crown. The allegiance which the subject paid to the Crown was in return for certain privileges and protection. The Habeas Corpus Act was for the purpose of protecting the subject. In *Rudolph Stallmann's* case (1) Woodroffe and Mookerjee, JJ.,

(1) 12 Ind. Cas. 273; 39 C. 164; 15 C. W. N. 1053; 14 C. L. J. 375; 12 Cr. L. J. 505.

said that there had been no attempt by Legislature to alter section 491 of the Criminal Procedure Code and the section was still read in the larger sense used by Mookerjee, J.

Sir S. P. Sinha, for the Crown.—The questions before your Lordships are whether those two Ordinances are *ultra vires* or they had expired. Ordinances Nos. III and V of 1914 would have expired in six months' time, but for the Act I of 1915 whereby the Legislature enacted that the Ordinances should not cease but should remain on the Statute Book for the period therein mentioned. As regards the question as to whether the Habeas Corpus Act could be suspended, the question has been set at rest many years ago. [Cites *In the matter of Tuckut Roy* (2) and *Ameer Khan's* case (3)].

[CHAUDHURI, J., refers to *Alte. Kaufman v. Government of Bombay* (4)]

Mr. Avetoom in reply.—Having regard to what was said in *Rudolph Stallmann's* case (1) by Woodroffe and Mookerjee, JJ., the point is whether the words of the section are sufficient to take away from the Court its jurisdiction and the right of any person to come there.

[CHAUDHURI, J.—If the Governor-in-Council is satisfied then I cannot question the validity of the orders. To do so is to sit as an Appeal Court over the decisions of the Governor-in-Council. That is exactly what I am precluded from doing by section 11.]

Mr. Avetoom.—Your Lordships can enquire into the reason.

JUDGMENT.

CHAUDHURI, J.—This is an application under section 491, Criminal Procedure Code, on behalf of five persons, inhabitants of Surat, who state that "they had been working as traders in South Africa for some years and had lately invested all their savings in gold and sovereigns, as they considered it the most safe and convenient form of investment during the War; that they were coming from South Africa by 'S. S. Kathiawar', which arrived in Calcutta on the 19th June 1916 when they were

(2) 1 Boulnois 354; 3 Ind. Dec. (o. s.) 217.

(3) 6 B. L. R. 392 and 459.

(4) 18 B. 636; 9 Ind. Dec. (n. s.) 933.

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arrested under the orders of the Commissioner of Police, with all their belongings including 58 lbs. of gold nuggets and 119 sovereigns, without any warrant being produced or read out to them." They further state that they have been continually in custody ever since their arrest; that they applied for bail to the Senior Deputy Commissioner of Police (in whose hands the case had been placed by the Commissioner of Police) on three occasions, "but that it was then said that they had been arrested under section 54 of the Criminal Procedure Code and Indian Ordinances which were not specified, and that a cable had been sent to South Africa to make enquiries regarding the petitioners, and that no orders could be passed till an answer was obtained from South Africa, and that the Deputy Commissioner of Police could give them no idea as to when it was likely to be received; that failing to obtain bail they made a representation to the Secretary to the Government of Bengal and were informed that as it was an ordinary criminal case the Government would not interfere. They assert that they have committed no criminal offence. They were at first kept in the Central Police Lock-up at Lal Bazar and are now in the Alipur Central Jail, both places being within the Ordinary Original Jurisdiction of this Court. They applied to me on the 3rd July 1916 that the Commissioner of Police and the Officer in charge of the Alipur Jail should be called upon to produce them before this Court to be dealt with according to law. I thereupon made an order for their production before me. On the 5th of July they were so produced, when the learned Standing Counsel appeared and stated that the petitioners had been interned under the provisions of Ordinances Nos. III and V of 1914, which had been embodied in the Emergency Legislation Continuance Act (Act I of 1915), and submitted copies of the orders passed by the Governor-in-Council under which they had been interned. The petitioners then applied that as they were not aware of the special Ordinances under which the Government had purported to act, they should be allowed time to consider the position. I directed that a return should be made on behalf of the Government and the case of the petitioners be stated both on affidavits.

I have now before me the affidavit of one

Vallub Das on behalf of the petitioners, in which he has submitted that the orders for internment are *ultra vires* and illegal in so far as they interfere with their personal liberty, safeguarded as the same is both by the common law and the statutory provisions of the British Parliament.

It appears from the affidavit, filed by the Deputy Commissioner of Police, F. S. R. Anley, that by Notification No. 113/2P., dated the 24th November 1914, the Governor of Bengal in Council delegated certain of the powers delegated to him by the Governor-General-in-Council to supervising officers, whereby *inter alia* such supervising officers were authorized to detain any person entering the Presidency of Bengal whether by sea or land after the 5th of September 1914, when it appeared to them that such person had entered the Presidency of Bengal with intent to prosecute some purpose prejudicial to the safety, interests or tranquillity of the State, and that by Notification No. 12148P., dated 10th December 1914, the said F. S. R. Anley was empowered by the Governor-in-Council to exercise the powers of such a supervising officer. By reason of certain information received by him, he arrested the petitioners on the 19th June 1916, in pursuance of the powers so vested in him pending the receipt of orders from the Local Government. He reported the matter to the Local Government through the Commissioner of Police on the 20th June 1916, and five different orders dated the 26th June 1916 were received from the Local Government, one in respect of each of the petitioners, under which the petitioners were interned in the Alipur Central Jail. All the orders are practically in the same terms, one of which is quoted below:

"Whereas by section 3 of the Foreigners' Ordinance 1914 (III of 1914), read with section 2 of the Ingress into India Ordinance 1914 (V of 1914), the entry of Foreigners into British India by sea or land can be regulated and restricted.

"And, whereas by Government of India Home Department Notification No. 1374, dated the 12th September 1914, the powers conferred by the said Ingress into India Ordinance 1914, read with the aforementioned Foreigners' Ordinance 1914, have been delegated to the Local Government.

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"And, whereas the Governor-in-Council is satisfied that in order to protect the State from acts prejudicial to its interests, it is desirable to exercise the powers under the said Ordinances in respect of Kana Probhu Patel, son of Parbhoo, village Sossodhra, Police Station Jalalpur, District Surat, who entered the Presidency of Bengal by sea in the 'S. S. Kathiawar.'

"Now, therefore, the Governor-in-Council is pleased to direct that the said Kana Probhu Patel shall be interned temporarily in the Alipur Central Jail, 24-Pergunahs. The person interned under this order shall remain in the place appointed unless permitted by the Governor-in-Council to leave.

(Sd.) J. G. CUMMING,

Additional Secretary to the Government of Bengal."

Counsel for the petitioners contends that under section 23 of the Indian Councils Act, 1861, (24 and 25 Vict., c. 67) no Ordinance can have any force of law for more than six months from its promulgation, and that the Governor-General has no power under that section to extend the period. The contention that an Ordinance expires after six months is correct. He argues therefrom that inasmuch as Act I of 1915 extends the period, it is *ultra vires*. In this he overlooks that the power of the Governor-General-in-Council to pass an Act embodying the provisions of an Ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General-in-Council has power to pass such an Act embodying the provisions of the Ordinances in question. It is not an Ordinance extended but an Act, and I hold against the above contention.

It is next argued that under section 22 of the Indian Councils Act, 1861, it is not in the power of the Governor-General-in-Council to make such laws as affect the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty of the Crown. Counsel argues that inasmuch as section 11 of the Ordinance No. III of 1914 embodied in

the present enactment seeks to oust the jurisdiction of the Courts, it offends against section 22 of the Indian Councils Act, 1861. His argument is that sections 29, 26 Geo. III, c. 57, known as the East India Company's Act, made residents in India amenable to the Courts and although that section was repealed by Act XI of 1872, the repealing Act itself was *ultra vires*, that inasmuch as Act XI of 1872 has again been repealed, section 29 must be considered as restored. It is correct that where an Act is repealed and the repealing enactment is repealed by another which manifests no intention that the first shall continue repealed, the common law rule was that the repeal of the second Act revived the first. But this rule does not apply to repealing Acts passed since 1850. The last repeal does not now revive the Act or provisions before repealed, unless words be added reviving them; 52 and 53 Vict., c. 63, section 11. The same principle or rule of law applies to this country. Section 3 of the General Clauses Act, Act I of 1868, expressly provided that for the purpose of reviving either wholly or partially a Statute, Act, or Regulation repealed, it shall be necessary expressly to state such purpose. The same is the effect of sections 6 and 7 of the General Clauses Act, X of 1897. Act XI of 1872 was repealed and re-enacted with modifications by Act XXI of 1879, which after various amendments was again repealed and re-enacted in a modified form by Act V of 1903. I do not find anything in these subsequent Acts reviving section 29 of 26 Geo. III, c. 57. Nor does it seem to me to have been necessary to revive the section as various Acts and Statutes had come into force making the persons mentioned in that section amenable to Courts of Justice. How we are now concerned with the constitution and rights of the East India Company, I have not been able to follow. I, therefore, hold against the said contentions. It is further argued that the present Act also offends against the allegiance of the subject and the sovereignty of the Crown which are said to be "interdependent." One branch of the argument is that the said Ordinance and Act I of 1915 have not expressly suspended the

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Habeas Corpus, and no inference that it has been suspended can, therefore, be inferred, and reliance is strongly placed upon the following passages in the judgments of Woodroffe and Mookerjee, JJ., in *Rudolph Stallmann's* case (1). Woodroffe, J., says as follows (see page 182*):—"It must be shown that a supreme right such as that of Habeas Corpus or to directions in the nature of the writ has been expressly, if that be possible to the Legislature, taken away." Mookerjee, J., says (see page 198*): "The burden lies very heavily upon those, who in the words of Sir Joseph Napier in *Levinger v. Reg.* (5) assert that a right of so much importance to the criminal, given by the common law, has been taken away by implication." The learned Judges held in that case that the English Extradition Act expressly referred to the Habeas Corpus, but the Indian Act did not; that if the Legislature had intended to withdraw the matter from the cognizance of the Indian Courts, it would have said so, but as it had not, the Court had jurisdiction under section 491, Criminal Procedure Code, to enquire into the validity of the warrant under which the petitioner had been kept in custody.

Mookerjee, J., said that it was not necessary in that case to consider whether a writ of Habeas Corpus could be issued by this Court or whether the right of the Court to issue such a writ could be taken away by the Indian Legislature. The question of the prerogative of the Crown and the allegiance of the subject has been discussed in a great many cases in our Courts. Amongst them may be mentioned *In the matter of Tuckut Roy* (2), in which Colville, C. J., in discussing Regulation III of 1818 and Act XXXIV of 1850 expressed himself thus (see page 357): "It cannot now be contended that the Governor-General acting under the Statute (13 Geo. III, c. 33) had no power to legislate for the subjects of the British Government as was done by Regulation III of 1818, but it possibly was meant by the Statute to import some such qualification as was afterwards (5) (1877) 3 P. C. 282 at p. 239; 39 L. J. P. C. 49; 23 L. T. 362; 18 W. R. 1109.

more carefully expressed in section 43 of the Statute (3 and 4 Wm. IV, c. 85)." He thought that it certainly was rather a startling proposition that a law passed to increase the power of those who represented the Crown, and in derogation of the rights of those who had withstood that power, should be treated as affecting the prerogative, and this probably was one of those cases where confusion arose as to the meaning of a word, from a difference in its use in rhetoric and in logic. He held that by legislation of this character the prerogative is not affected. He said: "It is not for the Court to assume a power of disregarding what is made part of the law of the land. It is not our part to consider what the Legislature ought to have done, we are only to consider the law, and if we find that it has established certain principles and made certain provisions, it is our duty to obey them."

In *Ameer Khan's* case (3), *In the matter of Tuckut Roy* (2) was discussed. The discussion arose in connection with Regulation III of 1818, which was said to belong to that class of laws which authorised the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and well-being of the public. Such legislation, according to Norman, J., falls within the principle *salus populi suprema lex*. That learned Judge held in that case that the Governor-General-in-Council had a power analogous to that which the Parliament of the United Kingdom exercised when by legislative enactment it suspended the Habeas Corpus Act. The questions now raised were elaborately discussed and it was held by him that the principles which justified the temporary suspension of the Habeas Corpus Act in England, justified the Indian Legislature in entrusting to the Governor-General-in-Council an exceptional power of placing individuals under personal restraint, when for the security of the British Dominions, etc., such a course might appear necessary to the Governor-General-in-Council. He said: "The proviso in section 22 is not that no law shall be made contrary to the Magna Charta or any other similar Statute. The unwritten constitution of England is

*Pages of 39 C.—Ed.

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of a flexible character. It admitted a relaxation of the rules securing private rights in times of public distress or danger, *ne quid detrimenti capiat respublica.*"

In the Appeal Court in the same case Mr. Justice Phear, in discussing the same questions which have been raised before me, said: "The real effect of these Acts is that they create and make lawful a new cause of imprisonment and constitute the Governor-General-in-Council a Court, endowed with the fullest discretion to adjudicate such a cause."

The argument about allegiance, he thought, could be carried to the extent that "If the Regulation and Acts were void and of no legal force the subject had a right by law to disclaim allegiance to the Crown of the United Kingdom." He considered such an argument "startling" and not fit to be entertained. The other Judge in the Appeal Court, Mr. Justice Markby, said, that he saw no ground for supposing that an Act affected the prerogative of the Crown merely because it affected the liberty of the subject. If that were so, then the Indian Legislature would have no power at all to legislate in criminal matters. He held that the allegiance of a British subject in no way whatever depended upon the existence, or non-existence of such a power as was conferred on the Governor-General by the Regulation of 1818. He wholly repudiated the doctrine contended for, that the allegiance of a subject to his Sovereign could by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege or immunity whatsoever. Practically the same questions were raised in *Alter Kaufman v. Government of Bombay* (4), in which the decision of the Calcutta Court in *Ameer Khan's* case (3) was quoted with approval. The Indian Legislature both before and after the passing of the Indian Councils Act, 1861, has from time to time passed similar enactments authorizing the privation of liberty in certain circumstances, and no instance has been cited to me that such Acts have been held to be *ultra vires* or that any of the above arguments which have been repeated from time to time have ever been accepted as correct. The general powers of the Indian Legislature has been

discussed in *Rex. v. Burah* (6), which is the leading case on the subject. Lord Selborne has laid down in that case as follows:—"If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further or to enlarge constructively those conditions and restrictions."

The latest case, in which somewhat similar questions were raised, is that of *Rex. v. Halliday* (7). It was contended that it was the usual practice in England to pass an Act suspending the Habeas Corpus Act when circumstances required, the Suspension Act being always followed by an Indemnifying Act. General words, it was argued, ought not to be interpreted as taking away the fundamental rights of individuals as conferred by Statute or the Common Law but in view of the Defence of the Realm (Consolidation) Act, 1914, it was held in the Court of Appeal that the argument was not sound.

The Ordinances in question came into existence in India in circumstances of emergency. Act I of 1915 has been enacted owing to the same emergency and is of a temporary character, it being provided that it is to remain in force during the continuance of the present war and for a period of six months thereafter.

Section 11 of Ordinance No. III of 1914 incorporated in that Act expressly provides that "No order made under section 3 shall be called in question in any Court."

It expressly ousts the jurisdiction of the Courts of Justice, that is to say, when the requirements and provisions of the Act and Ordinances are fulfilled.

The orders we are dealing with mention that the Governor-in-Council is satisfied that in order to protect the State from acts prejudicial to its interests, it is desirable to exercise the powers under the said Ordinances in respect of the petitioners and that they have accordingly been interned.

Arguments have been addressed to me,

(6) (1878) 3 A. C. 889; 5 L. A. 178.

(7) (1916) 1 K. B. 737; 85 L. J. K. B. 953; 20 C. W. N. xci.

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with which I am unable to agree, that as the orders do not recite the Act but only the Ordinances and do not say that "It is desirable to protect the State from the prosecution by the petitioners of some purpose prejudicial to its interests," the orders are bad and inoperative. The sections of the Ordinances are referred to in the orders as they are incorporated in the Act and the wording of the orders seems to me substantially to comply with the requirements of section 2 (2) of Ordinance V of 1914. I hold the Act is not *ultra vires* and this Court has no power to call in question the orders which have been passed thereunder. It is for the Governor-in-Council to be satisfied on the materials before them. The Court cannot call for the materials or examine them. The real effect of these Acts, to adopt the language of Phear, J., is that they create and make lawful a new cause of imprisonment and constitute the Governor-in-Council a Court endowed with the fullest discretion to adjudicate such a cause.

The usual procedure in these applications is to issue a Rule in the first instance and not to order the production of the petitioners. I departed from this practice, as it was not mentioned in this case that their detention was under the said Ordinances and as it appeared from the affidavit filed on behalf of the petitioners that they had been detained for a considerable time, without a warrant, merely on a suspicion that they had committed some unknown offence, which seemed to me *prima facie* illegal and high-handed. It is asserted that even now the Government has no materials upon which they have purported to take action but I have no power to enquire into that allegation, as the orders comply with the requirements of the Act.

I accordingly dismiss this application.

[At the hearing of the appeal against this order, Counsel for the petitioners intimated to the Court that they had been released by the Commissioner of Police. The appeal, in these circumstances, was not pressed.—*Ed.*]

Babu Nitendra Krishna Dutt, Attorney-at-Law, for the Petitioner,

Mr. J. T. Hume, Public Prosecutor, for the Commissioner of Police.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 64 OF 1916.

May 26, 1916.

Present:—Mr. Hayward, J. C., and Mr. Fawcett, A. J. C.

BAGUMAL WADHUMAL—

APPLICANT

versus

EMPEROR—OPPONENT.

Bombay Prevention of Gambling Act (Bom Act IV of 1887), s. 6—Evidence Act (I of 1872), ss. 123, 125—Warrant issued under s. 6 containing direction for seizure of all money found on people in gaming house, legality of—Complaint on oath forming basis of warrant issued under s. 6, right of accused to inspection of.

A warrant issued under section 6 of the Bombay Prevention of Gambling Act is not rendered wholly bad or illegal by reason of its containing a direction for seizure of all money found on people in the gaming house; such a direction should be regarded as mere surplusage not affecting the main purpose of the warrant. [p. 55, col. 1.]

Non-production by a Court of the complaint on oath which forms the foundation of a warrant issued under section 6, is not improper, if the object of the production is to ascertain merely the name of the informer. [p. 55, col. 2.]

Per Fawcett, A. J. C.—The Court should decline to sanction any step which would in practice almost necessarily result in the disclosure of the name of the informer, contrary to the provisions of section 123 of the Evidence Act. [p. 56, col. 1.]

Laladhar Umarsi v. Emperor, 29 Ind. Cas. 79; 8 S. L. R. 309; 16 Cr. L. J. 447, referred to.

Application against the order of the City Magistrate, Hyderabad.

Mr. Wadhupal Oodharam, for the Applicant.

JUDGMENT.

HAYWARD, J. C.—We have heard Mr. Wadhupal at considerable length on the question of admission of this application, but have come to the conclusion after duly considering all his arguments that this is not a case for interference by revision.

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Mr. Wadhupal has addressed to us a variety of arguments, including arguments upon the question of fact whether the house in question was or was not a common gaming house. That question of fact, however, can safely be left in this case to the decision of the learned Magistrate.

But Mr. Wadhupal's efforts were directed not so much to denying the fact that the house in question was a common gaming house, as to detecting flaws in the procedure by means of which his clients hoped to evade their liabilities under the law. He endeavoured to show that the search was bad because the two "*mashirs*" called to be present thereat were not persons living in the neighbourhood and that, therefore, the results of the search ought not to have been considered by the Magistrate. It is not necessary to decide whether the *mashirs* were properly selected nor whether indeed any *mashirs* at all were necessary, for no irregularity in the search could prevent matters actually discovered being perceived and duly considered by the Magistrate.

Mr. Wadhupal then endeavoured to show that the directions in the warrant for seizure of all money found on people in the house, not being strictly according to law, rendered the whole warrant bad. But those misdirections must, in my opinion, be regarded as mere surplusage not affecting the main purpose of the warrant or rendering it other than it purported to be, merely a warrant under section 6 of the Gambling Act.

Mr. Wadhupal then seized on the little word "for" appearing after the title of the officer signing the warrant, viz., the Assistant Superintendent of Police, and contended that the warrant was not really issued by the Assistant Superintendent of Police but by an improper delegation of duty by the officer whose title followed the word "for", namely, the Superintendent of Police. But unfortunately for this contention the Assistant Superintendent of Police himself had authority conferred on him, quite apart from the Superintendent of Police, by due notification in the *Sind Official Gazette* by the Commissioner-in-Sind.

But Mr. Wadhupal's main effort was directed to show that he had improperly been denied permission to peruse the complaint on oath which was the foundation of the warrant. And he has suggested that if he had been allowed to see that document he would have been able to prove that the house mentioned in the complaint was an entirely different house from that entered in the warrant. But the Assistant Superintendent of Police, who issued the warrant and was called to give evidence, does not appear to have been directly questioned whether the house mentioned in the complaint was or was not the same as the house entered in the warrant. Mr. Wadhupal has stated that he cross-examined that witness at very considerable length, and that statement may be accepted as entirely true. But Mr. Wadhupal has not filed any affidavit, and is not prepared to file an affidavit to the effect that the question mentioned was definitely put to the Assistant Superintendent of Police in the witness-box. It appears to me, therefore, that the real reason for the demand to peruse the complaint cannot really have been to ascertain whether the house mentioned in the complaint was or was not the same as that entered in the warrant, but merely to ascertain the name of the informer. And if that is so, then clearly the non-production of the complaint was not improper but was privileged under section 125 of the Indian Evidence Act.

Lastly, Mr. Wadhupal has represented to us that the sentence of 12 weeks' simple imprisonment passed on his client was unduly severe. The period is no doubt long but the Magistrate has given his reasons for passing a long sentence. There is not, in my opinion, sufficient ground for interfering with the discretion vested in the Magistrate.

There are, therefore, in my opinion, no sufficient grounds for revision and this application ought to be rejected.

FAWCETT, A. J. C.—I concur. As regards Mr. Wadhupal's main contention, I would only add that I do not think the mere allegations that the house searched differs from that mentioned in the complaint on oath under section 6 affords any

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ground for the compulsory production of that complaint. It is not clearly shown that this allegation was in fact made before the Magistrate. But in any case the presumption under section 114 of the Evidence Act is that the two houses agree; and in the absence of any evidence, circumstantial or direct, in support of such an allegation, I am clearly of opinion that, for reasons given in my judgment in *Liladhar Umarsi v. Emperor* (1), the Court should decline to sanction any step which would in practice almost necessarily result in the disclosure of the name of the informer, contrary to the provisions of section 123 of the Evidence Act.

Application rejected.

(1) 29 Ind. Cas. 79; 8 S. L. R. 309; 16 Cr. L. J. 447.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 65 OF 1916.

June 30, 1916.

Present:—Mr. Hayward, J. C., and
Mr. Crouch, A. J. C.

UNAR GOOL AND OTHERS—APPLICANTS
versus

EMPEROR—OPONENT.

Criminal Procedure Code (Act V of 1898), ss. 413, 435, 438, construction of—Appeal, right of, when appealable, and non-appealable sentences passed in one judgment—Remedy where conviction set aside on appeal—Reference to High Court.

Section 413 of the Criminal Procedure Code declares in quite unambiguous terms that in those cases in which a Court passes only a light sentence the convicted person shall have no right of appeal. The words used in the section cannot bear the construction that no appeal lies at the instance of a convicted person, against a judgment in which no other sentence than one not exceeding one month has been passed [p. 57, cols. 1 & 2.]

Reg. v. Kalubhai Meghabhai, 7 B. H. C. R. Cr. 35; *Lal Singh v. Emperor*, 36 Ind. Cas. 481; 14 A. L. J. 518; 38 A. 395; 17 Cr. L. J. 513, referred to.

Consequently, where at a joint trial some accused persons are sentenced to appealable sentences and some to non-appealable sentences, the former alone can appeal. This strict interpretation might on occasions lead to apparent injustice, e. g., where on appeal by those having right of appeal, the conviction is set aside. Under the existing practice such injustice can be removed by the procedure of a reference for revision to the High Court under section 435 or 438, Criminal Procedure Code. [p. 57, col. 1.]

Criminal reference by the Sessions Judge, Larkana.

Mr. Wadhmal Oodharam, for Applicants Nos. 1, 3, 5 and 6.

Mr. Lalchand Hussomal, for the Complainant.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

HAYWARD, J. C.—There were nine persons convicted of rioting by the Sub-Divisional Magistrate, Larkana. Three of these persons were sentenced to appealable sentences and their convictions have been set aside on appeal by the Sessions Judge, Larkana. The remaining six were sentenced to non-appealable sentences and their case has been referred for our revisional consideration by the learned Sessions Judge. The Public Prosecutor for Sind in support of the reference has argued a point suggested in the referring letter, namely, that the case of these persons could properly have been disposed of by way of appeal by the Sessions Judge. He has been supported by Mr. Wadhmal on behalf of applicants Nos. 1, 3, 5 and 6, applicants Nos. 2 and 4 not being represented. Mr. Lalchand, on the other hand, on behalf of the complainant has contended that the case of these persons could only be considered by way of revision in this Court.

There appears to be a decision of the Chief Court of Lower Burma and another of the Punjab Chief Court in favour of the jurisdiction in such cases of the Sessions Judge. And there has also been a recent dictum of a single Judge of the Allahabad High Court in favour of the same view reported in the case of *Lal Singh v. Emperor* (1). On the other hand the case of *Reg. v. Kalubhai Meghabhai* (2) appears to have been consistently followed on this side of India. That practice seems to me, with deference to the other authorities, in accord with the actual wording of section 413 of the Criminal Procedure Code. The words are: "There shall be no appeal by a convicted person in cases in which a Court passes a sentence of imprisonment not exceed-

(1) 36 Ind. Cas. 481; 14 A. L. J. 518; 38 A. 395; 17 Cr. L. J. 513.

(2) 7 B. H. C. R. Cr. 35.

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ing one month only". Those words include every case in which a convicted person is sentenced to imprisonment not exceeding one month and cannot, without straining, be restricted to cases in which no other persons are tried or in which no other persons are sentenced to imprisonment exceeding one month. They apply, in my opinion, strictly interpreted, even in cases in which there are one or more persons sentenced to imprisonment not exceeding one month together with other persons sentenced to higher terms of imprisonment. That strict interpretation may certainly lead on occasions to apparent injustice, but that injustice can be and is under the existing practice remedied by reference for revision to the High Court. It is a somewhat cumbrous procedure no doubt, but that has been recognized in the Bill now under consideration to amend the Code of Criminal Procedure.

The Public Prosecutor for Sind has accordingly contended on the merits that this is a proper case for setting aside the convictions of the six applicants by way of revision. Mr. Lal Chand on behalf of the complainant has argued in favour of maintaining the convictions. We have had our attention drawn to the material parts of the evidence and have read the careful and well-considered judgment of the Sub-Divisional Magistrate and have had some hesitation in accepting the contrary views of the Sessions Judge. It is, however, clear that the evidence was far from satisfactory even in the opinion of the Sub-Divisional Magistrate and that there were substantial grounds for the doubts as to the true version of the fight held by the Sessions Judge. It seems to me, therefore, that it would not be proper for us to accept with regard to these six applicants a different version of the fight from that accepted with regard to the three appellants upon a detailed hearing of the appeal by the Sessions Judge. We had at the same time some difficulty in following the argument in certain passages toward the close of the judgment of the learned Sessions Judge, and it seems to me that his attention might usefully be invited to the remarks of Batchelor, J., on these kinds of cases made in *Bechar Anop v. Emperor* (3).

(3) 31 Ind. Cas. 372; 40 B. 105; 17 Bom. L. R. 888; 16 Cr. L. J. 772.

We ought, therefore, in my opinion, to accept the recommendation of the learned Sessions Judge and set aside the conviction and sentences passed on the six applicants.

CROUCH, A. J. C.—I concur in the proposed order.

Section 413 cannot, I think, bear the construction that no appeal lies, at the instance of a convicted person, against a judgment in which no other sentence than one not exceeding a month is passed. If such had been the intention of the Legislature there would have been no difficulty in giving expression to it.

The appeal is against the judgment (section 404), and the judgment necessarily contains the conviction and sentence (section 365).

"Case" is not equivalent to either "judgment" or "trial". Where several accused are tried together, the "case" of each has to be treated separately, and it is usual in giving the decision to state "in the case of accused No. 1 the order is that, etc." Section 413 appears to me to declare in quite unambiguous terms that in those cases in which a Court passes a light sentence the convicted person has no appeal.

Convictions and sentences reversed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CRIMINAL JURISDICTION.

July 20, 1916.*

Present:—Mr. Justice Chaudhuri.

In the matter of CHARU CHANDRA
MAJUMDAR—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 54, 491—Directions of the nature of habeas corpus—Application to be made to Judge on Original Side of High Court—S. 54, scope of—Circumstances justifying arrest—"Credible information" and "reasonable suspicion", meaning of—Discretion to be exercised by police-officer, delegation of.

An application under section 491, Criminal Procedure Code, is to be made to the High Court in its Ordinary Original Criminal Jurisdiction. [p. 60, col. 2.]

The petitioner, who was the managing agent of a certain Provident Company of Calcutta, was arrested by the Calcutta Police under section 54, Criminal Procedure Code, on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police, Calcutta, in which it was stated that on enquiries

*The head-note, facts and arguments have been taken from the C. W. N. with permission—Ed.

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into complaints against the Company and their local agent in Bombay it appeared, there being *prima facie* evidence to that effect, that the managing agent and the local agent had committed offences under sections 409 and 420, Indian Penal Code. The letter contained a request to cause the arrest of the petitioner and was forwarded by the District Magistrate with a note that the petitioner might be arrested under section 54, Criminal Procedure Code, and sent to the Magistrate, 1st class, of the District, to be tried by him. It was admitted that the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case:

Held, that the arrest of the petitioner under section 54, Criminal Procedure Code, was not proper. [p. 63, col. 1.]

That section 54, Criminal Procedure Code, gives wide powers to a Police Officer to make an arrest without an order from a Magistrate and without a warrant only in certain circumstances limited by the provisions contained in the section and it is necessary in exercising such large powers to be cautious and circumspect. [p. 63, col. 1.]

The section gives a Police Officer personal authority and involves personal responsibility, and the "reasonable suspicion" and "credible information" must be based upon definite facts which the Police Officer must consider for himself before he acts under the section. He cannot delegate his discretion or take shelter under the belief or judgment of another Police officer. [p. 62, col. 1 p. 63, col. 1.]

In the circumstances of the case the High Court under section 491, Criminal Procedure Code, directed the release of the petitioner.

This was a Rule in the nature of a *habeas corpus* issued by Sanderson, C. J., under section 491 of the Code of Criminal Procedure on an application by the petitioner above named.

FACTS as stated in the petition of the applicant were as follows:—

Charu Chandra was a member of the firm of Messrs. C. C. Mazumdar and Sons, having its place of business at Bhowanipore. This firm were the Managing Agents of the Bharat Luxmi Provident Co., Ltd., having its Head Office at No. 81, Olive Street (Calcutta). On the 26th of June last, while the petitioner was at the Head Office, two members of the Calcutta Police force took him to the Lal Bazar Police Office, where he was informed that he was under arrest on charges under sections 420 (cheating and dishonestly inducing delivery of property) and 409 (criminal breach of trust) of the Indian Penal Code as the Managing Agent of the Bharat Luxmi Provident Co., Ltd., under instructions from the District Superintendent of Police at a place called

Karwar in the Presidency of Bombay. The petition stated that there was no warrant against the petitioner and that he was arrested in pursuance of a letter from some Bombay Police Officers to the Commissioner of Police, Calcutta. The petitioner had moved the Deputy Commissioner of Police for bail, but the application was rejected on the ground that the Police had instructions to send the petitioner to Bombay that evening. The Chief Presidency Magistrate of Calcutta was then moved, but with no effect. The petitioner next moved the High Court under sections 491 (for issue of directions in the nature of a *habeas corpus*) and 498 (for admission to bail) of the Criminal Procedure Code, whereupon the present Rule was issued and the petitioner was admitted to bail, and pending the hearing of the Rule the petitioner was ordered not to be removed to Bombay. On the above Rule coming up for hearing before Sanderson, C. J., and Walmsley, J., who were then sitting on the Criminal Revisional and Appellate Bench:

Sir S. P. Sinha (Advocate-General) appeared for the Crown and drew their Lordships' attention to the fact that in order to preserve the unanimity of practice in the Court it was necessary to consider whether the Rule should be heard by their Lordships, or one of the Judges of the Original Civil Side or by the learned Judge exercising the Original Criminal Jurisdiction. It was a very serious matter and if the Rule came on for hearing on the Original Side and if the application was refused, there was a right of appeal. If a Divisional Bench heard the application the petitioner would lose his right of appeal. From 1870 downwards the uniform practice was, with the exception of one case, that if it was a criminal case, to make the application before the Judge exercising the Original Criminal Jurisdiction, if it was a civil case, to make the application before the Judge exercising the Original Civil Jurisdiction. Section 491 of the Criminal Procedure Code made it quite clear that the application should be made before the Judge exercising the Original Criminal Jurisdiction. If your Lordships would constitute yourselves into a Bench exercising the Original Jurisdiction in this Court, the

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Rule might be heard before you but that would mean that there would be no right of appeal in that case.

[SANDERSON, C. J.—This, of course, is a case within the Original Jurisdiction of this Court.]

Mr. *Avetoom* who appeared with Messrs. C. R. Das and R. N. Mitter.—That is so.

Their Lordships then ordered that the Rule would be heard before Mr. Justice Chaudhuri sitting on the Original Side.

On the Rule coming on before Mr. Justice Chaudhuri for hearing:

Messrs. C. R. Das and R. Mitter appeared for the Petitioner, Charu Chandra Majumdar. Mr. *Avetoom* represented the Bharat Luxmi Provident Company.

Sir S. P. Sinha, Advocate-General, and Mr. B. C. Mitter, Standing Counsel, appeared for the Commissioner of Police.

Sir S. P. Sinha said that before Mr. Das began, he ought to mention how this matter came before his Lordship. It was desirable that the procedure to be adopted should be settled definitely once for all. The application was made, because the matter was urgent and there was no other Judge available, by Mr. *Avetoom*, before the Chief Justice who granted a Rule, although the Rule was issued as a Rule on the Crown Side of this Court. When the matter came on for hearing before the Chief Justice and Mr. Justice Walmsley, he (Sir S. P. Sinha) mentioned that the practice of this Court was that all these matters should be heard by a Judge on the Original Side. He being the Judge who exercised the Original Criminal Jurisdiction of this Court, it would be for his Lordship to lay down definitely the practice of the Court in this respect.

Mr. Das said that he endorsed what had fallen from the learned Advocate-General. He stated that Charu Chandra Majumdar was the Managing Agent in Calcutta of the Bharat Luxmi Insurance Company. There were certain proceedings, the exact nature of which the petitioner was not aware of, against a man named Soman, who was agent of the Company at Karwar, a place about 200 miles from Bombay.

Certain charges were being investigated by the Police at Karwar. What the foundation of the allegation against the petitioner was he did not know but a letter was sent by the District Superintendent of Police, Karwar, to the Commissioner of Police here requesting the latter to arrest the petitioner. That letter was countersigned by the District Magistrate, who expressed the opinion that the petitioner might be arrested on suspicion under section 54 of the Criminal Procedure Code. On receiving that letter the Calcutta Police arrested the petitioner on June 26th in his office. He was kept in custody the whole of that day and that night, and the next day the petitioner had information that he would be sent to Karwar. On that, at half past five in the evening, the Chief Justice was moved and this Rule obtained.

Counsel then read the letter. It was to the effect that from enquiries made into the complaint against the Bharat Luxmi Provident Company and their Agent, Soman, it was found that the Managing Agent, Charu Chandra Mazumdar of Calcutta, had committed offences under sections 409 (criminal breach of trust) and 420 (cheating) and there was *prima facie* evidence to that effect. The Commissioner of Police here was requested to arrest Charu Chandra Majumdar and send him to Karwar for trial. His contention was that it was not a warrant of any Court. The question was whether upon this information the arrest under section 54 was a legal arrest and a proper arrest. Section 54 of the Criminal Procedure Code, no doubt, gave very large powers, at the same time the larger the powers so conferred the greater ought to be the caution.

[Mr. JUSTICE CHAUDHURI.—What do you contend, is it in excess of their authority?]

Mr. Das.—I contend, *first*, that it is in excess of the powers conferred by section 54, and, *second*, that in any event it is an improper arrest.

[Mr. JUSTICE CHAUDHURI.—Section 54 is rather wide.]

Mr. Das.—Yes. I contend that section 54 must be interpreted to mean that suspicion or information—whatever it is—must be based on facts. What was done

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immediately after this Rule was granted was that we sent a telegram to the Police at Karwar for information. The Police at Karwar said in reply they had no information to give and that we had better apply to the C. I. D. at Poona. We did so by telegram and were referred back to Karwar. On the 6th instant we sent a telegram to the District Magistrate at Karwar and on the 9th we received a reply that a complaint was being recorded not against the petitioner but against Soman.

Mr. Das then pointed out that all these Companies were regulated by the Provident Insurance Companies Act, in which elaborate provisions were made for the investigation of charges against a Company.

Sir S. P. Sinha (Advocate-General) said that the only point was whether section 54 of the Criminal Procedure Code gave authority to the officer, here entrusted with the duty of arresting the petitioner, to arrest him. It was quite clear that when the officer in question effected the arrest, all he had before him was this letter dated the 22nd April of the Police Officer at Karwar. This letter was followed by a number of reminders. The question was whether the Police were justified on receipt of the information contained in this letter of the 22nd April in arresting the petitioner without an order from a Magistrate and without a warrant. Although this letter was signed by the Magistrate, it was not a warrant. If this arrest was to be justified it could only be justified under the first clause of section 54, which stated that there must be a "reasonable complaint" or "credible information" or "reasonable suspicion." He did not think that the other side would contend that the Police had not acted *bona fide*.

[Mr. JUSTICE CHAUDHURI.—A person is entitled at the time of his arrest to know what he is arrested for.]

The *Advocate-General*.—The letter in question from the Police Inspector was countersigned by the District Superintendent of Police and the District Magistrate. The signatures of these two superior officers could have no force or effect beyond this, that they made the information

in the letter of the 22nd April more credible and more worthy to be acted upon than it would otherwise have been.

[Mr. JUSTICE CHAUDHURI.—Could the Commissioner of Police delegate his power to arrest?]

The *Advocate-General*.—The arrest was actually made by laying hands but the officer who really arrested was the Commissioner of Police.

There was no case exactly on the point, though the question was a very important point.

Mr. Das in reply cited *Queen v. Behary Singh* (1).

JUDGMENT.—This is an application under section 491 of the Criminal Procedure Code for the production of one Charu Chandra Majumdar, who was arrested under section 54 by the Calcutta Police. A Rule was issued by the Chief Justice and Mr. Justice Walmsley constituting the Criminal Bench; but a question having been raised as to what the proper procedure is in a case of this character, as to whether such applications ought not to be made to the Judge exercising the Ordinary Criminal Jurisdiction of this Court, the matter has been sent to me for disposal. For a great number of years all these applications have been made as a rule to the Original Side of this Court. With the exception of one case, namely, that of *Rudolph Stallmann**, I do not remember any single case in which that practice was departed from. An application was made in that case to a single Judge of this Court, but the Rule was evidently heard by three Judges forming a Special Bench constituted by the Chief Justice. Having regard to the practically uniform procedure of this Court and the rules framed by the Court under section 491 (2), Criminal Procedure Code, I hold that the Original Side in its Criminal Jurisdiction is the proper Court to deal with these applications. I find that the same is the procedure in Bombay—applications being made on its Crown Side. I apprehend the application was made in Stallmann's case following the practice obtaining in England, where such an application may be made to any Judge of

(1) 7 W. R. Cr. 3.

*The case is reported as 12 Ind. Cas. 273.—*Ed.*

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the Supreme Court, but such a procedure, so far as I know, has no sanction so far as we are concerned. I have made the above observations as I have been asked by both sides to deal with the question of procedure in my judgment in this matter. It is to be noticed that an order made by me in the exercise of my Original Criminal Jurisdiction is appealable under our rules, whereas an order made by the Criminal Bench is not appealable.

Now coming to the matter of the application, section 54, Criminal Procedure Code, authorises arrest without an order from a Magistrate and without a warrant only in certain circumstances, limited by the provisions therein contained. I need not deal with any other proviso except the first. In this case there was no complaint before the Police officer who arrested the applicant, and the question is as to whether he had received "credible information," or whether it can be said that "reasonable suspicion" existed that the applicant was concerned in a cognizable offence. There was no information before the officer except the following letter:

No. 267 of 1916.

Karwar, 22nd April 1916.

To

THE COMMISSIONER OF POLICE,
Calcutta.

SIR,

*Re: enquiry into the affairs
of the Bharat Luxmi Provident
Company of Calcutta.*

I respectfully beg to state that on enquiry made into the complaints against the above-named Bharat Luxmi Provident, Ltd., 81, Olive Street, Calcutta, and their Agent, D. R. Soman of Khanapur, Bombay Presidency, it is found out that the Managing Agent, Charu Chandra Majumdar, of Calcutta, and Agent D. R. Soman, of Bombay, have committed offences under sections 409, 420, Indian Penal Code, as there is *prima facie* evidence to that effect. I, therefore, request that you will kindly arrange to have the said Charu Chandra Majumdar, the Managing Agent of the Company, 81, Olive Street, Calcutta,

arrested and sent to the District Magistrate, Kanara, Karwar, for trial.

I beg to remain,

SIR,

Your most obedient servant,
(Sd.) R. V. KOWSHIK,

Police Inspector, C. I. D.,
Poona, on special duty in
Kanara District, Bombay
Presidency.

Respectfully forwarded through the District Superintendent of Police, and the District Magistrate, Kanara.

No. 1391 of 1916.

I. $\frac{3242}{\text{No. 7-5-16}}$

Karwar 22th April 1916.

23-4-16.

Forwarded with compliments.

(Sd.) DANIEL DONALD,
D. S., Police, Kanara.

I. R. $\frac{1267}{\text{No. 4-5-16.}}$

Karwar 3rd May 1916.

Forwarded with compliments.

The person in question may be caused to be arrested under section 54 of the Criminal Procedure Code and forwarded to the Magistrate, 1st class, Karwar, by whom the case will be heard.

Signature illegible,
Dist. Magte., Kanara.

Below No. 3416, dated the 3rd May 1916, from District Magistrate, Kanara.

No. 1466 of 1916.

Karwar, 4th May 1916.

Forwarded with compliments to the Commissioner of Police, Calcutta, for whom this is intended.

(Sd.) DANIEL DONALD,
D. S., Police, Kanara.

The letter, it will be noticed, contains no particulars. The note made by the Magistrate is merely a recommendation, which may be neglected. It is not suggested by the Crown that it may be read as warrant or that it should be considered of any

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value. If the Magistrate had materials before him, he was the proper officer to issue a warrant, but if he did not feel competent to exercise his power, his recommendation is worth nothing.

A statement of an indefinite character is all that was before the Police Officer who acted upon the letter, and apparently he did so being frequently applied to by the Police Officer at Kanara. It seems clear to me that the information upon which a Police Officer may act under this section, must be such as enables him to conclude that it is credible, there must be facts before him to base his judgment upon. I do not think it can be said that a Police Officer has credible information, merely because a brother Police Officer in some remote part of the country writes a letter that he has information upon which he thinks that there is "*prima facie* evidence" and that action ought to be taken under this section. The discretion which is given to the officer who has to arrest, must mean discretion exercised by him upon consideration of the materials placed before him, not merely on intimation that some other Police Officer thinks that some offence or other has been committed. What the precise nature of the offence is, the letter does not state. A Police Officer acting under this section has to act on his personal responsibility. If he could act on a representation made to him as in this case by a brother Police Officer that he had some information, the responsibility could be shifted from person to person, and the provisions of section 220, Indian Penal Code, entirely nullified. Section 54 gives him personal authority and must involve personal responsibility. He has to be satisfied that he has credible information, and he has to show it.

I have next to consider the proviso about "reasonable suspicion." It may be argued that a Police Officer is justified in thinking that "reasonable suspicion" exists, when he is informed by a brother Police Officer holding a responsible position that the latter has information upon which he thinks a cognizable offence has been committed. I do not think the section can mean such suspicion. If it be so construed, it may be carried to this extent, that any officer may write to any other officer

that he suspects a man of having committed a cognizable offence and cause his arrest. The section gives wide powers and ought to be rigorously construed. It is not mere suspicion, but the suspicion must be "reasonable" —reasonable according to the opinion and in the judgment of the officer called upon to arrest. I do not think the argument can be accepted that suspicion entertained by another officer, however responsible the office he may hold, is sufficient for the arresting officer to act upon, or that it is reasonable for him to entertain a suspicion because some one else suspects; as thereby he practically consigns his reason to another person, and gets rid of his personal responsibility. I think that "reasonable suspicion" means reasonable suspicion based upon facts which have been brought to the knowledge or cognizance of the officer called upon to arrest—not suspicion which may be aroused in his mind by a communication from a brother officer without particulars. I am strengthened in my opinion by the case of *Queen v. Behary Singh* (1), where Markby, J., says: "The widest power is that conferred by paragraph 2 of section 100 (the then corresponding section), which provides that a Police Officer may arrest without orders from a Magistrate and without warrant any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in any offence specified in the schedule to the Act as offences for which Police officers may arrest without a warrant," in other words, "cognizable offences" in the words of the present Code. "What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite facts tending to throw suspicion on the person arrested and not on mere vague surmise or information." This case has been cited in later cases both here and in Bombay, and been tacitly followed. The Deputy Commissioner of Police, in his affidavit in answer to the application, says that he had no information about the case except what was contained in the letter above quoted. He had no personal knowledge of the facts, but he thought that upon the letter it was a fit and proper case in which he could exercise the powers conferred upon him by

NGA HLA v. EMPEROR.

section 54. He does not tell us whether he acted because he thought there was reasonable suspicion entertained by him or whether he thought he had credible information. A Magistrate's power to take cognizance of an offence under section 190 (1) (c) Criminal Procedure Code, is guarded by the words "upon his own knowledge or suspicion," and I do not think that larger powers were intended to be given to a Police Officer. It is necessary in exercising such large powers to be cautious and circumspect, and I hold that "reasonable suspicion" and "credible information" in section 54 must be based upon definite facts which the Police Officer must consider for himself before he acts under the section. He cannot delegate his discretion, or take shelter under another person's belief or judgment. Any other interpretation would tend to diminish the sense of responsibility of the officers concerned, and make the exercise of the power dangerous, possibilities which ought to be guarded against. The Crown has placed this matter before me in the fairest manner possible, and has not desired that my decision should be based upon further materials which have come to the possession of the Police Officer since the arrest was effected. The applicant has also placed certain facts he has since ascertained, but under the circumstances I am not called upon to consider them, or discuss their relevancy. I make the Rule absolute and direct that the accused be set at liberty.

Rule made absolute.

Babu S. C. Mukerjee, Attorney, for the Petitioner.

Mr. J. T. Hume, Public Prosecutor, for the Crown.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 444 OF 1916.

May 29, 1916.

Present:—Mr. Justice Twomey.

NGA HLA—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 221 (7), 537—Charge, omission to set forth previous conviction in—Irregularity, whether curable—Form to be used.

Magistrates should be careful to comply with the provisions of section 221 (7), Criminal Procedure Code. An omission to do so is an irregularity curable by section 537, if it has not actually prejudiced the accused.

Where it is intended to prove a previous conviction against an accused for the purpose of affecting the punishment which a Court is competent to award, Criminal Form 79 should invariably be used.

JUDGMENT.—After reading the petition of appeal and the proceedings of the trial I see no reason to interfere with the conviction under section 374/75, Indian Penal Code, or the sentence of rigorous imprisonment for seven years and I dismiss Nga Hla's appeal summarily.

The District Magistrate's procedure was irregular. He was bound by section 221 (7), Code of Criminal Procedure, to state the fact, date and place of previous conviction on the charge and omitted to do so. The omission is, however, not material as the previous convictions were put to the accused and admitted by him before judgment was passed. It is covered by section 537, Criminal Procedure Code. The District Magistrate should be careful to comply with the provisions of the Code in future. The use of Criminal Form 80 does not dispense with the procedure laid down in section 221 (7). It is not sufficient to use Criminal Form 80 alone, except in cases of the kind described in paragraph 241, Lower Burma Courts Manual. Where it is intended to prove the previous conviction "for the purpose of affecting the punishment which the Court is competent to award," Criminal Form 79 should invariably be used. There is no objection to using Criminal Form 80 as a *supplementary* form in such cases.

Appeal dismissed.

SATTENDRA NATH v. KRISHNADHAN ADHIKARI.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 359 OF 1916.

April 28, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

SATTENDRA NATH BANERJEE AND
OTHERS—2ND PARTY—PETITIONERS

versus

KRISHNADHAN ADHIKARI AND OTHERS
—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Disputed land under water—Recent possession, determination of, impossible—Procedure.

Where in a proceeding under section 145, Criminal Procedure Code, the Magistrate finds that none of the parties was in undisturbed possession of the land in dispute within two months preceding the date of the proceeding owing to the land remaining under water, the proper order for him to make is one under section 146, Criminal Procedure Code, and not to make an order in favour of the party who was in possession during the previous year.

Rule against the order of the Sub-Divisional Magistrate, Kutwa, dated the 27th January 1916.

FACTS.—In this case the dispute was about the possession of 24 *bighas* of *boro* land situate in a *beel* village. The first party claimed the land as within his boundary *jama*, and the second party, who was the *zemindar*, claimed it to be *utbandi* land, liable to settlement from year to year.

The land had been under water for some time, and as soon as it rose above water the first party went to cultivate it. The second party opposed the cultivation, and the Police, apprehending a breach of the peace, submitted proceedings under section 145, Criminal Procedure Code.

The Magistrate found that nobody had been in undisturbed possession of the land during the year in which the dispute arose, the land having remained under water till the beginning of *Assin*, but that possession must be presumed to have been with the party who was in possession during the previous year, and, accordingly, after a consideration of the evidence adduced by both parties, he declared that the first party was in possession of the land and was entitled to hold it until evicted from it in due course of law.

Babus *Jogendra Nath Mukherjee* and *Atulya Charan Bose*, for the Petitioners.

Babu *Satis Chunder Munshi*, for the Opposite Party.

On a Rule obtained by the second party against the Magistrate's order, the High Court delivered the following

JUDGMENT.—In this case we think that the Rule must be made absolute. The order of the Magistrate, as it stands, cannot possibly be supported on the evidence on the record and on his own findings. He states distinctly that nobody has been in undisturbed possession of the land this year. That must mean from the previous *Bysakh*. Later on, he says: "As there could not be any act of peaceful possession within two months of the date of the proceeding, this being impossible owing to the land remaining under water, the possession of this year is to be presumed of the man who was in possession during the previous year." This is in direct contravention of section 145 (4), Criminal Procedure Code. We think, therefore, that the proper order which the Magistrate should have made in this case was one under section 146, Criminal Procedure Code, and we accordingly substitute such an order for the order now complained of. We hold that it was impossible for the Magistrate to satisfy himself as to which of the parties was in possession of the land in dispute; and the land must, therefore, be attached until a competent Court has determined the rights of the parties thereto or the persons entitled to possession thereof. The Magistrate will issue the necessary attachment on receipt of this order.

Rule made absolute.

BENI MADHO v. ASGHAR HUSAIN.

ODDH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 133 OF 1916.

July 31, 1916.

Present:—Mr. Stuart, J. C.

BENI MADHO—DEFENDANT No. 1—

APPELLANT

versus

Sheikh ASGHAR HUSAIN—PLAINTIFF,
GANGA BAKHSH SINGH AND OTHERS

—DEFENDANTS—RESPONDENTS.

Mortgage by co-sharer—Mortgagor tenant of mortgagee—Sale of mortgaged property to third person—Consideration, portion of, left with vendee to pay off arrears of rent—Rent, suit for arrears of, by mortgagee—Proper parties—Jurisdiction of Civil and Revenue Courts.

A co sharer in a village mortgaged his share with possession, and remained in cultivation of certain portions of the mortgaged land as tenant. Subsequently he sold his share, leaving a portion of the purchase-money with the vendee to pay up the arrears of rent due by him to the mortgagee and the *lambardar*. The vendee paid the whole money left with him to the *lambardar* alone. The mortgagee sued the *lambardar*, together with the vendor and the vendee, in the Civil Court, for his share of the money thus paid to the *lambardar*.

Held, that the mortgagee had no remedy of any kind against the vendee, but only as against the *lambardar*, and this too in a Rent Court. [p. 66, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 16th February 1916, reversing the order of the Munsif, Purwa, dated the 23rd September 1915.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellant.

Syed Shahenshah Husain Rizwi and Pandit Pridyumna Kishen Kaul, for Respondent No. 1.

JUDGMENT.—Jagan Nath and Suraj Bali Singh each owned an eight-annas share in the village of Ismailpur. Jagan Nath was and is still the *lambardar* of the village. Suraj Bali Singh mortgaged with possession his eight-annas share on 10th June 1903 to Asghar Husain, exempting 5 *bighas* 4 *biswas* of *sir* land which he was to cultivate rent-free, 2 *bighas* 12 *biswas* of *khalsa* land which he was to cultivate on a rent of Rs. 12 a year, and two groves. In addition to the exempted land Suraj Bali Singh cultivated certain land as an ordinary tenant paying rent to Jagan Nath and Asghar Husain, which was at first asserted to be Rs. 40-3-0 annually but which is actually Rs. 39-12-0. Suraj Bali Singh died before 1911 and was succeeded by his sons Ganga

Bakhsh Singh, Raghunath Singh and Sardar Singh. In 1911 Jagan Nath instituted three suits for rent due against Ganga Bakhsh Singh, Raghunath Singh and Sardar Singh in respect both of the 2 *bighas* 12 *biswas* exempted by the deed of mortgage and the plot of the rental of Rs. 39-12. On 7th June 1911 Ganga Bakhsh Singh, Raghunath Singh and Sardar Singh sold the whole of their rights in the eight-annas share to a certain Pandit Beni Madho for Rs. 15,000. One item of consideration in the deed was in respect of Rs. 400 which was to be left with the vendee, for payment of the rent payable to Asghar Husain and Jagan Nath for the years 1316 to 1318 *Fashi*. Decrees were passed for all the rent due in those years shortly after the deed of sale was executed. One decree, Exhibit A11, dated the 12th June 1911, was for Rs. 7-9-6, another Exhibit A13, also of 12th June 1911, was for Rs. 56 7-0 and the third, Exhibit A 9, dated the 23rd June 1911, was for Rs. 188, the total amount being Rs. 252-0-6. These decrees were passed in favour of Jagan Nath as *lambardar*. It is to be observed that the amount of rent due was considerably less than Rs. 400 but the account was subsequently made up by Pandit Beni Madho in the following way. He paid the decretal amount due to Jagan Nath in satisfaction of the three decrees, Exhibits A11, A13 and A9. That amount came with costs to Rs. 278-15-0. He was due to pay Asghar Husain under the terms of the sale-deed on another account Rs. 178. He paid Rs. 178-14-0. He was due to pay a certain Bachehu Sahu under the terms of the sale-deed Rs. 42. He paid him Rs. 61-1-9 on account of the vendee, paying an extra amount of Rs. 19-1-9. He was due to pay to a certain Jagan Nath on account of certain decrees on behalf of the vendors under the terms of the sale-deed Rs. 925. He paid Rs. 989-0-11, making an excess of Rs. 64-0-11, and he repaid the vendors on different dates Rs. 37-4-0. He thus paid under this head of Rs. 400 Rs. 278-15-0 actually for rent and Rs. 121-4-8 partly to the vendors and partly to other persons on their behalf. He paid altogether Rs. 400-3-8.

Asghar Husain instituted a suit on 27th May 1915 in the Court of the Munsif of

BINDU BASHINI DASIA v. KESHAB LAL BASU.

Purwa, Unao District, against Pandit Beni Madho, joining Ganga Bakhsh Singh, Raghunath Singh, Sardar Singh, and Jagan Nath for half of his share of rent of the plot cultivated by Ganga Bakhsh Singh, Raghunath Singh and Sardar Singh at the rental of Rs. 39-12-0 (which he erroneously stated as Rs. 40-3-0) from 1315 to 1318 *Fasli*, that is to say, for Rs. 160-12-0, and also for the rent of the 2 *bighas*, 2 *biswas* at Rs. 12 a year from 1315 to 1318 *Fasli*, that is to say, Rs. 48.

The learned Munsif dismissed the suit. The learned Subordinate Judge on appeal decreed it, on the ground that there was a trust between Asghar Husain and the vendee, for half of what he found had been actually paid to Jagan Nath, that is to say, Rs. 85-6-0, and Rs. 48, the rent of the *khalsa* land, total Rs. 133 6-0.

Pandit Beni Madho has come here in appeal against this decision. Asghar Husain has filed cross-objections. I am unable to accept the learned Subordinate Judge's view that there was any trust. The vendors had agreed that they would write off Rs. 400 as consideration received if the vendee satisfied all the arrears of rent due from them to Jagan Nath and Asghar Husain. They erroneously stated that amount to be Rs. 400. The amount actually due was Rs. 278-15-0. The vendee satisfied that amount. If he had done nothing further the vendors would have had a case against him for the balance of Rs. 400. But it is established that the vendee, finding that the amount due for rent was less than Rs. 400, repaid the balance partly to the vendors themselves and partly to their credit with other persons. The amount of rent due was paid to Jagan Nath and was rightly paid to Jagan Nath as *lambardar* on behalf both of himself and Asghar Husain. Asghar Husain has endeavoured to improve his case by producing in evidence a notice that was sent on 20th June 1911 by a certain Mr. Mathura Dutt, a Pleader of Naini Tal, asking Asghar Husain what was due to him for rent. It is sufficient to say with regard to this notice that there is a final finding of fact to the effect that Mr. Mathura Dutt had no authority to act on behalf of Pandit Beni Madho, and it is further not established what amount Asghar

Husain claimed in reply to this notice. He proves that he sent a reply but there is no proof as to its contents. The point for decision is an extraordinarily simple one. The vendors owed certain rent. They agreed with the vendee that the vendee should pay that rent. They erroneously stated that they owed more rent than the amount which was actually due. But the vendee straightforwardly made up the difference and returned them the balance. Certain rent was due to Asghar Husain. He cannot possibly claim more than was due to him because the vendors had misstated the amount to the vendee. The amount of rent due to Asghar Husain was paid to Jagan Nath who was acting on his behalf as *lambardar*. His remedy was against Jagan Nath in a Rent Court and he has no remedy of any kind against Pandit Beni Madho.

I, therefore, allow this appeal and dismiss the cross-objections. The suit of Asghar Husain will stand dismissed. Asghar Husain will pay his own costs of the appeal and the cross-objections and those of Pandit Beni Madho in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 27 OF 1916.

August 18, 1916.

Present:—Sir Asutosh Mookerjee, Kt., and
Mr. Justice Cuming.

BINDU BASHINI DASIA—

OPPOSITE PARTY—APPELLANT

versus

KESHAB LAL BASU AND ANOTHER

—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Execution proceedings, order at one stage of—Right to question in another stage—Order-sheet, correctness of entries in—Presumption—Burden of proof.

An order made at one stage of execution proceedings cannot be questioned at a later stage, unless the party sought to be bound by such order had no notice of the proceedings. [p. 68, col. 1.]

Mungul Pershad Ditch v. Grijā Kant Lahiri, 8 C. 51 (P. C.); 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32; *Mazzem Hossein v. Sarat Kumari Debi*, 5 Ind. Cas. 89; 11 C. L. J. 357;

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14 C. W. N. 433; *Mon Mohan v. Dwarka Nath*, 7 Ind. Cas. 55; 12 C. L. J. 312; *Mochai Mandal v. Meseruddin Mollah*, 9 Ind. Cas. 213; 13 C. L. J. 26; *Sheik Budan v. Ramchandra Bhungaya*, 11 B. 537; 6 Ind. Dec. (N. S.) 354; *Narayana Pattar v. Gopalakrishna Pattar*, 28 M. 355; 15 M. L. J. 247; *Ramasami Naik v. Ramasami Chetti*, 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201, referred to.

A first application for the execution of a decree was not made in accordance with law within three years of the passing of the decree. On a second application for execution made within three years of the first, the Court directed a writ of attachment to issue. The order-sheet showed that the order for attachment was made after service of notice upon the judgment-debtor, but the execution case was dismissed for default. On a third application for execution made within three years of the second, the judgment-debtors appeared and contended that the execution was barred:

Held, that so long as the order for attachment passed on the second application for execution stood, the judgment-debtors could not contend that the execution of the decree was barred unless they established that the order was made without notice to them. [p. 68, col. 1.]

Held, also, that in view of the entry of service of notice in the order-sheet the onus lay upon the judgment-debtors to establish that the notice was not served upon them. [p. 69, col. 1.]

Ex parte entries made in the order-sheet of a Court are not conclusive evidence of their correctness, but there is no presumption that the entries are false. [p. 68, col. 2.]

A party, therefore, who contends that they do not correctly state the events that have taken place must start his case. But the position is different where the entry affects a person who is not a party to the proceedings and he questions its correctness. [p. 68, col. 2; p. 69, col. 1.]

Mr Tapurah Hossein v. Gopi Narayan, 7 C. L. J. 251; *Radhay Koer v. Ajodhya Das*, 7 C. L. J. 262; *Ananda Kishore v. Daiji Thakurani*, 1 Ind. Cas. 549; 10 C. L. J. 189; 36 C. 726 and *Mohiuddin v. Pirthichand Lal*, 31 Ind. Cas. 664; 19 C. W. N. 1159, referred to.

Ananda Kishore v. Daiji Thakurani, 1 Ind. Cas. 549; 10 C. L. J. 189; 36 C. 726 and *Mohiuddin v. Pirthichand Lal*, 31 Ind. Cas. 664; 19 C. W. N. 1159, distinguished.

Appeal against the order of the Subordinate Judge, Jessore, dated the 17th September 1915, affirming that of the Munsif, 3rd Court, of that place, dated the 12th December 1914.

Mr. B. K. Lahiri and *Babu Khetra Mohan Ghose*, for the Appellant.

Babus Sarat Chandra Roy Choudhury and *Satya Charan Sinha*, for the Respondents.

JUDGMENT.—This appeal is directed against an order of dismissal of an applica-

tion for execution of a decree. The decree was made on the 5th November 1906. The first application for execution was made on the 12th October 1909. Notice under Order XXI, rule 22, was directed to issue, as more than a year had elapsed from the date of the decree. There is an entry in the order-sheet of return of service, which states that notice was served duly. But on the 15th December 1909, the application was dismissed for default, as neither the decree-holder nor the judgment-debtor was present. The second application for execution was made on the 15th July 1911. Notice was directed to issue on the judgment-debtors under Order XXI, rule 22. The entry in the order-sheet made on the 7th August 1911 recites that the notice had been duly served. On the 21st August 1911 the Court directed a writ of attachment to issue in respect of the immoveable properties of the judgment-debtors. There is an entry in the order-sheet that the writ had been served in due course. This was followed by an order for proclamation of sale. But the proclamation was not published and the case was again dismissed for default on the 16th January 1912. The present application for execution was made on the 24th January 1913. The judgment-debtors entered appearance and contended that the application was barred by limitation. The Courts below have given effect to this objection and have dismissed the application. They have found that the application for execution made on the 12th October 1909 was defective in substance, that time was accordingly given to the decree-holder to amend and re-file the application within five days, that the application was not re-filed within the time allowed, and that, even when re-filed on the 20th November 1909, without leave obtained for extension of time, it was defective in material particulars. On these grounds the Courts have held that the application of the 12th October 1909 was not in accordance with law to the proper Court to take a step-in-aid of execution, that the subsequent application for execution made on the 10th July 1911 was consequently of no avail to the decree-holder, and that the present application was thus clearly barred by limitation. Neither of the Courts below,

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however, has examined in detail the proceedings on the basis of the second application for execution, and, this omission has, in our opinion, led to an error of law which vitiates their concurrent decision.

An examination of the order-sheet in the proceedings on the basis of the second application discloses that on the 21st August 1911, the Court directed a writ of attachment to issue. This was in substance a determination that the decree was on that date alive and capable of execution. So long as that determination stands, it is impossible for the judgment-debtors to contend that the present application is barred by limitation. [*Mungul Pershad Dicht v. Grija Kant Lahiri* (1)]. The order for attachment was, if the entries in the order-sheet are reliable, made after service of notice on the judgment-debtors under rule 22 of Order XXI of the Code, and was followed by service of the writ of attachment. Consequently, to entitle the judgment-debtors to escape from the operation of the order of the 21st August 1911, they must establish that the order was made without notice to them. The principle applicable to cases of this character, as deducible from a long line of cases, *Mazzeem Hossein v. Sarat Kumari Debi* (2), *Mon Mohan v. Dwarka Nath* (3) and *Michai Mandal v. Meseruddin Mollah* (4), is that an order made at one stage of execution proceedings cannot be questioned at a later stage, unless the parties sought to be bound by such order had no notice of the proceedings. Cases are by no means rare where orders have been obtained in execution proceedings without service of notice on the judgment-debtor, who has subsequently succeeded, on proof of non-service of notice upon him, in escaping from the effect of such *ex parte* order. Reference may, in this connection, be made to *Sheik Budan v. Ramchandra Bhunjjaya* (5), *Narayana Pattar v. Gopalakrishna Pattar* (6) and *Ramasami Naik v. Ramasami*

Chetti (7). This point of view does not appear to have been fully realised in either of the Courts below; as a result, the judgment-debtors have been allowed to attack the validity of the proceeding on the first application, regardless of what had taken place on the second application. But before they could reach that stage, they were bound to attack the order of the 21st August 1911 and to establish that it was not operative against them because made without previous service of notice. The judgment-debtors, however, have contended here that the burden lies upon the decree-holder to establish that the order in question is conclusive, because made after service of notice on them. In our opinion, this position is absolutely untenable. There is no presumption that the proceedings in execution in this or in other cases have been vitiated by fraud and that the entries in the order-sheet contain untrue statements of what took place in the Court below. The petition of objection of the judgment-debtors shows that they attacked the proceedings in execution as fraudulently taken. They alleged specifically that by reason of collusion between the officers of the Court and the decree-holders, the notices had been deliberately suppressed and false returns had been submitted to the Court. When fraud of this description is charged, it is incumbent upon the judgment-debtors to establish at least a *prima facie* case. But reference has been made to the decisions in *Mir Tapurah Hossein v. Gopi Narayan* (8), *Radhay Koer v. Ajodhya Das* (9), *Ananda Kishore v. Daiji Thakurani* (10) and *Mahmuddin v. Pirthichand Lall* (11) to show that entries in the order-sheet as to the factum of service of notice issued by the Court are not admissible in evidence. There is no room for dispute that such *ex parte* entries do not constitute conclusive evidence; at the same time, as we have said, there is no presumption that the entries are false. The party who contends that the entries do not correctly state the events that have taken place

(1) 8 C. 51 (P. C.); 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. s.) 32.

(2) 5 Ind. Cas. 89; 11 C. L. J. 357; 14 C. W. N. 433.

(3) 7 Ind. Cas. 55; 12 C. L. J. 312.

(4) 9 Ind. Cas. 213; 13 C. L. J. 26.

(5) 11 B. 537; 6 Ind. Dec. (N. s.) 254.

(6) 28 M. 355; 15 M. L. J. 247.

(7) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.

(8) 7 C. L. J. 251.

(9) 7 C. L. J. 262.

(10) 1 Ind. Cas. 549; 10 C. L. J. 189; 36 C. 726.

(11) 31 Ind. Cas. 664; 19 C. W. N. 1159.

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must start his case. The position is different where, as in the case of *Mir Tapurab Hossein v. Gopi Narayn* (8), where service of notice of deposit under section 61 (2) of the Bengal Tenancy Act was raised, or in *Radhey Koor v. Ajodhya Das* (9), where service of notice of annulment of incumbrance under section 167 of the Bengal Tenancy Act was in controversy, the entry affects a person who is not a party to the proceedings. The case of *Ananda Kishore v. Daiji Thakurani* (10) merely shows that an entry in an order-sheet of a Collector in a proceeding for partition of an estate, that possession has been delivered to one of the share-holders, is no evidence that he is in possession at a subsequent date so as to bar a suit for declaratory relief. There is also a fundamental difference between the case before us and the other cases represented by *Mohiuddin v. Pirthichand Lal* (11), where no right accrues against a stranger till the statutory notice has been served on him. There the service of notice is the foundation of the jurisdiction of the Court and is essential for the creation of a right in the claimant; in such a case the claimant must establish that all the statutory requirements have been strictly carried out. We feel no doubt whatever that in the case before us the burden lies upon the judgment debtors to establish that the notices were not served upon them. If that allegation is not made out, the order of the Court dated the 21st August 1911 stands unimpeached and is an effective bar against an attack on the earlier proceedings in execution.

The result is that this appeal is allowed and the order of the Courts below discharged. The case will be remitted to the Court of first instance in order that it may, upon evidence to be adduced by both sides, determine whether the order of the 21st August 1911 was or was not made with notice to the judgment-debtors. If it is established that it was made with notice to the judgment-debtors, the objection of limitation must be overruled. If, on the other hand, it is established that the order was made without service of notice upon the judgment-debtors, the question of validity of the earlier proceedings in execution will be taken up for examination. The appellant is entitled to her cost in this Court as

also in the Courts below. We assess the hearing-fee at two gold *mohurs* in this Court and at one gold *mohur* in each of the Court below. The sum payable as costs which will be specified in the decree must be deposited in the Court of first instance within one month after the arrival of the record there. If the sum is not so deposited, the objection of the judgment-debtors will stand overruled and execution will proceed forthwith at the instance of the decree-holder.

Appeal allowed.

ODISH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 131 OF 1913.

February 25, 1916.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

DIP NARAIN SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

Chauhlari HARGOBIND SINGH—

PLAINTIFF—RESPONDENT.

Gift—Will—Construction of document—Vested interest, transfer of—Will and gift, deeds of, executed simultaneously—Statement in Will as to revocability of gift, effect of—Estoppel.

Where a document, executed on account of natural love and affection and registered as a non-testamentary document relating to immoveable property, stated that, as the executant was "giving" the property to the person named therein to be enjoyed by the latter as owner after the death of the former and his widow, he agreed not to transfer the property by gift, sale, or mortgage, or encumber or hypothecate it:

Held, that the document transferred a vested interest by gift and was not a devise that could be revoked. [p. 71, col. 1.]

Where a deed of gift and a deed of Will are executed simultaneously, the fact that the executant states in the latter deed that he shall have the power to revoke the former on the occurrence of a certain specified contingency, does not detract from the former deed operating as a deed of gift. [p. 71, col. 1.]

Obiter dictum.—Where in consideration of A's withdrawing all claims to properties transferred to B, A is given some property under a deed executed in his favour, B is estopped from questioning the validity of the deed. [p. 71, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 20th October 1913.

Babus Ram Chandra and Brij Bhan Chandra, for the Appellants.

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Babu Basdeo Lal and Mr. Mohamed Siddique, for the Respondent.

JUDGMENT.—Bangsopal and Suraj Prasad were the sons of Madho Ram Kayesth. Bangsopal had a daughter *Musammatt Jagbans Kuar*, who married Gopal Bakhsh. Suraj Prasad had a son named Hargobind Singh. Jagbans Kuar and Gopal Bakhsh had two sons Dip Narain and Mahip Narain. Bangsopal, having no male issue, executed on 17th April 1878 a deed of sale in favour of Gopal Bakhsh, his son-in-law, in respect of a share of four annas in the village of Bishanpur Kharehna in the Gonda District. Although the transfer purported to be by sale, it appears that no consideration passed and that Bangsopal intended to make a gift of this property to his son-in-law for the benefit of his daughter and his daughter's children. When an application was made for mutation of names with respect to this property, Hargobind Singh raised an objection in the Revenue Court to the effect that this transfer was prejudicial to his rights as a reversionary heir to the property of Bangsopal. Bangsopal, Gopal Bakhsh and Suraj Prasad then met and agreed to make an arrangement by which the interests both of the sons of Gopal Bakhsh and Hargobind Singh should be secured, and in consequence of this arrangement four documents were executed and registered on 18th January 1879.

The first of these documents (Exhibit 1) purported to secure to Hargobind Singh a four-annas share in Bodhipur after the death of the Bangsopal and the death of the wife of Bangsopal. The second document (Exhibit 2) was a Will by which Bangsopal, after the exclusion of the four-annas share in Bodhipur and the four-annas share in Bishanpur Kharehna, made provision for his wife and devised portions of his property to Dip Narain, Mahip Narain and Hargobind Singh. The third document (Exhibit 10) was an agreement by Gopal Bakhsh assenting to the above dispositions. The fourth document (Exhibit 12) was executed by Suraj Prasad on behalf of himself and Hargobind Singh who was then a minor. By this he accepted the transfer of the four-annas share in Bishanpur Kharehna to Gopal Bakhsh and withdrew all the objections made to that transfer filed on

behalf of Hargobind Singh. He further accepted the arrangement made in Exhibit No. 1 and Exhibit No. 2.

Bangsopal made a subsequent Will on 13th December 1892 by which he left the whole of his property to Dip Narain and Mahip Narain, excluding the share in Bishanpur Kharehna which had already been taken possession of by Gopal Bakhsh. His wife predeceased him and he died himself on 27th July 1904. On his death Hargobind Singh applied for mutation over the property, to which he laid claim on the death of Bangsopal. Dip Narain and Mahip Narain set up a title based on the subsequent Will. They obtained mutation and possession over the whole of the property of Bangsopal on 27th September 1905.

Hargobind Singh instituted the present suit on 23rd November 1912 for possession of the four-annas share in village Bodhipur and mesne profits. He based his claim on the provisions of Exhibit No. 1. Dip Narain and Mahip Narain denied the validity of this document. They set up that it was invalid *per se*, and that, if it had any validity, it was valid only as a revocable testamentary disposition, and, as such, had been revoked and cancelled by the Will of 13th December 1892. The learned Subordinate Judge who tried the suit decided against them. He found that the document Exhibit No. 1 gave title to the plaintiff to succeed to the property, and that the suit had been brought within limitation, and he gave a decree for possession and mesne profits. Against this decree the present appeal is preferred.

The decision of this appeal turns on the interpretation of Exhibit No. 1 and a consideration of its validity. This document was registered as a non-testamentary document relating to immoveable property. Bangsopal states therein: "I am giving" the four-annas share in Bodhipur to Hargobind Singh. He goes on to say that as he is giving the share to Hargobind Singh he agrees that he will not transfer the share by gift, sale, or mortgage, or encumber it or hypothecate it. But he continues that, during his lifetime and the lifetime of his wife, the share shall be enjoyed by himself during his lifetime and

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by his wife after his death. The words here are slightly obscure as a verb has apparently been left out. He continues that Hargobind Singh shall be owner and possessor of the share after his death and after the death of his wife. The meaning presents no difficulties. The deed transfers a vested interest by gift. It is a registered deed and it is executed on account of natural love and affection. It is not a devise and is not revocable. It is true that in Exhibit No. 2 Bansgopal has stated that if he contracts a second marriage and a son is born to him he shall have the power to revoke Exhibit No. 1. But the fact that he made this statement does not affect the case. It is admitted that the contingency therein contemplated did not arise, and that he died without having re-married or having a son born to him. It is further to be noticed that in Exhibit No. 2, which is clearly a Will and as such revocable, Bansgopal has asserted that his dispositions made therein are irrevocable. This circumstance did not make them irrevocable and the Will was as a matter of fact revoked. It is unnecessary in these circumstances to go into the other points raised in connection with the validity of this instrument, although it may be noticed that, inasmuch as Dip Narain and Mahip Narain benefited by the execution of Exhibit No. 2 and Exhibit No. 12 and inasmuch as Hargobind Singh withdrew all his objections to the transfer of the four-annas share in Bishanpur Kharebna because Exhibit No. 1 was executed in his favour, they would in any circumstances be estopped from questioning the validity of Exhibit No. 1. That point is, however, unimportant for the title on Exhibit No. 1 cannot be challenged legally. We do not consider that the decree for mesne profits is open to objection.

We, therefore, dismiss this appeal. The appellants will pay their own costs and those of the respondent.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 87 of 1914.

January 24, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

KETOKEY CHURAN BANERJEE AND

ANOTHER—DEBTORS—APPELLANTS

versus

Sreemutty SARAT KUMARI DABEE—

CREDITOR—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 8 (2), 12 (1) (a), 13, 25, 26, 27, 86—“Person aggrieved by the decision”, meaning of—Benamdar of creditor, whether can prove debt in insolvency—Petitioning creditor’s claim, whether can be questioned in insolvency—Admission by attorney, effect of.

It is open to an insolvent to question the right of a person, on whose petition as a creditor the adjudication in insolvency has been made, to claim in the insolvency as a creditor, and the Official Assignee, after the insolvency, is competent to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he must strike out his name from the list of creditors. [p. 72, col. 1; p. 73, col. 2.]

A benamdar for the real creditor is not competent to rank as a creditor in insolvency proceedings, but the person who really advanced the money should come forward and prove his claim. [p. 73, cols. 1 & 2.]

Per Mookerjee, J.—Any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision is, if the decision goes against him, thereby a “person aggrieved by that decision” within the meaning of that expression in section 86 of the Presidency Towns Insolvency Act. [p. 73, cols. 1 & 2.]

Official Receiver, Ex parte, Read, Brown & Co., In re, (1887) 19 Q. B. D. 174; 4 Morrell 225; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 60; Lamb, In re, Board of Trade, In re, (1894) 2 Q. B. 805; 1 Manson 373; 64 L. J. Q. B. 71; 71 L. T. 12, referred to.

The term “creditor” in the Presidency Towns Insolvency Act does not include a benamdar of the creditor. [p. 73, col. 2.]

An admission of an attorney, until satisfactorily explained away, is cogent evidence against his client. [p. 74, col. 2.]

Slatterie v. Pooley, (1840) 6 M. & W. 664 at p. 669; 1 H. & W. 18; 10 L. J. Ex. 8; 4 Jur. 1038; 151 E. R. 579; 55 R. R. 760; Chandra Kumar v. Chaudhuri Narpal Singh, 34 I. A. 27; 29 A. 154; 11 C. W. N. 321; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 4 A. L. J. 102, referred to.

Appeal against the order of Mr. Justice Chaudhuri, in Insolvency Jurisdiction.

Mr. N. N. Sircar (with him Mr. P. C. Sen) for the Appellants.

Mr. H. D. Bose (with him Mr. A. N. Chaudhuri), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case the adjudication in insolvency was made on the

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2nd of February 1912, upon the petition of Sarat Kumari Dabee. An application for the cancellation of the adjudication was made in March 1912, based, as I understand, on the ground that there was no debt due to Sarat Kumari Dabee, and this application for the cancellation of the adjudication was dismissed, and, therefore, the adjudication in insolvency stood. And, the first point taken by the learned Counsel appearing for Sarat Kumari Dabee was that inasmuch as the adjudication had been made upon her petition, it was not now open to the insolvents to question her right to claim in the insolvency as a creditor. I do not think that is a sound point, for the reason that if we look at the sections of the Second Schedule to the Presidency Towns Insolvency Act, sections 25, 26 and 27, it is clear, to my mind, that after the adjudication of insolvency the Official Assignee is to examine every proof and the grounds of the debt and in writing to admit or reject it in whole or in part, or require further evidence in support of it; and, if he rejects a proof, he shall state in writing to the creditor the grounds of the rejection. In my opinion, it must be open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he surely must say so and strike out his or her name from the list of creditors. For this reason I do not think that the first point taken by learned Counsel is a good one.

The second point which the learned Counsel for Sarat Kumari Dabee argued was that the learned Judge's judgment ought to be supported on the merits of the case. Now, it appears that the claim of the alleged creditor in the first instance was stated to be Rs. 8,000 and then subsequently it was increased to Rs. 15,641, and that appears to be the balance of an account which appears in the *hatchitta* which is set out in the paper-book No. 2, and we have been informed that there are entries in the firm's books, which correspond with the entries in the *hatchitta*. Now, the first entry in the account, page 1, is a sum of Rs. 2,487-8-6, which on the face of it appears to be due by the firm to Sarat

Kumari Dabee. It is, however, admitted by the learned Counsel who appears for her that that money was advanced by her husband Surendra Nath Bannerjee, and was not her money at all. The second item which appears in that account is a sum of Rs. 14,498-13-6: that appears to have been originally a debt due from the firm to Nogendra Nath Bannerjee, brother-in-law of the lady. That item was transferred from the account of Nogendra Nath Bannerjee in January 1909 to the account of the lady, and it is not suggested that any consideration passed for that transaction, and it is now admitted that that really was money advanced by Nogendra Nath, and the lady in respect of that item was not in fact a creditor of the firm. Now, with regard to the rest of the items, when we once get it admitted that of these two items, the first represents a debt due to her husband and the second, a debt due to her brother-in-law, it makes the Court particularly careful to require proof of the remainder of the items. The lady has not been called as a witness. She has not come forward to say that she advanced those moneys. Her husband has not been called as a witness to say that the money was his wife's, and, the result is that I am led to think that this account is not an account of the lady at all; it is partly an account of her husband and partly an account of her brother-in-law. In addition to the reasons which have been given by the Official Assignee in the judgment, I think the statement of these facts is sufficient for the judgment at which I have arrived, and this is that this lady is not a creditor of the firm at all, and that her name ought to be struck out of the list of creditors. This, as I understand, does not prevent the persons who have really advanced the moneys to the firm from coming forward and substantiating their claims against the firm. It is right that the persons who really advanced the moneys should come forward and prove their claims to the Court. As between them and the firm and other creditors in the case different questions may arise than what would arise between the lady and the firm and other creditors of the firm.

There is only one other point which has

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been urged by the learned Counsel and that is that inasmuch as the lady, if she was in the position of a *benamdar*, could sue for the money, she is entitled to claim as a creditor in the insolvency.

Speaking for myself, I do not think that is so; she is not in the position of a trustee or executor, to which reference was made by learned Counsel, and in the absence of evidence as to her real position it must be assumed that the lady was simply a conduit pipe for the money being advanced, and in all probability she knew nothing of the money being advanced, and her name was taken merely as a blind for the real transaction that had taken place, and I do not think that this last contention is a good one.

For these reasons I think this appeal should be allowed and the order of the Official Assignee should be restored with costs both of this Court and the Court below, and the name of Sarat Kumari Dabee should be removed from the list of creditors.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree that the order of Mr. Justice Chaudhuri cannot be supported. The appeal has been preferred by three persons who were adjudicated insolvents on the 2nd February 1912 at the instance of the respondent. An endeavour was made to have the adjudication annulled, but as the conditions imposed by the Court were not fulfilled, the attempt proved infructuous. The appeal to Chaudhuri, J., was preferred under section 86 of the Presidency Towns Insolvency Act against a decision by the Official Assignee that the respondent is not a creditor of the insolvents as she asserts, but a *benamdar* for her husband's brother who is alleged to have been a partner of the insolvents. The present appeal has been preferred under section 8, clause (2), from the order of Chaudhuri, J., who reversed the decision of the Official Assignee.

The preliminary objection taken on behalf of the respondent to the competency of this appeal has been overruled on the principle that any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision, is, if the decision goes against him, thereby a "a person

aggrieved by that decision" within the meaning of that expression in section 86 [Official Receiver, *Ex parte*, Reed, Brown & Co., *In re* (1) and Lamb, *In re*, Board of Trade, *In re* (2)].

As regards the merits the decision of Chaudhuri, J., has been sought to be supported on three grounds:—*First*, that it is not now open to the appellants to assert that the respondent is not their creditor, inasmuch as an order for adjudication has already been made at her instance on the basis that she was a creditor; *secondly*, that even if it be found, as was held by the Official Assignee, that she was not a real creditor but a *benamdar* of her husband's brother, who at one time was a partner of the firm of the insolvents, she was entitled to rank as a creditor in these proceedings; and *thirdly*, that the evidence establishes that she was not a *benamdar* of her husband's brother as alleged by the insolvents.

As regards the *first* point, I am of opinion that the provisions of the Insolvency Act taken together indicate with reasonable certainty that it cannot possibly be supported. If the contention of the respondent were to prevail, the result would follow that when an adjudication order has been made at the instance of a person claiming to be a creditor whose debt exceeded the statutory amount, it would not be open to the Official Assignee, on the investigation to be held thereafter, to find that the amount due to the petitioning creditor was smaller than that mentioned in section 12 (1) (a). But sections 12 and 13, read with the provisions contained in the Second Schedule for investigation and proof of the claim of a creditor, make it obvious that this was not intended by the Legislature. I hold, accordingly, that the Official Assignee was competent to come to the conclusion he did, namely, that nothing was due to the respondent as a creditor of the insolvents.

As regards the *second* point, I am of opinion that the term "creditor" in the Presidency Towns Insolvency Act does not include a *benamdar* of the creditor. The

(1) (1887) 19 Q. B. D. 174; 4 Morrell 225; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660.

(2) (1894) 2 Q. B. 805; 1 Manson 373; 64 L. J. Q. B. 71; 71 L. T. 12.

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respondent has argued that as it has been ruled by the Judicial Committee [*Gopeekrist Gosain v. Gungapersaud Gosain* (3)] that a *benamdar* for the real creditor can maintain a suit for recovery of the money, he is equally competent to pose as a creditor in insolvency proceedings. I am clearly of opinion that we should not accept this contention. The ordinary meaning of the term "creditor" is that he is a person to whom a debt is payable. No doubt, it is open to a *benamdar* to maintain a suit on a money-bond in his own name, although the money may have been advanced really by some one else and by the application of the doctrine of estoppel, the act of the *benamdar*, when a suit is so instituted, may conclude the real creditor; but this does not justify the contention that the term "creditor," as used in the Presidency Towns Insolvency Act, includes the *benamdar* of a creditor. A *benamdar* is merely a name-lender, a mask for the real owner, and is, undoubtedly, not in the position of a trustee; the view cannot consequently be maintained that, although the money is established to be not really payable to the person who pretends to be a creditor of the insolvent, yet such person should be allowed to rank as a creditor in insolvency proceedings, merely because the transaction took place in his name.

As regards the *third* point, there is no room for reasonable doubt that the respondent is not a creditor of the insolvents. Our attention has been drawn to the circumstance that an account was opened in the name of the respondent as early as the 18th March 1906, and that, so far as the evidence goes, a sum of Rs. 2,487-8-6 was advanced by her to the partnership concern. It has not been maintained, however, that this was her own money, for it has been conceded on her behalf that the money really belonged to her husband, Surendra Nath Bannerjee.

Another sum of Rs. 14,233-13-6, it is plain from the accounts placed before us, originally constituted a debt payable by the partnership concern to Nogendra Nath Bannerjee. On the 10th January 1909, this sum was

transferred to the account of the respondent. There is no reasonable doubt that this was a mere paper transfer and in no sense a real transaction; indeed, the attorney for the respondent admitted before the Official Assignee that no consideration passed as between Nogendra Nath Bannerjee and his sister-in-law, the present respondent, Mr. Bose fully appreciated the effect of such admission, which, until satisfactorily explained away, furnished cogent evidence against the respondent [*Slatterie v. Pooley* (4) and *Chandra Kunwar v. Chaudhri Narpal Singh* (5)]; he was consequently constrained to present her case before us on the basis that this transfer was a *benami* transaction, and that in respect of this sum, which ultimately found its way into the account of the respondent, she was a *benamdar* for her brother-in-law. He argued, however, that in the absence of evidence to show the source of the subsequent advances to the partnership firm, the inference should be drawn that they were the moneys of the respondent in the sense that they were the moneys of her husband. In my opinion this inference cannot legitimately be drawn in favour of the respondent. The essence of the matter is that her account opens with two sums, Rs. 2,487-8-6 and Rs. 14,233-13-6 respectively; in respect of one of these sums, the lady was a *benamdar* of her husband, while in respect of the other, she was a *benamdar* of her brother-in-law. True it is that there is no evidence of the source of the subsequent advances, but in the absence of tangible proof, we cannot assume that those sums belonged rather to her husband than to her brother-in-law. There is a further significant admission by Nogendra Nath Bannerjee that he and his brother Surendra Nath Bannerjee are joint, and this account may lend some support to a possible theory that both the brothers used the name of the respondent as their *benamdar*. But whatever the real state of affairs may be, one cardinal fact is established beyond controversy, namely, that the respondent is not a creditor of the insolvents. How much of the sum which stands in her name is her husband's

(4) (1840) 6 M. & W. 664 at p. 669; 1 H. & W. 18; 10 L. J. Ex. 8; 4 Jur. 1038; 151 E. R. 579, 55 R. R. 760.

(3) 6 M. L. A. 53 at p. 72; 4 W. R. (P. C.) 46; 1 Sar. F. C. J. 493; 19 E. R. 20,

(5) 34 I. A. 27; 29 A. 184; 11 C. W. N. 321; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 4 A. L. J. 102.

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money and how much thereof is her brother-in-law's money, we do not know; but if she be not a creditor of the insolvents, as I hold she is not, the conclusion is irresistible that her name must be removed from the category of the creditors of the insolvents in these proceedings. This, it may be added, will not debar either Nogendra or Surendra from taking such steps as they may be advised to adopt for the establishment of their claims, if any, as against the insolvents.

Appeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 88 OF 1915.

January 6, 1916.

Present:—Mr. Justice Parlett.

MA PU—APPLICANT

versus

MA SU—RESPONDENT.

Suit by executor for possession of moveable property belonging to the deceased—Jurisdiction—Small Cause Court.

A suit by an executor or administrator for possession of moveable property belonging to the estate of the deceased is cognizable by a Court of Small Causes.

Kapalee Bewa v. Keshram Kooch, 11 W. R. 93; and *Khursedji Rustomji Colah v. Pestonji Cowasji Bucha*, 12 B. 573; Chitty's S. C. C. R. 187; 6 Ind. Dec. (N. S.) 865, followed.

Mr. Harvey, for the Applicant.

Mr. Vertannes, for the Respondent.

JUDGMENT.—The plaintiff's claim was treated by the Judge of the Small Cause Court of Rangoon as two-fold, *first*, for the return of property given her by the defendant and then resumed by her, and *secondly*, as administratrix of her son's estate for the possession of moveable property belonging to the estate in the hands of the defendant. The *first* part of the claim he held not proved on the evidence, and the *second* as not cognizable by a Court of Small Causes. The latter view is contested by the plaintiff in this Court and defendant's Counsel does not uphold it. There is authority to the contrary, *Kapalee Bewa v. Keshram Kooch* (1) and *Khursedji Rustomji Colah v. Pestonji Cowasji Bucha* (2), and I am of opinion that the claim was

(1) 11 W. R. 93.

(2) 12 B. 573; Chitty's S. C. C. R. 187; 6 Ind. Dec. (N. S.) 865.

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cognizable. I remand the case for a decision upon the plaintiff's claim as administratrix to the property as part of the estate of her son.

Revision allowed; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECTION 115 APPLICATION No. 96 OF 1916.

July 27, 1916.

Present:—Mr. Stuart, J. C.

RAM DAYAL—PLAINTIFF—APPLICANT

versus

RAM NEWAS AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Agreement to abide by oath of opposite party—Resiling from agreement subsequently, effect of.

Where the defendant first offered to abide by the plaintiff's oath and then resiled from it:

Held, that the plaintiff was not entitled to a decree merely on that ground.

Application for revision of the order of the Additional Judge, Small Cause Court, Lucknow, dated the 30th June 1916.

Babu Lachhman Das, for the Applicant.

JUDGMENT.—Record seen. The action of the defendants in first offering to abide by the plaintiff's oath and then resiling, cannot entitle the plaintiff to a decree. There is absolutely nothing on which a revision can be allowed. This was a clear decision on a point of fact. I dismiss this application. Let the record be returned.

Application dismissed.

JHABBA LAL v. SHIB CHARAN.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 22 OF 1916.

October 24, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Stuart.

JHABBA LAL—APPELLANT

versus

SHIB CHARAN AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 22, 46
—Appeal—Claim against insolvent's estate—Creditors,
rights and duties of—Party, who can be—'Person aggrieved',
meaning of—Estate, representation of—Receiver,
right of—Receiver not appointed—Procedure, proper.

One creditor out of the general body of creditors has no *locus standi* in an application in the Insolvency Court made, against the estate of the insolvent represented by the Receiver, by a person claiming adversely to the insolvent's estate and has no right of appeal against a decision in such an application. [p. 76, col. 2.]

Unless the Receiver has refused to move and so given a decision by which each of the general body of creditors has been aggrieved, a creditor cannot apply to the Insolvency Court for the attachment of any property as being the property of the insolvent. The proper course is to apply to the Receiver to set him in motion and if the Receiver declines to move, the creditor can apply to the Court under section 22 of the Provincial Insolvency Act against the act or decision of the Receiver. [p. 76, col. 2; p. 77, col. 1.]

The Receiver ought to be made a party to any proceedings under section 22 of the Provincial Insolvency Act, and all questions which arise between the insolvent and a person who is either a creditor or a stranger to the insolvency must be decided between such person and the Receiver as representing the estate. [p. 77, col. 1.]

Creditors have a right to prove for their own claims, a right to supply the Receiver with information relating to claims which the insolvent's estate may have against other persons, and a right to bring the Receiver's conduct and decisions before the Court if he declines to act or neglects his duties; but they have no legal interest in the insolvent's estate and no title to represent it. The proper course, if a creditor is desirous of starting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings or to obtain the permission of the Court to intervene as an *amicus curiæ*. [p. 77, cols. 1 & 2.]

No one of the creditors can intervene except through the Receiver. If he is not a proper party to an application, he clearly has no right of appeal except in the event of an order for costs being made against him which ought not to have been made. He is not a 'person aggrieved' within the meaning of section 46 of the Act. [p. 77, col. 2.]

Sidebotham, Ex parte, Sidebotham, In re, (1830) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715, referred to.

Balli v. Nand Lal, 33 Ind. Cas. 773; *Ketokey Churan Banerjee v. Sarat Kumari Dabee*, 37 Ind. Cas. 71; 20 C. W. N. 995, distinguished.

The words 'a person aggrieved' do not mean a man who is disappointed of a benefit which he might have received if some other order had been made.

He must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something. [p. 77, col. 2.]

Where no Receiver has been appointed and the Judge is acting as Receiver under the provisions of the Act, the better course in such a case, when a dispute arises, is for the Judge to make an order appointing a particular creditor to represent the interests of the general body of creditors. [p. 78, col. 1.]

First appeal from the order of the District Judge, Meerut, dated the 1st December 1915.

Mr. M. L. Agarwala, for the Appellant.

Dr. S. N. Sen, for the Respondent.

JUDGMENT.

WALSH, J.—The question raised by this appeal is, whether one creditor out of the general body of creditors has a *locus standi* in an application in the Insolvency Court made, against the estate of the insolvent represented by the Receiver, by a person claiming adversely to the insolvent's estate. In our opinion he has no *locus standi* and no right of appeal to this Court against a decision in such an application.

The question is of some practical importance and inasmuch as there is no authority in this Court, it seems desirable to set out the grounds of our decision at some length. The appellant before us Jhabba Lal was petitioning creditor in an insolvency petition against Jetha Mal, the result of which petition was that Jetha Mal was adjudicated insolvent and the Court Nazir was appointed Receiver.

About the 19th of July 1915, the appellant applied to the Insolvency Court for the attachment of the property now in dispute as being the property of the insolvent. Whether he had any right to do so unless the Receiver had declined to interfere is immaterial, but the Insolvency Court made an order on the 23rd of August 1915 that the Receiver should attach the property, and on the 6th and 7th of September following it was duly attached. We think, however, that unless the Receiver has refused to move and so given a decision by which each of the general body of creditors has been aggrieved, there is no provision in the Act which enables a creditor to make such an application to the Insolvency Court, and that his proper course is to

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apply to the Receiver to set him in motion. If the Receiver declines to move, then the creditor can apply to the Court under section 22 against the act or decision of the Receiver. On the 11th of September 1915 an application was made out of which the present appeal arises. It was made by two persons, Shib Charan Dass and Har Charan Dass, a minor by his next friend, sons of the insolvent. It was called an objection and was in form an objection to the attachment and was a claim by these two persons, who were not creditors and who were, therefore, strangers to the insolvency, that the property was theirs and not the property of the insolvent. That was clearly an application allowed by section 22. By the application the Receiver was made a party to it. That was right and indeed necessary. The Court ought to insist upon the Receiver being made a party to any proceedings under section 22.

The petitioning creditor, the present appellant, was also made a party. That was clearly wrong. From the moment of attachment and the appointment of a Receiver the property of the insolvent rests in the Receiver. All questions which would otherwise arise between the insolvent and a person who is either a creditor or a stranger to the insolvency, must be decided between such person and the Receiver as representing the estate.

Creditors have a right to prove, for their own claims, a right to supply the Receiver with information relating to claims which the insolvent's estate may have against other persons; and they have a right to bring the Receiver's conduct and decisions before the Court if he declines to act or neglects his duties, but they have no legal interest in the insolvent's estate and no title to represent it. If they want the Receiver to litigate the question, they can supply him with funds or indemnify him against the costs in the event of failure, if he is unable to proceed for want of funds, but it would be contrary to the whole scheme of the Insolvency Act if any one out of a large number of creditors was at liberty to start all kinds of questions and set the law in motion independently of the Receiver. The proper course,

if a creditor is desirous of starting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings or obtain the permission of the Court to intervene as an *amicus curiæ*.

In this case we note that the present appellant was not only made a party, but the applicant or objector, as he called himself, asked for costs against him. His attendance, therefore, to resist any order for costs being made against him, was necessary and proper and the Court ought to have dealt with him on that footing and dismissed him from the application giving him his costs. The Court passed a decree partly in favour of the two applicants. From that decision the present appeal is brought not by the Receiver but by the petitioning creditor. We are of opinion that such a person has no right of appeal at all. If he was not a proper party to the application, he clearly could not appeal except, of course, in the event of an order for costs being made against him which ought not to have been made. He is not a "person aggrieved" under section 46. He has no interest of his own in the property in dispute which, if it belonged to the insolvent, is vested in the Receiver. This question is well settled by the decisions in England. In *Sidebotham, Ex parte Sidebrtham, In re* (1) Lord Justice James giving judgment in the Court of Appeal in a case which is precisely in point laid down the law as follows: "It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something". This observation applies precisely to the position of the present appellant. Again, "if there has been any misfeasance on the part of the trustee, the bankrupt or any creditor has a right under section 20 to apply to the Court".

The person who made such an application (1) (1830) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

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would be in the position of a litigant and would have a right of appeal from any order which the Court might make. That applies precisely to the position of a creditor who under section 22 complains against an act of the Receiver. Reliance was sought to be placed upon a decision of my brother Piggott and myself in *Balli v. Nand Lal* (2). In that case leave was necessary and had not been obtained. We looked into the merits and declined to grant leave. The question now before us did not arise. Furthermore in that case no Receiver had been appointed. It is perhaps as well to point out that where no Receiver has been appointed and the Judge is acting as Receiver under the provisions of the Act, the better course in such a case where a dispute arises is for the Judge to make an order appointing a particular creditor to represent the interests of the general body of creditors. There is nothing in the Act providing for such a case, but it is obvious that the general body of creditors have to be represented and it is difficult to say how the Judge, who has to determine the dispute, can do it himself.

In *Ketokey Churan Banerjee v. Sreemutty Sarat Kumari Dabee* (3) there is a dictum of Mookerjee, J., apparently in favour of the appellant. We say apparently, because if the learned Judge meant to refer to a person who had already made a proper application or had been properly brought before the Court, we agree with him and the English authorities cited by him bear out that proposition but they have no bearing upon the case before us. The appeal in that case was an appeal against the decision of the Official Assignee or Receiver.

An attempt was made before us to justify the position of the appellant here as being that of "a person aggrieved by any act or decision of the Receiver". He clearly was nothing of the kind. The attachment had been ordered by the Court and the Receiver had carried out the order. The applicants alleged themselves to be aggrieved by that and the present appellant supported the act of the Receiver.

If the Receiver fails to appeal when he ought, a creditor may clearly apply to the Court under section 22, but the appeal if brought by the order of the Court must be an appeal by the Receiver.

There are strong reasons upon grounds of public policy for maintaining this view, even if the Act were not clear upon the point. To hold otherwise would enable any creditor to harass and delay the winding-up by frivolous and irresponsible appeals, and would enable the insolvent by scheduling a fictitious creditor with a trivial claim, which had no real existence, to provide himself with a tame litigant who could raise questions and get them decided adversely to the general body of creditors. Decisions in such matters must be passed against somebody representing the estate and must be such as will bind the estate in law.

Fortunately no harm can be done by dismissing this appeal upon this purely technical but important question. The applicants have appealed in another appeal against the order on the merits which was passed in their favour. That appeal has been returned to the Insolvency Court for re-hearing and we have pointed out to the Insolvency Court that the Receiver is a necessary party to the litigation, which at the re-hearing can be determined on the merits in favour of either one party or the other.

We, therefore, dismiss the appeal with costs.

STUART, J.—I concur.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 51 of 1914.
March 17, 1915.

Present:—Mr. Lindsay, J. C., and
Mr. Stuart, A. J. C.

Syed SARFARAZ HUSAIN, MINOR UNDER
THE GUARDIANSHIP OF Syed AIJAZ HUSAIN
—OBJECTOR—APPELLANT

versus

Babu AMAR CHAND PAL—DECREE-
HOLDER, Mirza MUHAMMAD HUSAIN
—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 282, 283

(2) 33 Ind. Cas. 773.

(3) 37 Ind. Cas. 71; 20 C. W. N. 995.

SARFARAZ HUSAIN v. AMAR CHAND PAL.

—Civil Procedure Code (Act V of 1908), s. 70, O. XXI, rr. 62, 63—Rules framed under s. 70, r. 3—Execution—Objections to sale of property—Court, power of, to amend application—Date of application—Construction of document—Decree, interpretation of—Res judicata—Burden of proof—Costs—Mortgagor and mortgagee.

Objections were taken to the sale of proprietary rights in certain plots in execution of a decree, on the ground that the judgment-debtor had no proprietary title to the plots but simply a right to collect and appropriate their revenue. The Court took action under rule 3 framed by the U. P. Government under section 70, Civil Procedure Code, and notified in

Notification No. —1887—
—1—38, dated 7th October 1911,

and referred to in paragraph 181 of the Oudh Civil Digest, Volume I. It considered the objections, without waiting for the result of a petition taking certain objections to the sale that appeared to have in the meantime been sent by one of the objectors to the Local Government, and found that the objections were sound and amended the decree-holder's application so as to confine it to the sale of the right to receive revenue and to omit all reference to full proprietary title:

Held, (1) that the Court was right in not waiting for the result of the petition sent to the Local Government; [p. 81, col. 2.]

(2) that the Court had authority to amend the application under the provisions of the above-mentioned rule 3; [p. 81, col. 2.]

(3) that the date of the application must be taken to be the one on which it had been originally presented to the Court, and not the one on which the Court subsequently amended it, inasmuch as there was no new application, but simply an application made for the whole was reduced to an application for a part. [p. 82, col. 2.]

A mortgagee got a decree on the basis of a mortgage-deed which described the mortgaged property as a "rent-free *jagir*" in a village. It appeared that the mortgagor held a settlement decree in his favour, which did not clearly describe his rights in the village. But the entries in the revenue papers showed that these rights were confined to the assignment of land revenue, so that he obtained no land in the village except the right to collect a portion of the land revenue from the *zamindars*:

Held, that the mortgagor must be taken to have mortgaged all the rights that he possessed under the settlement decree, and that, therefore, the right to receive land revenue, although not mentioned in the deed as having been mortgaged, was affected by the decree obtained by the mortgagee. [p. 81, col. 2; p. 82, col. 1.]

The subsequent mortgagees got a decree for sale of the mortgaged property against the mortgagor alone. Later on the prior mortgagee obtained a similar decree against both the mortgagor and the subsequent mortgagee. In execution of the former decree the prior mortgagee applied under section 282, Civil Procedure Code, (1882), [= Order XXI, rule 62, Civil Procedure Code (1908)] for a declaration of his mortgage encumbrance. The Court dismissed the application, holding that the prior mortgage and the decree obtained on its basis did not relate to the same property as was covered by the subsequent mortgage:

Held, that the above finding that the prior and the subsequent mortgages did not include one and the same property, did not operate as *res judicata* between the prior and the subsequent mortgagees, inasmuch as the point was not one that could be decided under the provisions of section 282, Civil Procedure Code (1882) [= Order XXI, rule 62, Civil Procedure Code (1908)]; and that, therefore, the prior mortgagee was under no disability under the provisions of section 283, Civil Procedure Code (1882), [= Order XXI, rule 63, Civil Procedure Code, (1908)]. [p. 82, col. 1.]

The burden of proving that a purchase of the subsequent mortgagee's rights under a decree obtained by him against the mortgagor alone, was made prior to a later decree obtained by the prior mortgagee against both the mortgagor and the subsequent mortgagees, lies on the purchaser asserting that he is not bound by the latter decree. [p. 82, col. 1.]

An objector who impugns the decree-holder's title to the whole property cannot, in case his objections are disallowed, avoid payment of full costs incurred by the decree-holder, on the ground that he claimed only half the property. [p. 83, col. 1.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 7th September 1914.

Pandits Manmohan Nath Chak and Jagmohan Nath Chak, for the Appellant.

Pandit Gokaran Nath Misra and Babu Jiban Krishna Banerji, for the Respondents.

JUDGMENT.—On the 16th February 1864 a. decree was passed by the Settlement Officer of Lucknow with reference to the village of Gaurbhit in the Lucknow District. The Settlement Officer decided that two persons Pitam Singh and Nihal Chand were proprietors of the village and that they held their proprietary title subject to the rights of a certain Anis-ud-daula, *jagirdar*, over an area of 216 *bighas* odd out of the whole village area. The decision ends with the words, "I therefore decree proprietary title in Gaurbhit to Pitam Singh Mulhans and Nihal Chand Kaet, the *lambardars* of 1858 A. D., subject to the lien of overproprietary title of Anis-ud-daula *jagirdar* as by the terms of the *sanad* for the portion measured to her (*sic*) as *jagir*." The settlement for decree does not clearly describe the rights of Anis-ud-daula, but the revenue papers on the record of this case show that these rights were confined to the assignment of land-revenue with regard to this particular area. Anis-ud-daula obtained no land in the village Gaurbhit. He obtained the right to

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collect a portion of the land revenue from the *zamindars*. He died and was succeeded by his son Mirza Muhammad Husain who resided in Calcutta. On the 7th July 1896 Muhammad Husain executed a deed of mortgage in favour of Amar Chand Pal. This mortgage secured amongst other properties the property in Gaurbhit, the words of the mortgage being, "and also all that rent-free *jagir* in Lucknow, *tahsil* Lucknow, *thana* Lucknow, registration District Lucknow, containing villages Gaurbhit....."

We interpret this portion of the deed to mean that Muhammad Husain mortgaged thereby all the rights that he possessed under the Settlement Court decree of 16th February 1864. On the 20th March 1897, Muhammad Husain executed a deed of mortgage in favour of Khurshed Laka Begam and Husaini Begam, by which he secured amongst other property "*wa nankar jagir mauza Gaurbhit.*" We interpret this portion of the deed to mean that he again mortgaged the whole of the rights that he possessed in the village of Gaurbhit under the Settlement Court decree dated 16th February 1864. On the 23rd August 1899, Khurshed Laka Begam and Husaini Begam brought a suit on the foot of the deed of mortgage dated 30th March 1897 in the Court of the Subordinate Judge of Lucknow. They first joined Amar Chand Pal as a party to the suit, but subsequently withdrew his name from the array of parties on the ground that he had given up all his rights under the deed of the 7th July 1896 and obtained a simple money-decree in lieu thereof. Amar Chand Pal was not a party to the suit. There is no evidence on the record to show whether he did or did not bring a suit for a simple money-decree on the cause of action created by the mortgage of 7th July 1896. Khurshed Laka Begam and Husaini Begam obtained a decree on the foot of the mortgage of 30th March 1897 in this suit on the 19th of February 1900. On the 22nd April 1901 Amar Chand Pal brought a suit on the foot of the deed of mortgage dated 7th July 1896 in the Court of the Subordinate Judge of Alipur. That mortgage affected property in the city of Calcutta in

addition to property in Oudh. In this suit he joined as defendants Muhammad Husain, *Musammât* Khurshed Laka Begam and *Musammât* Husaini Begam and obtained a decree on the 25th February 1902.

We may here dispose of one point raised in the appeal as to whether the present appellant's predecessor-in-interest was or was not a party to this suit.

Khurshed Laka Begam sold her rights under the decree of 19th February 1900 to Muhammad Bahadur, who is now represented by Syed Sarfaraz Husain the appellant. But there is nothing to show that Khurshed Laka Begam transferred her rights to Muhammad Bahadur before the 25th of February 1902. The assignment by Khurshed Laka Begam to Muhammad Bahadur is first mentioned in an application dated May 1902 in the file of the execution of the decree of the 19th February 1900. When execution was taken out of the decree of 19th February 1900, Amar Chand Pal applied to have notice of his rights under the mortgage of 7th July 1896 declared. Objection was taken and the following decision was arrived at on the 5th March 1903:—

"Amar Chand Pal vs. { Husaini Begam
and
Khurshed Laka Begam.
"Application under section 282,
"Civil Procedure Code.

"*Musammât* Khurshed Laka Begam and Husaini Begam hold a decree here on Muhammad Husain; in execution thereof the assignee of *Musammât* Khurshed Laka Begam has put to sale the cash *nankar* or the annuities which the judgment-debtor receives from certain persons. The objector holds a mortgage decree dated 25th February 1902 against the same judgment-debtor and *Musammât* Khurshed Laka Begam and Husaini Begam, and applies here for the declaration of his mortgage encumbrance. Mirza Muhammad Bahadur assignee of *Musammât* Khurshed Laka Begam objects.

"Issues—

"1. Has the applicant mortgage encumbrance on the property which has been put to sale here (*sic*) ?

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"2. Is Mirza Muhammad Bahadur bound by the decree of 25th February 1902 obtained against Khurshed Laka Begam ?

"The objector's mortgage-deed and his decree of 25th February 1902 show that the rent-free *jagir* comprising Gaurbhit and other villages is mortgaged to him, not the *nankar* or cash allowance which the judgment-debtor receives from certain persons and which have been put to sale here (Exhibits Nos. 1 and 3 of the objector). Therefore I find Issue No. 1 in the negative. Issue No. 2 requires no finding. The objector's application is dismissed with costs.

"(Sd.) SURAJ NARAIN BAHADUR,
"SUBORDINATE JUDGE.
"5th March 1906."

According to our finding to the effect that exactly the same property was mortgaged in the mortgages of 7th July 1896 and 30th March 1897 this decision is erroneous. We shall subsequently consider whether it operates to make the point *res judicata*. If it does so operate, it will be immaterial whether it is erroneous or not. On the 28th June 1904, in execution of the decree of 19th February 1900, Muhammad Bahadur and Husaini Begam bought Muhammad Husain's interest. The sale was confirmed on 21st September 1904 and a certificate was issued on 27th January 1905.

Amar Chand Pal applied on 21st July 1913 for the sale of certain specified plots of an aggregate area of 281 *bighas* odd in Gaurbhit and other property not now in dispute in execution of the decree of 25th February 1902. The Civil Court, by a *rubkar* dated 21st October 1913, directed the Deputy Commissioner to sell the property and the Deputy Commissioner issued a notice for the sale of the plots in question. The *zamindars* apparently objected in the Civil Court that property was being brought to sale which did not belong to the judgment-debtor, as he possessed an assignment of revenue and no proprietary title. Under the rules made by a Notification No. ¹⁸⁸⁷₁₋₂₃₈, dated 7th October 1911, under section 70 of Act V of 1908, to which reference is made in paragraph 181 of the Oudh Civil Digest, Volume I, the Subordinate

Judge considered this objection under the authority of the third rule. The present appellant appears to have sent a petition to the Lieutenant-Governor through the Deputy Commissioner taking certain objections to the sale. We are not concerned with that petition. The Subordinate Judge with the consent of all parties considered the objections, and by a Court order amended the application so as to confine it to the sale of the right to receive revenue and to omit all reference to full proprietary title. It was then for the Deputy Commissioner to sell the right to receive the revenue, but objections were taken to the sale of that right. These objections were determined by Pandit Suraj Narain Bahadur, Subordinate Judge, on the 7th September 1914. He dismissed them and directed the sale to proceed. The present appeal is preferred against the dismissal of those objections.

We proceed to take up the grounds of appeal in order. The *first* ground of appeal questions the right of the Subordinate Judge to take up the matter in view of the petition to the Lieutenant-Governor. It is suggested that as a petition had been filed to the Lieutenant-Governor it was only open to the Subordinate Judge to stop the sale. This plea is untenable. The matter was entirely for the Subordinate Judge to settle, and the circumstance that a petition had been sent to the Lieutenant-Governor could have no effect of any kind.

The *second* point taken is that, inasmuch as the application for execution was for the sale of certain plots of land, it was not open to the Subordinate Judge to amend the application so as to make it refer to the sale of the right to receive the revenue. As has already been noted, the learned Subordinate Judge had authority to amend the application under the provisions of the third rule of the rules contained in the Government Notification of 1911.

The *third* ground is to the effect that the right to receive Government revenue was not mortgaged by the mortgage of 17th July 1893, and that that right is not affected by the decree of the 25th of February 1902. We have already decided that the rights possessed by Muhammad Husain in Gaurbhit under the settlement

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decree of 16th February 1864 were mortgaged by the mortgage of 7th July 1896 and were covered by the decree of 25th February 1902.

The *fourth* ground raises the plea that the decision of the Subordinate Judge of 5th March 1903 prevents Amar Chand Pal now suggesting that the right to receive land revenue can be sold in execution of his decree, as that point was decided against him in the decision of 1903 and cannot be re-opened as the matter is *res judicata* between parties. It will be noted that the application in question was, as stated in the decision, an application under section 282 of Act XIV of 1882, the Code of Civil Procedure, which was then in force. The procedure under that section refers to the sale of property attached and contemplates a claim made by a person holding a mortgage or having a lien upon attached property to set aside the attachment or to have the mortgage or lien declared with respect to it. That section does not provide for the determination of the point as to whether property ordered to be sold in execution of a mortgage decree is subject to a decree obtained on a prior mortgage. It would not have been possible under that section to determine whether the right of the decree-holders under the decree of the 19th February 1900 was merely a right of puisne mortgagees to redeem a prior mortgage or something greater. Such an order could not operate to set aside the decree of the 25th February 1902 or to deprive Amar Chand Pal of his lien. Amar Chand Pal was not a party to the proceedings that terminated in the decree of 19th February 1900. But Khurshed Laka Begam and Husaini Begam were parties to the proceedings that terminated in the decree of 25th February 1902. This order does not operate to make the point *res judicata*.

The *fifth* point taken is that the sale to Muhammad Bahadur and Husaini Begam of Muhammad Husain's interest, which took place on the 28th June 1904, prevents the present objection being filed. This point was not argued and we decide against the plea. We do not see how the fact that this sale took place can affect the rights of Amar Chand Pal.

The *sixth* point proceeds on the assumption that Muhammad Bahadur was not a party to the decree of 25th February 1902. As we have already found, Khurshed Laka Begam was a party to that decree and there is nothing to show that Khurshed Laka Begam had assigned her rights under the decree of 19th February 1900 to Muhammad Bahadur until a date subsequent to 25th February 1902. It was for the appellant to prove the date of the assignment, and he has not proved that it was prior to the 25th of February 1902. We, therefore, decide this point against the appellant.

The *seventh* point is that the application of Amar Chand Pal is barred by limitation. It is urged that it is barred by limitation under the provisions of section 283 of Act XIV of 1882, because Amar Chand Pal did not bring a suit within one year of the 5th March 1903. But we have already decided that the decision does not bind Amar Chand Pal. The point in dispute was not a point that could be decided under the provisions of section 282. Thus Amar Chand Pal was under no disability under the provisions of section 283. There is, however, another point raised. The decree was dated the 25th February 1902, and this application for execution was made on the 16th July 1913. The application was within limitation. But the learned Counsel for the appellant argues that that application is not now being executed but that another application, which he urges was dated the 27th August 1914, is the application under execution. We find, however, that the application is one and the same. On the 16th July 1913 Amar Chand Pal made an application for the sale of full proprietary rights of revenue-free land. On the 27th August 1914 the Subordinate Judge, under the authority which he possessed, reduced the sale to a sale of a portion of the rights in the land. He did not alter the application of the 16th July 1913 to make it refer to a different subject-matter but he abstracted a portion of the subject-matter, directed the sale of that and refused to allow the sale of the remainder. There was no new application. The application made for the whole was reduced to an application for a part. Thus the application is not barred by limitation.

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The *eighth* ground takes a point that Amar Chand Pal had obtained a simple money-decree on the basis of his mortgage of 7th July 1896, that in those circumstances he was rightly excluded as a party from the suit brought on 23rd August 1899, and that he had no right to obtain a subsequent decree on the foot of the mortgage. There is no evidence as to his having obtained a simple money-decree. It was for the appellant to produce evidence on this point. He has not done so. We, therefore, find that he fails on this point also.

The *ninth* ground taken is that, as the appellant only claims half the property, he should not be made to pay the fees on the total value of the right to receive land revenue. We find that although he claims half he has impugned Amar Chand Pal's title to the whole, and that, therefore, the learned Subordinate Judge has rightly fixed the amount of costs. This concludes all the points taken in the memorandum of appeal.

We dismiss this appeal. The appellant will pay his own costs and those of Babu Amar Chand Pal.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1483 OF 1914.

July 14, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

RAYARATH PARKUM KURUMAN
KANDIYAL KOMBILAN AMMOTTI—

DEFENDANT No. 1—APPELLANT

versus

KOTTEKULATH KUNHI SANKARAN

ADIODI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 110, 116—Rent, suit for—Kanom, expiry of—Accrual of rent after expiry—Limitation.

A suit for rent on the expiry of a *kanom* is governed by Article 116 and not by Article 110 of the Limitation Act. A *kanom* tenure involving the taking of an account for the whole period of the *kanomdar's* occupation is not subject to the legal incidents of a lease in this respect.

Seydarakath Kakkachi v. Valiarath Muhamad Kutti, 6 Ind. Cas. 754; (1910) M. W. N. 186, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 658 of 1911, preferred against that of the Court of the District Munsif, Badagara, in Original Suit No. 369 of 1911.

FACTS.—The plaintiff, as the assignee from the *jeremi*, brought the present suit for the recovery of arrears of *michavaram* due under a *kanom* document executed by the defendant. The defendant pleaded that a claim for arrears of *michavaram* for more than three years was barred by limitation under Article 110 of the Limitation Act, the *kanom* having expired more than three years before suit. Both the lower Courts disallowed the plea, on the ground that a *kanom* was a mortgage and the relationship of mortgagor and mortgagee continued till redemption. In that view both the lower Courts held that the *michavaram* was due under the registered *kanom* deed and that Article 116 of Schedule I of the Limitation Act applied to the case. As the plaintiff claimed arrears for only about 5½ years the plaintiff's suit was decreed in full.

The decree of the Primary Court being confirmed on appeal, the 1st defendant appealed to the High Court.

Mr. C. Madhavan Nair, for the Appellant.

Mr. A. S. Venku Iyer, for the Respondent.

JUDGMENT.—The second appeal is argued only on the plea of limitation. It is urged with reference to *Seydarakath Kakkachi v. Valiarath Muhamad Kutti* (1) that Article 110, not Article 116, of the Limitation Act is applicable. In that case, however, the question was of a tenant holding over after the expiration of an ordinary lease. Here it is of a *kanomdar*; and the *kanom* tenure, involving the taking of an account for the whole period of the *kanomdar's* occupation, is not, in our opinion, subject to the legal incidents of a lease in this respect.

The second appeal is dismissed with costs.

Appeal dismissed.

V. R. P.

(1) 6 Ind. Cas. 754; (1910) M. W. N. 186.

PIYARI v. JAGANNATH KUAR.

ODDH JUDICIAL COMMISSIONER'S
COURT.]

CIVIL MISCELLANEOUS APPEAL No. 39 OF 1915.

March 24, 1916.

Present:—Mr. Lindsay, J. C.

Musammât PIYARI AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

Rani JAGANNATH KUAR—PLAINTIFF,

Mir EHSAN ALI—DEFENDANT—

RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108(5)—Jurisdiction of Civil and Revenue Courts—Landlord, suit by, against mukhtar—Rent of shops—Bazar dues—Limitation—Civil Procedure Code (Act V of 1908), O. VII, rr. 14, 18, O. XIII, r. 1, O. XLIII—Documentary evidence, permission to file at late stage, application for—Court, duty of—Appeal against order refusing documentary evidence, whether maintainable.

A suit by a landlord against his agent (*ziladar* and *mukhtar*) for the recovery principally of money collected as rent of shops, and of price of certain grain realised as *bazar* dues, lies in a Civil and not in a Rent Court, inasmuch as it does not fall within the purview of section 108 (5) of the Oudh Rent Act, and consequently it is not subject to the period of limitation prescribed by the said Act. [p. 85, col. 1.]

Dhara Singh v. Seth Jai Dayal, 6 O. C. 104, distinguished from.

Where a party to a suit applies on the first hearing for permission to file certain documentary evidence at a subsequent stage, the Court ought to decide the application at once. [p. 85, col. 2.]

Obiter dictum.—Order XLIII, Civil Procedure Code, does not contemplate the filing of any appeal against an order refusing or accepting documentary evidence which has been tendered. [p. 85, col. 1.]

Appeal from the decree of the Officiating Subordinate Judge, Rae Bareilly, dated the 14th June 1915, reversing the order of the Munsif, Rae Bareilly, dated the 8th February 1915.

Mr. Mohammad Wasim holding brief of *Mirra Sami Ullah Beg*, for the Appellants.

Babu Kismat Rai Jagdhari, for Respondent No. 1.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff-respondent Rani Jagannath Kuar against three defendants Mir Ehsan Ali, Musammât Piyari and Abdul Ali Khan. The first defendant is the son of one Enayet Ali deceased, while the second defendant is Enayet Ali's widow. It was alleged in the plaint that Mir Enayet Ali had been employed by the plaintiff *rani* as a *ziladar* and *mukhtar* and it was stated in the first paragraph of the plaint that besides collecting rents of tenants of the estate, he used

also to collect on behalf of the plaintiff the rent of certain shops and also of certain *bazar* dues in respect of a *bazar* named Harbansganj. It was alleged in the second paragraph of the plaint that by reason of Mir Enayet Ali not having deposited certain sums which he had collected on the plaintiff's behalf, he was placed under suspension on the 26th of September 1913. Enayet Ali died on the 25th of November 1913 and the present suit was brought against the defendants to recover a sum of Rs. 639 odd, which was alleged to be due by Enayet Ali on account of money received by him on behalf of the plaintiff. The first and second defendants were impleaded as the legal representatives of Enayet Ali. The third defendant Abdul Ali Khan was impleaded as Enayet Ali's surety, he having executed a surety bond in favour of the plaintiff for the due discharge of his duties by Enayet Ali. Various pleas were raised by way of defence; one of them was to the effect that the suit did not lie in the Civil Court. The Court of first instance overruled this plea and held that the suit was entertainable in a Civil Court, inasmuch as it was a suit against the legal representatives of Mir Enayet Ali and could not, therefore, be treated as a suit under section 108, clause 5, of the Oudh Rent Act. A plea of limitation which was also raised by the defendants was accepted by the Court of first instance. The Munsif held, on the strength of a ruling of this Court reported as *Dhara Singh v. Seth Jai Dayal* (1), that although the suit was entertainable in the Civil Court the period of limitation prescribed by the Rent Act applied. The suit was dismissed accordingly. On appeal the Subordinate Judge has overruled the decision of the Court of first instance and remanded the suit for disposal on the merits under the provisions of Order XLI, rule 23, of the Code of Civil Procedure.

The defendants appeal to this Court and the first two points raised in the memorandum of appeal relate to the issues of limitation and jurisdiction. With regard to the plea of jurisdiction I am satisfied that the decision of the lower Appellate Court is correct. The suit as it was framed was not a suit

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within the purview of section 108, clause 5, of the Oudh Rent Act. That clause relates to suits against an agent employed in the management of land or collection of revenue or rent for money received or accounts kept by the agent in the course of his employment as aforesaid. A reference to the items contained in the account which is attached to the plaint, shows that the sum which was claimed in this suit was made up principally of two items, namely, Rs. 450 alleged to have been collected as rent of shops and Rs. 378 odd being the price of certain grain which had been realised by Enayet Ali as *bazar* dues. A claim of this nature was not entertainable in the Rent Court and was rightly brought in the Civil Court. Then as to the question of limitation it appears to me also that the decision of the Court below is correct and that the ruling in *Dhara Singh v. Seth Jai Dayal* (1), upon which reliance was placed by the Court of first instance, does not apply. If, as I hold, the suit was one which was not at any time entertainable in a Rent Court, it follows that no special period of limitation prescribed in the Oudh Rent Act could apply so as to bar the entertainment of the suit by a Civil Court. The only other point which has been raised in appeal here is with reference to a certain order passed by the lower Appellate Court in the matter of the production of certain documentary evidence. I am inclined to doubt whether any appeal is open to the appellants with regard to this matter. This is an appeal against an order passed under Order XLI, rule 23, and Order XLIII does not appear to contemplate the filing of any appeal against an order refusing or accepting documentary evidence which has been tendered. However, assuming that an appeal is competent with regard to this matter, I think the order of the lower Court should be maintained. It seems that the case came up in the Court of the Munsif for the first hearing on the 18th of December 1914. Up to that time the plaintiff had not produced any documentary evidence, except a surety bond which had been executed by the third defendant. On the 18th of December issues were framed and the case was fixed for the 27th of January for the reception of evidence. On this latter date an application which the plaintiff had

presented at the previous hearing, that is to say on the 18th of December 1914, was taken up and considered by the Munsif. The application of the 18th of December 1914 was to the effect that as the third defendant had totally denied the accounts as set out in the plaint and as it was necessary to produce certain registers, account books and receipts in order to prove the accounts and as the plaintiff's *mukhtar* had been on tour and had not been able to get these documents from the head-quarter office and further as no list of the documents had been prepared, a date might be fixed to allow the filing of the documentary evidence. When this petition was presented on the 18th of December the Munsif passed no order regarding it. The only endorsement on the application is that it is to remain with the record. When the case came up for hearing again on the 27th of January 1915, an affidavit was put in on behalf of the plaintiff asking for leave to put in documentary evidence on that day. The ground set out in the affidavit was that the first defendant had led the plaintiff's agent to believe that he would confess judgment and that afterwards it had become apparent that the first defendant was denying the claim. The Munsif referred to the provisions of Order VII, rules 14 and 18, and also to the provisions of Order XIII, rule 1, and refused to allow the documents to be put in. The Subordinate Judge thought, and in my opinion, rightly, that the order of the Munsif could not be supported. It was the business of the Munsif to decide on the 18th of December 1914 what was to be done with reference to the application made by the plaintiff for the reception of documentary evidence. The 18th of December being the first date fixed for hearing it is possible, as the learned Subordinate Judge observes, that the plaintiff might have on that date been able to put in certain documentary evidence which he would have had a right to put in under the provisions of Order XIII, rule 1. No doubt the action of the plaintiff in the matter of putting forward this documentary evidence was irregular and not in strict accordance with the provisions of the Code; at the same time it would, I think, for the reasons just given, be unfair to the plaintiff to uphold the order of the first Court refusing to

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receive the evidence, that order having been passed long after the first hearing of the case, although there was before the Munsif an application at the first hearing in this connection which it was his duty to decide then. I may also remark with reference to one of the reasons given by the Munsif for the rejection of the plaintiff's documents that it does not appear to have any force in it. Certain account-books were tendered by the plaintiff regarding which the Munsif has remarked that the accounts contained in them do not appear to have been regularly kept in the course of business. The plaintiff's reply to this is that the account-books were the books kept not by her but by her deceased agent Enayet Ali, against whose legal representatives and surety the present suit has been brought. I see no reason for interfering with the order of the Court below and, I therefore, dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 162 OF 1915.
June 6, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Lindsay.

KHAWANI SINGH—DEFENDANT—
APPELLANT
versus

CHET RAM AND OTHERS—PLAINTIFFS
—RESPONDENTS.

*Hindu Law—Alienation—Widow, relinquishment by
—Reversioners—Acceleration of estate, what amounts to
—Alienation by widow—Consent of nearest reversioner,
effect of.*

In order to accelerate the vesting of an estate in the nearest reversioner there must be complete surrender of the widow's estate. [p. 87, col. 2; p. 88, col. 1.]

Behari Lal v. Madho Lal Ahir Gayawal, 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603; *Pilu Appa Nalwade v. Babaji Naru Mang*, 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291 and *Murudamuthu Nadan v. Srinivasa Pillai*, 21 M. L. J. 128; 8 M. L. J. 69; 7 Ind. Dec. (N. S.) 447, referred to.

The rule that a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner is applicable only to cases of transfers for consideration, and should not be extended to a case where a transfer has been made by way of gift. [p. 88, col. 1.]

Bajrangi Singh v. Manokarinka Bakhsh Singh, 30 A. J. 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 25 I. A. 1; 17 M. L. J. 605; 11 O. C. 78, referred to.

First appeal from a decree of the Second Additional Subordinate Judge, Aligarh.*

Mr. *Gulzari Lal* (with him Mr. *Pauna Lal*), for the Appellant.

Mr. *Peary Lal Banerji* (with him Mr. *Braj Nath Vyas*), for the Respondents.

JUDGMENT.—This is the appeal of Khawani Singh, who was a defendant in a suit brought by Chet Ram and others for the purpose of obtaining a declaration that a certain document, dated 7th February 1914 and registered on 10th February 1914, and which was executed by *Musammam Uda Kuar* in favour of Khawani Singh, is null and void and ineffectual as against them after the death of *Musammam Uda Kuar*. It appears from a pedigree, which is to be found in the first paragraph of the plaint, that one Mansa Ram had four sons, Badam Singh, Lalji, Bakhti and Khushali. *Musammam Uda Kuar*, the lady who executed the document which forms the subject-matter of this suit, is the widow of Lalji. Khawani Singh who is the appellant in the present case is the son of Badam Singh, and, therefore, nephew of Uda Kuar's deceased husband. The plaintiffs in the case are the descendants of Bakhti and Khushali, the other two sons of Mansa Ram. The case set out in the plaint was to the effect that Lalji, the husband of *Musammam Uda Kuar*, had died about thirty years before the suit leaving *Musammam Uda Kuar* in possession of his estate as a Hindu widow. It was claimed, therefore, that having this estate she had no right to make the transfer of the property which was evidenced by the document referred to in the plaint. It was further stated in the plaint that all the declarations made by *Musammam Uda Kuar* in this document of transfer were untrue statements. It appears from the document itself that *Musammam Uda Kuar* declared that the property which she was purporting to dispose of had been joint property held by her deceased husband and the father of Khawani Singh. The plaintiffs' case was that this property was the separate property of Lalji, which was held by his widow as a limited estate which a Hindu widow possesses. The defence raised by Khawani Singh was that the plaintiffs could not maintain the suit. In the eleventh para-

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graph of the written statement a further plea was taken that Khawani Singh and his father had been living jointly with Lalji, husband of *Musammāt* Uda Kuar. In the 12th paragraph of this written statement it was pleaded that the property in suit had been bought by Lalji in his own name out of the joint family funds. Fourteenth paragraph of the same document sets out that the plaintiffs were not reversioners. In the last paragraph of the written statement a ground is taken that even if Badam Singh and Lalji were found to be separate in estate, the deed of relinquishment simply operated as an acceleration of the succession in favour of Khawani Singh. There can be no doubt on the pedigree set up in the plaint that on the assumption that Lalji was a separate owner of the property in suit Khawani Singh is at the present time a nearer reversioner of Lalji than any of the plaintiffs.

The principal matter to be considered is that of the interpretation of the deed of 7th February 1914 printed at page 1 A. According to the construction put upon this document by the Court below there was no transfer at all on the part of *Musammāt* Uda Kuar. The learned Subordinate Judge came to the conclusion that as a matter of fact Lalji, the husband of *Musammāt* Uda Kuar, had been separate from the rest of his family, and this finding, we may say, is not contested here in appeal. He went on to point out that in drawing up this document *Musammāt* Uda Kuar professes to be dealing with joint family property. She did not profess to deal with it as having been the separate estate of her deceased husband and so the Subordinate Judge came to the conclusion that the document would not operate as transfer of any interest in favour of Khawani Singh; for if the property, as has been declared to be in the said document, was joint property there could be no transfer of it made by this lady Uda Kuar. The consequence was that the Subordinate Judge decreed the suit. In appeal here it is contended that the Court below has placed a wrong interpretation upon the terms of this document. According to the argument of the learned Counsel who supports the case for the appellant, this document amounts in one view to a total surrender of the interests of *Musammāt* Uda Kuar in this

property. We must take it now for the purpose of disposing of the case that the property was in fact the separate property of Lalji. Unfortunately, however, for this argument of the appellant, we find that in this document of transfer executed by *Musammāt* Uda Kuar a certain area consisting of 21 *bighas* 10 *biswas* of land was reserved from the operation of the deed. It is not for us to inquire where the property so reserved has since gone to. We have only to look to the deed as we find it on the record. It being found that a portion of the property was reserved from the operation of the deed, the clear inference is that *Musammāt* Uda Kuar did not surrender the whole of the widow's estate in favour of Khawani Singh. The doctrine of surrender has been laid down by their Lordships of the Privy Council in the case of *Behari Lal v. Madho Lal Ahir Gayawal* (1). It is true that since that case has been decided, the various Courts in India have taken different views as to what is meant by a particular passage in the judgment of Lord Morris in which he has laid down the principle that there must be a surrender of the entire estate. The Calcutta High Court has taken the view that the rule laid down by their Lordships of the Privy Council means nothing more than that the widow is bound to divest herself of all her interest in the particular portion of the estate which she is transferring. Other High Courts on the contrary have held that the judgment of the Privy Council intends to lay down a much wider rule, namely, that the widow is bound to withdraw from the entire estate which she holds so as to accelerate succession in favour of the nearest reversioner. In this connection we may refer to the decision of the Bombay High Court in *Pilu Appa Nalvade v. Babaji Naru Manj* (2) and the judgment of the Madras High Court in the case of *Marudamuthu Nadan v. Srinivasa Pillai* (3). A similar view, we may observe, has been taken in the Punjab Chief Court. The balance of authority is certainly in favour of the proposition that there must be complete surrender of the widow's estate in order to

(1) 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 83; 9 Ind. Dec. (N. S.) 671.

(2) 4 Ind. Cas. 594; 34 B. 165; 11 B. N. L. R. 1231.

(3) 21 M. 128; S. M. L. J. 69, 7 Ind. Dec. (N. S.) 447.

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accelerate the vesting of the estate in the nearest reversioner. Accepting this view, we hold that in the present instance there not having been a complete withdrawal from the estate of Lalji by *Musammatt Uda Kuar*, the document in suit cannot be said to have vested the estate of Lalji in the appellant *Khawani Singh*. Then it has been contended that *Khawani Singh* being the nearest reversioner, this transfer will take effect on the principle which is laid down by the Privy Council in the case of *Bajrangji Singh v. Manokarnika Bakhsh Singh* (4), namely, that a transfer made with the consent of the nearest reversioner will take effect as against the more remote reversioner. That rule, as we understand, is applicable to cases of transfer for consideration. It has not been extended, so far as we are aware, to a case where a transfer has been made by way of gift. Further, if the transfer be with the consent of the nearest reversioner, it takes effect because it affords evidence of the propriety of the transaction; in other words, it justifies the transaction on the ground of legal necessity. It cannot, we think, be said that the consent of the beneficiary himself is such a consent as would give rise to any such presumption. In either of these views it appears to us that the appellant here is not entitled to rely upon this document as being a transfer in his favour and to claim that the estate of the deceased Lalji has vested in him. We are of opinion that the plaintiffs were entitled to the declaration sought, and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

(4) 20 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605; 11 O. C. 78.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 37 OF 1915.
March 31, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.
S. GREENBERG—APPLICANT

versus

A. S. PINTO—RESPONDENT.

British subject, who is—'Alien enemy,' meaning of.

Persons born within the allegiance of the British Crown include every one who is born within the dominions of the Crown, whatever may be the nationality of either or both of his parents; unless he is either (a) a child of a foreign sovereign or any foreign state's ambassador, or, possibly, of any other foreign diplomatic agent or (b) a child born in British territory of alien parents, if the territory was in the occupation of a foreign army at the time of his birth. [p. 89, col. 1.]

The term alien enemy includes not only the subjects of a state at war with Great Britain but also British subjects and subjects of a neutral state who are voluntarily residing in a hostile country. [p. 89, col. 1.]

Kreglinger v. Samuel, (1915) 31 T. R. 162, followed.

Mr. Xavier, for the Applicant.

Mr. Hancock, for the Respondent.

JUDGMENT.—The suit and this application were, no doubt, intended to be those of Marcus Moses Greenberg, executor of Moses (otherwise Maurice) Greenberg, but through the carelessness of the Advocates concerned the plaint was instituted in the name of S. Greenberg, the Attorney of M. M. Greenberg, residing at 36, Soolay Pagoda Road, and the application is that of S. Greenberg without even the addition of "Attorney of M. M. Greenberg." The plaint and application deserve to be dismissed on this ground alone. S. Greenberg, who is Solomon Greenberg, has no right of suit personally, but he may have a right to institute a suit in the name and on behalf of Marcus Moses Greenberg, executor of Moses Maurice Greenberg.

The Judge took no notice of the objection taken in the written statement that the plaint was defective in form, and I have not been pressed to dismiss the application on the ground that Solomon Greenberg has no *locus standi*, consequently I will deal with it.

The suit was for rent or possibly it might be taken to be one for use and occupation of three rooms in a house. It was instituted on the 19th August 1914, that is, after war had commenced between the British and German Empires but before war had been declared between Great Britain and Turkey.

Moses (Maurice) Greenberg was a German subject by birth but he became a naturalized British subject in India in 1866. There appears to me to be sufficient evidence to show that his son Marcus Moses Greenberg was born in Calcutta in 1861, although no

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British birth certificate was produced to show this. •

If he was born in Calcutta, he was a natural born British subject although his father was at the time of his birth a German subject.

Persons born within the allegiance of the British Crown include every one who is born within the dominions of the Crown, whatever may be the nationality of either or both of his parents, unless he is either (a) a child of a foreign sovereign or any foreign state's ambassador, or possibly of any other foreign diplomatic agent or (b) a child born in British territory of alien parents, if the territory was in the occupation of a foreign army at the time of his birth. See Halsbury's Laws of England, Volume 1, page 303.

There was sufficient evidence before the Court on which to hold that Marcus Moses Greenberg is a British subject, and the discussion as to whether he became such by reason of his father having become a naturalized British subject was not in point.

A British subject may, however, have to be treated during a war in which Great Britain is engaged as an alien enemy.

In the recent case of *Kreglinger v. Samuel* (1), the Court of Appeal in England accepted the following statement by Professor Dicey as correct: "Under the term alien enemies are included not only the subjects of any State at war with us, but also any British subjects and subjects of any neutral State voluntarily resident in a hostile country."

The affidavits filed in the case show that Marcus Moses Greenberg lived for many years in Rangoon, but he went to Beyrouth which is in Turkish territory in 1911, and was resident there certainly up to the 14th June 1914, since when nothing has been heard from him apparently. In a letter written on that date from Beyrouth he states that he intended to leave for Rangoon about the end of October, but he has not appeared here so far. Possibly he may be dead, in which case Solomon Greenberg would have no right to institute a suit as his Attorney. If, however, he is still alive the only reasonable conclusion to draw is that he is still in Turkish territory. There can be no question as to his having voluntarily resided in

Beyrouth. Consequently when war between Great Britain and Turkey was declared he, although a British subject, became an alien enemy of Great Britain as long as he was and is in Turkish territory during the continuance of the war.

The case above referred to shows that any suit of his in a British Court cannot be proceeded with during such period.

The application is dismissed with costs. Two gold *mohurs* allowed as Advocate's fee.

Application dismissed.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1096 OF 1915.

July 14, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Sunder Lal.

RAM CHANDAR—PLAINTIFF—
APPELLANT

versus

GANGA SARAN—DEFENDANT—
RESPONDENT.

Specific Relief Act (I of 1877), ss. 39, 40, 42—Declaration, suit for, that an endorsement on a document is a forgery, nature of—Endorsement, whether document.

An endorsement on a document is by itself a document and is similar to the several parts of a document indicated in section 40 of the Specific Relief Act. [p. 90, col. 1.]

A suit for a declaration that an endorsement on a mortgage-deed is a forgery is really a suit for cancellation of an instrument and is of the nature indicated in section 39 of the Specific Relief Act. Section 42 is not applicable to such a case. [p. 90, col. 1.]

Second appeal from a decree of the Second Additional Judge, Aligarh.

Mr. Nihal Chand (with him Mr. B. E. O'Connor), for the Appellant.

Mr. Peary Lal Banerji, for the Respondent.
JUDGMENT.

SUNDER LAL, J.—This is a suit by the plaintiff, who is the mortgagee under a document dated the 17th of February 1913. The mortgage was for a term of ten years. The plaintiff's case is that under the circumstances mentioned in the plaint the defendant got hold of the original document from the plaintiff's custody and fraudulently endorsed the following note on the document;—

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Received Rs. 1,200 the 17th February 1913 up to the 19th of June 1913.

	Rs.	A.	P.
Principal ...	1,144	0	0
Interest ...	56	4	0

The endorsement purports to bear the signature of Ram Chandar, plaintiff, by the pen of Afzal Khan and his thumb impression. The Court of first instance tried the case and held that the endorsement was a forgery and that no payment has been made in fact, and decreed the suit. The plea under section 42 of the Specific Relief Act was raised in the Court of first instance, which that Court overruled for the reasons given in its judgment. The defendant appealed to the learned Judge, who without going into the merits of the case has held that the suit is barred by section 42 of the Specific Relief Act, as the plaintiff could have brought a suit for the recovery of the amount due on the mortgage in which the question of payment and the genuineness of the endorsement could have been tried. The plaintiff appealed to this Court and after hearing both the parties Mr. Nihal Chand, who appeared for the plaintiff-appellant, was granted leave to apply for the amendment of the plaint. Mr. Nihal Chand has applied for the amendment of the plaint. It is now after the amendment really a suit for cancellation of the endorsement fraudulently put upon the mortgage-deed by the defendant. The suit is of the nature indicated in section 39 of the Specific Relief Act. The endorsement by itself is a document and it is similar to the several parts of a document indicated in section 40 of the Act. In any case the provisions of the Specific Relief Act under which a plaintiff may sue for the cancellation of the document are not exhaustive. I think that section 42 of the Specific Relief Act is not applicable to this case. I would set aside the decree of the Court below and remand the case to that Court with directions to restore the appeal to the file of pending cases and to hear and dispose of the same according to law under Order XLI, rule 23, of the Civil Procedure Code. Costs here and hitherto will abide the result.

WALSH, J.—I agree, I am glad that we

have been able to come to the conclusion that section 42 of the Specific Relief Act does not apply because the second sub-section, if it had applied, undoubtedly created a difficulty. And it seems to me that the law would be in an unsatisfactory state if a person could commit such a gross trespass, as is alleged in this case, and then force the victim of it to a remedy which he was not otherwise disposed to take. Inasmuch as the appellant has taken a reasonable course and amended what undoubtedly was an unsatisfactory plaint, it is not necessary for us to decide anything beyond the circumstances of the particular case. But for my own part I am not prepared to hold that, although such a claim is unusual and possibly unparalleled in any reported case, a man who has suffered an injury like the endorsement is alleged to be in this case as a result of a tort, could not get it removed through the machinery of a declaration, with the addition of a consequential relief for its cancellation. There are many instances to be found in the recognised books of pleading where the main cause of action is a tort like forgery, and the prayer for relief is wound up by a claim for the delivery up of the document or its destruction. However, it is not necessary to decide this and it may be that it is desirable before giving a final opinion upon it to hear further argument. I agree with my learned brother.

By THE COURT.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside, and the case is remanded to the Court below under Order XLI, rule 23, of the Civil Procedure Code with directions to restore the appeal to the file of pending cases and to hear and dispose of the same according to law. Costs here and hitherto will abide the result.

Appeal decreed; Case remanded.

MA SHWE U v. MAUNG PO LU.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 60 OF 1914.

July 23, 1915.

Present:—Mr. Justice Ormond and

Mr. Justice Twomey.

MA SHWE U AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

MAUNG PO LU AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Sale, conditional—Option to re-purchase—Mortgage—Registration Act (XVI of 1908), s. 17—Interest in land, option to re-purchase, whether is—Lease, agreement to—Registration—Plaint, amendment of.

The test for determining whether a document is a mortgage or a sale is, whether the relation of creditor and debtor subsists between the parties after execution of the document. If it does, the document is a mortgage.

Ma Hnin U v. Osman Gani, 15 Ind. Cas. 423; 5 Bur. L. T. 99, followed.

An option to purchase is not an interest in land and a document creating an option to purchase does not require registration under section 17 of the Registration Act.

Where plaintiff sued to redeem a mortgage, but it was found that the document sued on was in effect a sale-deed with an option to re-purchase, and the plaintiff sought to be allowed to ask for specific performance of the agreement to re-sell:

Held, that, the facts and the relief sought being in effect the same, the plaintiff should be allowed to amend his plaint.

Mr. *Palit*, for the Appellants.

Mr. *May Oung*, for the Respondents.

JUDGMENT.—The plaintiffs sued for redemption of three plots of land. On the 4th April 1910 the plaintiffs executed a document of sale, Exhibit C, in favour of the defendants which was registered, and on the same day the defendants executed an agreement, Exhibit D, under which they were to lease the lands to the plaintiffs for a period of three years, and not to lease to anybody else during that period, and to re-sell the lands to the plaintiffs for the price paid by the plaintiffs plus Rs. 50, if the plaintiffs wish to re-purchase within the three years. That document was not registered. Both the lower Courts have held that the transaction was a mortgage and that the agreement, Exhibit D, should have been registered as it formed part of the mortgage transaction. The written documents clearly show a sale and an option of re-purchase within three years, which period had not expired when the suit was

brought. The relation of debtor and creditor no longer existed after the execution of these documents. The fact that the purchaser leased out the lands to the vendor and undertook to re-sell the lands within a certain period at a certain price if the plaintiffs wished to re-purchase, is not inconsistent with an outright sale. The case of *Ma Hnin U v. Osman Gani* (1) is very similar to the present one. The agreement, Exhibit D, does not confer an interest in land; it merely gives an option of re-purchase to the vendor and is an agreement to lease agricultural land which does not require registration (*vide* section 117 of the Transfer of Property Act). The agreement is in Burmese, and uses the Burmese word "Ywe" for redemption, but that should not be taken necessarily in its English technical meaning as applicable only to the case of a mortgage. It means no more than the right to buy back. In the plaint the suit is framed as one for redemption of a mortgage. The plaintiff now asks for leave to amend his plaint by asking for specific performance of the agreement to re-sell. The relief sought is in effect the same, and the facts are in no way different. We think the plaintiff should be allowed to amend his plaint accordingly, in order that he should obtain the relief which is applicable to the facts stated in the plaint, his suit really being based on the two documents of the 4th April 1910. Mr. May Aung for the defendants states as to costs that if the suit had been framed as a claim for specific performance of a contract to re-sell, it is possible his client might have admitted the claim and so avoided litigation. The case is remanded under Order XLI, rule 23, to be re-admitted and determined on its merits. If the defendant admits the claim as amended, each party will bear their own costs throughout; otherwise the costs throughout will abide the ultimate result. A certificate will be granted for a refund of the Court-fees under section 13 of the Court Fees Act.

Appeal allowed; Case remanded.

(1) 15 Ind. Cas. 423; 5 Bur. L. T. 99.

ABDUL MAJID v. BEDYADHAR SARAN DAS.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 82 OF 1916.

July 14, 1916.

Present:—Justice Sir George Knox, Kt.

ABDUL MAJID—DEFENDANT

—APPLICANT

versus

BEDYADHAR SARAN DAS—PLAINTIFF—
RESPONDENT.

Small Cause suit heard as a regular suit—Appeal—Jurisdiction—Revision.

Where a Small Cause suit, instituted in the Court of a Munsif invested with Small Cause Court powers, is heard and decided by the Munsif as a regular suit and not summarily, his decree is not appealable. But if appealed from and reversed, the High Court is bound to set aside the appellate decree on revision as passed without jurisdiction.

Kollipara Seetpaty v. Kankipaty Subbaya, 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718, followed.

Civil revision from an order of the Additional District Judge, Gorakhpur.

Mr. Bhagwati Shankar, for the Applicant.

Mr. Baleshwari Prasad (with him Mr. Binode Behari), for the Opposite Party.

JUDGMENT.—The plaintiff brought a suit for recovery of Rs. 11-12-0 as his share of some trees which, he said, had been cut and appropriated by defendant No. 1 on some *abadi* land. The nature of the suit was undoubtedly such as was cognizable by a Court of Small Causes and the value of the subject-matter was also within the jurisdiction of the Court of Small Causes. As a matter of fact the suit was instituted in the Court of the Munsif exercising the powers of a Small Cause Court, and it was tried by the Munsif who was invested with Small Cause Court powers. Somehow or other, and it is not explained how, the case was not heard summarily but heard after the fashion of a regular suit and it was dismissed. The reason why it was dismissed was that the plaintiff had not proved that he had been in possession. An appeal was filed from the decision of the Munsif and it was heard by the Additional Judge of Gorakhpore, who gave the plaintiff a decree for Rs. 7-2-8, as the price of the tamarind and the bamboo trees. The defendant comes here in revision, and the first ground taken is that no appeal lay to the District Judge who had no jurisdiction to try the appeal. The learned Vakil who appears for the applicant called my attention to the Full Bench decision of the Madras High Court in the case of *Kollipara Seetpaty*

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v. *Kankipaty Subbaya* (1). The view taken by the learned Judges of the Madras High Court in a similar case was that where a Small Cause suit is tried by a Munsif on the Original Side and his decision is reversed in appeal by the subordinate Court the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction. It is in no way advisable that a Small Cause Court suit should be prolonged. If there is any value in the work of the Small Cause Court, it is that speedy justice is done and the parties get an early decision on the matter in dispute between them. The present case is a very good instance of the way in which petty litigation is prolonged and carried to an undue extent. I set aside the decision of the lower Appellate Court as a decision passed without jurisdiction and restore that of the Court of first instance with costs in all Courts.

Application allowed.

(1) 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 OF 1916.

June 27, 1916.

Present:—Mr. Stuart, J. C.

BAL MAKUND *alias* KANHAIYA LAL—

DEFENDANT No. 2—APPELLANT

versus

Saiyid MAQSUD ALI—PLAINTIFF,
MUHAMMAD ASHFAQ HUSAIN KHAN
—DEFENDANT No. 1 AND BALDEO PRASAD
alias LALLU MAHARAJ—

Pro forma DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58 to 62—Operative order—Investigation, however little, sufficient—Second appeal—Findings of mixed law and fact.

The findings that there was no proper investigation of a claim preferred under Order XXI, rule 53, Civil Procedure Code, and that, therefore, no operative order could be passed against the claimant under Order XXI, rule 61, Civil Procedure Code, are findings of mixed law and fact, which can be questioned in second appeal. [p. 93, col. 2; p. 94, col. 1]

An order passed under Order XXI, rules 60 to 62, Civil Procedure Code, is not an operative order only if there has been no investigation whatever under Order XXI, rule 58, Civil Procedure Code, but it is an operative order if there has been some investiga-

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tion, whether perfunctory or satisfactory. For example, an order passed to the effect that a deed produced by a claimant or objector is not genuine, although it may be open to criticism on the ground that it is based upon the mere examination of the deed, without a fair opportunity of proving it having been given to the claimant, is nevertheless an operative order. [p. 94, col. 2; p. 95, col. 1.]

Sardhari Lal v. Ambika Pershad, 15 C. 521, 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931; *Rahim Bux v. Abdul Kader*, 32 C. 537, *Karsan v. Ganpatram*, 22 B. 875; 11 Ind. Dec. (N. S.) 1166; *Lachmi Narain v. H. C. Martindell*, 19 A. 253 (F. B.); A. W. N. (1897) 60; 9 Ind. Dec. (N. S.) 166; *Kurada Venkatachalapathi Row v. Gudivada Pedaveeraswami*, 28 Ind. Cas. 244, (1915) M. W. N. 188, 17 M. L. T. 223, *Gayadin v. Musammat Baij Nath*, 11 O. C. 180, referred to.

Appeal from the decree of the Additional Judge, Lucknow, dated the 10th November 1915, confirming the order of the Subordinate Judge, Lucknow, dated the 26th July 1915.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellant.

Syed Zahur Ahmad, for Respondent No. 1.

JUDGMENT.—Muhammad Ashfaq Husain was the owner of a four-annas seven-pies share in *Mahal* Agha Ali Khan in the village of Amraudha in the Cawnpore District and of a share in a certain house in Banjari Tola, Lucknow City. On 10th April 1911 Muhammad Ashfaq Husain executed a deed of simple mortgage for Rs. 2,000 in favour of Saiyid Maqsd Ali by which he hypothecated both properties. Before this deed of mortgage had been executed, a simple money-decree was passed in favour of Jagan Nath against Muhammad Ashfaq Husain. In execution of the decree he attached the four-annas seven-pies share in *Mahal* Agha Ali Khan in village Amraudha belonging to the judgment-debtor. The execution was in the Court of the Subordinate Judge of Cawnpore. Maqsd Ali put in two petitions in the Court of the Subordinate Judge of Cawnpore on 8th May 1911 and 22nd November 1911 setting up the deed of mortgage dated the 10th April 1911, and asking that the existence of this mortgage should be notified in the sale-proclamation. On 22nd November 1911 the Subordinate Judge of Cawnpore entered the application, and issued notices to parties to appear on 16th December 1911. On 16th December 1911 the application came on for hearing but

no proceedings were taken, as the record of the case was in the Appellate Court. On 19th December 1911, the record having in the meanwhile been returned from the Appellate Court, the Subordinate Judge took up the matter in the presence of the Pleader for Maqsd Ali and finding that there was no evidence to support the genuineness of the mortgage of 10th April 1911, he refused to notify the existence of the mortgage and dismissed the application.

The decree had been transferred to Bal Makund alias Kanhaiya Lal; he was given permission to purchase the property and purchased it on 20th December 1911.

On the 11th May 1915 Maqsd Ali instituted a suit on the basis of the mortgage of 10th April 1911 against Muhammad Ashfaq Husain, Bal Makund and Baldeo Prasad. Bal Makund took an objection (amongst others) that, inasmuch as the application of Maqsd Ali under the provisions of Order XXI, rule 58, had been dismissed, Maqsd Ali could not bring a claim upon the deed of mortgage under the provisions of the Limitation Act. He contended that Maqsd Ali's only remedy was to institute a suit according to the terms of Order XXI, rule 63, and that as he had not brought a suit within a year of the dismissal of his application, his claim was time-barred. Both the Courts below having rejected this contention, Bal Makund comes here in second appeal.

On the face of it, Maqsd Ali had made a claim to have his mortgage notified under the provisions of Order XXI, rule 58, and that claim was dismissed and thus *prima facie* the provisions of Order XXI, rule 63, had operation and under the law of limitation the present suit would be time-barred. But the lower Courts have held that the provisions of Order XXI, rules 58 to 63, have no application, inasmuch as there had been no proper investigation of Maqsd Ali's claim, and no operative order had been passed against him. The learned Counsel for the contesting respondent urges that these findings of the lower Courts are findings of fact with which this Court cannot interfere in second appeal. I do not accept this contention. I consider that these findings are findings of mixed law and fact, and that

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it is open to me to decide whether the order passed against Maqsud Ali in those proceedings was or was not operative.

The provisions of the rules in question reproduce to all intents and purposes the provisions of the old law on the subject, and the decisions which have been passed by competent Courts under the provisions of the old law apply *mutatis mutandis* to the law as it now stands.

The most important of these decisions is contained in a pronouncement of their Lordships of the Privy Council in *Sardhari Lal v. Ambika Pershad* (1). At page 525 their Lordships say:—

"The other reason assigned is that section 280 does not contemplate that any order shall be made until after an investigation which is directed by section 278. The answer to that is that in the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion off hand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. However that may be (and their Lordships do not desire to pronounce any opinion as to the extent of the investigation which is required under the Code), in this case the order was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the Law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought."

(1) 15 O. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 21 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931.

The question has been before every High Court in India and there is a very large number of decisions upon it. It is not necessary for me to do more than refer to some of them. I refer to *Rahim Bux v. Abdul Kader* (2), *Karsan v. Ganpatram* (3), *Lachmi Narain v. H. C. Martindell* (4) and a recent decision of the Madras High Court in *Kurada Venkatchalapathi Row v. Gudivada Pedd Veeraswami* (5). I refer in particular to a decision of Mr. Chamier in *Gayadin v. Musammatt Baij Nathi* (6).

According to my reading of these decisions, all the above Courts are in substantial agreement as to the requisites of an operative order. There must be some investigation. If there is no investigation of any kind, if in other words the Judge in the execution department ignores the application of a third party, there can be no operative order against such party and the bar of one year's limitation does not apply to the case of such a third party because there is no order against him. There is what purports to be an order but it is not an order. The Judge having taken no cognizance of the complaint, the order has in effect been passed without jurisdiction, and is neither operative nor legal. It is an order in name and not in reality. But I can find no authority of weight in support of a proposition that, where a Judge has passed an order after a perfunctory investigation, such an order is not an operative order. There is nothing, in my opinion, to support an interpretation of the plain words of the law to the effect that an order can only be operative, if the investigation has been satisfactory. The order is equally operative whether the investigation has been satisfactory or unsatisfactory. The contention of the learned Counsel for the contesting respondent which found favour with the Courts below is that, where on the face of it the Judge in the execution department has failed to give

(2) 32 C. 537.

(3) 22 B. 875; 11 Ind. Dec. (N. S.) 1166.

(4) 19 A. 253; A. W. N. (1897) 60; 9 Ind. Dec. (N. S.) 166.

(5) 23 Ind. Cas. 244; (1915) M. W. N. 188; 17 M. L. T. 223.

(6) 11 O. C. 180.

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the objector a fair opportunity of proving his case, the order is inoperative. I cannot find support for that contention in the words of the law or in the mass of the authorities quoted.

I have now to examine exactly what happened in this case. Maqsd Ali put forward a mortgage. The Judge would have been wrong if he had accepted that mortgage until it was established that it was a good mortgage.

Maqsd Ali was ordered to support his application on 16th December 1911 and, as far as he knew at that time, the application would be taken up on that date and it was for him to be ready to prove the genuineness of the deed by producing evidence. It is true that on 16th December 1911 the application was not taken up. It was not taken up for the very good reason that the record had not been then returned from the Appellate Court.

But this did not relieve Maqsd Ali from the necessity of having his evidence ready. From the record it appears that he did not have his evidence ready and that he called no witnesses. When the record arrived, the Subordinate Judge called on the Pleader of Maqsd Ali and asked him whether he was in a position to prove the genuineness of the deed. The Pleader replied that he was not in a position to do so. The Judge then decided that he would wait no longer. He had, in my opinion, made an investigation, he had examined the deed, and he had given a date on which the deed could be proved. No evidence had been produced and he was in a position to say that, as the genuineness of the deed had not been proved, he would not regard it as valid. That was the position which he took up. Maqsd Ali has undoubtedly a right to say that he was hurried in the matter, that he was not given very much time within which to produce his evidence, and that, if circumstances had been more favourable, he might have been able to satisfy the Court that his deed was a genuine one. But these are not objections to the effect that no investigation took place. They are objections to the effect that an investigation took place, but that the investigation was badly conducted and, as I understand the

law, an objection (even if it be a good objection) to the effect that the investigation has been badly conducted in no way goes to show that the order passed was inoperative. I take the order to be an operative order passed after an investigation which was open to criticism. The law then allowed Maqsd Ali a remedy, but that remedy was subject to the condition that he should bring his suit within a year. As he failed to bring the suit within a year he has no remedy left. This, as I understand it, is the view that was taken by Mr. Chamier in *Gayadin v. Musammatt Baij Nathi* (6); and it is the view which appears correct to me.

I, therefore, allow this appeal and direct that the suit stand dismissed and that Maqsd Ali pay his own costs and those of the appellant in all three Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1336 OF 1915.

July 12, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

ALI AHMAD AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

KALKA PRASAD—DEFENDANT—

RESPONDENT.

Mortgage—Redemption—Interest, covenant as to payment of, construction of.

A mortgage-deed provided that the mortgagee would remain in possession of the mortgaged property and would receive the profits thereof in lieu of interest, the mortgagor being entitled to redeem the property on payment of the principal sum. In case of a deficiency of profits the mortgagor covenanted to make it up from his own pocket.

Held, that there being no covenant on the part of the mortgagor that the deficiency in the profits should be added to the principal or that it should be paid at the time of redemption, he was entitled to redeem the mortgaged property on payment of the principal sum only. [p. 96, col. 1.]

Jawahir Singh v. Someshwar Das, 28 A. 225; 10 C. W. N. 266; 1 M. L. T. 66; 3 C. L. J. 354; 33 I. A. 42, distinguished.

Second appeal from a decree of the Subordinate Judge, Mainpuri.

Mr. Sital Prasad Ghosh, for the Appellants.

Mr A. P. Dube, for the Respondent.

KSHETRA MOHAN GHOSH v. CORPORATION OF CALCUTTA.

JUDGMENT.—We think that the plaintiff was entitled to redeem the mortgage upon payment of Rs. 200. It is contended in support of the decision of the Court below that if there was a deficiency of profits, that is to say, when the profits did not reach Rs. 48 the mortgagee was entitled to add this amount to the principal, and that the property could not be redeemed otherwise. The deed itself expressly says that the property can be redeemed upon payment of Rs. 200. True it is that a personal liability was undertaken to pay year by year the deficiency in the profits. The decision of the Privy Council in *Jawahir Singh v. Someshwar Dat* (1) relied upon by the respondent is distinguishable, as the document in that case was quite different. There it was expressly stipulated not only that the deficiency should be made good by the mortgagor, but that if it was not paid, it should be paid at the time of redemption. We allow the appeal, set aside the decrees of both the Courts below and in lieu thereof decree the plaintiff's claim for redemption upon payment of Rs. 200. The money must be paid within three months from this date. If it is not paid within this time, the suit will stand dismissed with costs in all Courts. The appellants will have their costs in the Courts below and in this Court, provided the mortgage is redeemed.

Appeal allowed.

(1) 28 A. 225; 10 C. W. N. 266; 1 M. L. T. 66; 3 C. L. J. 354; 33 I. A. 42.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 184
OF 1912.

July 11, 1916.

Present:—Justice Sir Asutosh Mookerjee, K.T.,
and Mr. Justice Cuming.

KSHETRA MOHAN GHOSH AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

THE CORPORATION OF CALCUTTA—
DEFENDANT—RESPONDENT.

*Calcutta Municipal Act (III of 1899), s. 286—
Highway or drain, vesting of, in Municipality, effect of
—Municipality, powers of—Owner of land covered by
drain, rights of—Injunction—Declaration.*

A house-drain alongside a public street made by the owner of the adjoining premises, to which the land covered by the drain appertains, for the outlet of water therefrom is excluded from the operation of section 286 of the Calcutta Municipal Act. [p. 97, col. 2.]

The legal effect of the statutory vesting of a street or a drain in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street or the drain exists; but only the surface and so much of the air-space above and so much of the soil below the surface vest in and belong to the Municipality as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public; and to this extent only, the owner of the land covered by the street or drain is divested of his property. [p. 98, col. 1.]

In construing an Act like the Calcutta Municipal Act, Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public Corporation without compensation granted to the proprietor, but the reasonable inference should be that the right of the owner was intended to be abridged only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public. [p. 98, col. 2.]

When a highway vests under a Statute in a local authority, the property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway and subject to this qualification the original owner's rights and property remain, and if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. [p. 99, col. 1.]

English, American and Indian Case-Law considered.

The plaintiffs' land, covered by a drain that had vested in the Calcutta Corporation under section 286 of the Calcutta Municipal Act, having been included within the boundaries of the Municipal land, they brought a suit for a perpetual injunction against the Corporation and for a declaration of their title to the land:

Held, that the plaintiffs were entitled not only to a declaration of title but also to a perpetual injunction restraining the Corporation and its officials and servants, from interfering with the exercise by the plaintiffs of their right of ownership in the disputed land, except in so far as such interference might reasonably be required for the control, protection and maintenance of the drain thereon for the use of the public. [p. 99, col. 2.]

Appeal against the decree of the Subordinate Judge, 24-Pergannahs, dated the 20th September 1911, modifying that of the 2nd Munsif, Alipore, dated the 27th July 1907.

FACTS of the case appear from the judgment.

Babu Bhudeb Chandra Roy, for the Appellants.—The finding of the lower Appellate Court is that the land in dispute belongs to

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me. But it says that as there is a road-side drain on the land, it has "vested" in the defendant Corporation by reason of section 286 of the Calcutta Municipal Act. I submit section 286 does not give the defendant the ownership of the disputed property. The drain is vested "as a drain." As to the effect of "vesting" see the cases of *Sundaram Ayyar v. Municipal Council of Madura* (1), *Madathapu Ramaya v. Secretary of State* (2), *Finchley Electric Light Co. v. Finchley Urban District Council* (3), *Tunbridge Wells Corporation v. Baird* (4) and *Judicial Committee in Sydney Municipal Council v. Young* (5).

As to how the defendant Corporation can use the drain, *Coccardale v. Charlton* (6) is an authority on the point.

Babu *Debendra Chandra Mullick*, for the Respondent.—By section 286, the drain is vested in the defendant Corporation and that includes the ownership of the drain and the land under it. The plaintiffs' rights are extinguished and the suit must fail.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for a perpetual injunction to restrain the defendant Corporation from interference with them in the exercise of their rights as proprietors. The case for the plaintiffs is that the disputed land appertains to their premises 13/3, Circular Garden Reach Road, that their predecessor constructed a drain thereon for the outlet of water from the premises, and that on the 22th May 1903 two of the officers of the Corporation had caused the land to be included within the boundaries of the adjoining street. The plaintiffs assert that such unlawful action on the part of the Corporation had rendered it necessary for them to obtain a declaration of their title and an injunction so as to secure

them from future interference. The defendant Corporation resisted the claim on the ground that the land was not the property of the plaintiffs, that the drain was a part and parcel of the public street and that it was in any event a public street within the meaning of section 335 of Act III of 1899 B. C. and had become vested in the Corporation and was their property. The Court of first instance found in favour of the plaintiffs on the question of title, and granted them a perpetual injunction. On appeal, the Subordinate Judge reversed this decision and dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. The Subordinate Judge, after remand, has declared the title of the plaintiffs to the site of the drain but has refused the injunction on the ground that as the drain had vested in the Corporation, the right of the plaintiffs had been extinguished. The decree as drawn up is possibly not in exact conformity with the judgment. The plaintiffs have now appealed to this Court, and have pressed their claim for an injunction; there is no cross-appeal by the Corporation upon the question of title. Consequently, we must proceed on the assumption that the land in suit covered by the drain appertains to the premises owned by the plaintiffs.

Section 286 of the Calcutta Municipal Act, 1899, provides that all public drains and all drains in, alongside or under any public street, whether made at the charge of Municipal funds or otherwise, and all works, materials and things appertaining thereto, shall vest in the Corporation. The drain which passes over the land in suit is not a public drain within the meaning of this section, but is a drain alongside a public street. Section 3, clause 16, shows that the term drain includes a house drain; consequently, the fact that the drain is a house drain made by the owner of the adjoining premises for the outlet of water therefrom does not exclude it from the operation of section 286. What then is the precise effect when, under section 286, a drain vests in the Corporation; does the Corporation thereby become the proprietor of the soil? The

(1) 25 M. 635 at pp. 642, 647; 12 M. L. J. 37.

(2) 27 M. 336 at p. 393.

(3) (1903) 1 Ch. 437; 72 L. J. Ch. 297; 88 L. T. 215; 51 W. R. 375; 67 J. P. 97; 1 L. G. R. 244; 19 T. L. R. 238.

(4) (1896) A. C. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788.

(5) (1898) A. C. 457; 67 L. J. P. C. 40; 78 L. T. 365; 46 W. R. 561.

(6) (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128; 40 L. T. 88; 27 W. R. 257.

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question is by no means of first impression. It has been ruled in a long series of decisions that when a road or a drain vests in the Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners. [*Chairman of the Naihati Municipality v. Kishori Lal Goswami* (7), *Modhu Sudan Kundu v. Promoda Nath Roy* (8), *Chairman of Howrah Municipality v. Khetra Krishna Mitter* (9), *Nihal Chand v. Azmat Ali Khan* (10), *Nagar Valab Narsi v. Municipality of Dhandhuka* (11)], though possibly a different view was taken in *Municipal Commissioners of Madras v. Sarangapani Mudaliar* (12). The principle applicable to cases of this character was elaborately examined by Sir V. Bhashyam Ayyangar in *Sundaram Ayyar v. Municipal Council of Madura* (1), which was followed in *Madathapu Ramaya v. Secretary of State* (2). It was pointed out that the legal effect of the statutory vesting of a street in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street exists; the street, *qua* street, vests in the Municipality, that is, the surface and so much of the air-space above and so much of the soil below the surface as is reasonably necessary to enable the Municipality adequately to maintain and manage the street as a street, was vested in and belonged to the Municipality. This conclusion is in conformity with what has been recognised as settled law in England and America. In England, the effect of a statutory provision whereby a road or drain is made to vest in a County Council or County Borough, is, not to transfer the freehold to the authority concerned, but merely to vest in them the property in the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public; to this extent only the owner

is divested of his property. The Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public Corporation without compensation granted to the proprietor. The reasonable inference, on the other hand, is that the right of the owner was intended to be abridged, only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public. Reference may usefully be made to the decision of the House of Lords in *Tunbridge Wells Corporation v. Baird* (4) and of the Judicial Committee in *Sydney Municipal Council v. Young* (5). In the former case, Lord Halsbury held that the street, *qua* street, and so much of the actual soil of the street as might be necessary for the purpose of preserving, maintaining and using it as a street, had vested in the Corporation. Lord Herschell, added that the vesting of the street vested in urban authority such property and such property only as was necessary for the control, protection and maintenance of the street as a highway for public use. In the latter case, Lord Morris observed that the vesting of a street vested no property in the Municipality, beyond the surface of the street and such portion as might be absolutely necessarily incidental to the repairing and proper management of the street; it did not vest the soil or the land in them as owners, that is, the street vested in them *qua* street and not as general property. The doctrine thus formulated has been recognised and applied in a variety of cases: *Bagshaw v. Buxton Local Board* (13), *Rolls v. Saint George Southwark Vestry* (14), *Wandsworth Board of Works v. L. & S. W. Ry. Co.*, (15), *Finchley Electric Light Co. v. Finchley Urban District Council* (3), *Coverdale v. Charlton* (6), *Poplar Corporation v. Millwall Dock Co.* (16), *Hyde Corporation v. Oldham Ashton and Hyde Electric Tramway* (17),

(7) 13 C. 171; 6 Ind. Dec. (N. S.) 617.

(8) 20 C. 732; 10 Ind. Dec. (N. S.) 494.

(9) 33 C. 1290; 10 C. W. N. 1044; 4 C. L. J. 343.

(10) 7 A. 362; A. W. N. (1885) 56; 4 Ind. Dec. (N. S.) 592.

(11) 12 B. 490; 6 Ind. Dec. (N. S.) 810.

(12) 19 M. 154; 6 Ind. Dec. (N. S.) 512.

(13) (1875) 1 Ch. D. 220; 45 L. J. Ch. 260; 34 L. T. 112; 24 W. R. 231.

(14) (1880) 14 Ch. D. 785; 49 L. J. Ch. 691; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680.

(15) (1862) 31 L. J. Ch. 854; 10 W. R. 814.

(16) (1904) 68 J. P. 339.

(17) (1900) 64 J. P. 596; 16 T. L. R. 492.

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Foley's Charity Trustees v. Dudley Corporation (18), *London and North Western Railway Company v. Westminster Corporation* (19), *Lodge H. C. Co., v. Wednesbury Corporation* (20), *Wandsworth Board of Works v. United Telephone Company* (21), *Battersea Vestry v. County of London* (22), *Mayor of Birkenhead v. London & North Western Railway Company* (23), *Lord Provost of Glasgow v. Glasgow & South Western Railway Company* (24). No useful purpose would be served by a minute analysis of the varying circumstances of these decisions; but the general principle deducible may be summarised to be that the property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway, that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. A similar view has been adopted in the Courts of the United States, where the question of the precise interest taken by the Municipal Corporation has sometimes arisen in relation to title to underground minerals or alluvial accretions. The doctrine has been adopted that the property or estate vested in the Municipality is such only as is necessary for street purposes and is in trust for public uses and not for purposes of profit and emoluments [Dillon on Municipal Corporations] 1911, Volume III, page 1691, *Banks v. Ogden* (25), *Thomas v. Hunt* (26), *Donovan v. Allert* (27), *Leadville v. Bohm Mining Co.* (28)]. In some of these

(18) (1910) 1 K. B. 317; 79 L. J. K. B. 410; 102 L. T. 7; 74 J. P. 41; 8 L. G. R. 320.

(19) (1904) 1 Ch. 759 reversed; (1905) A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143; 54 W. R. 129; 3 L. G. R. 1120; 69 J. P. 425.

(20) (1908) A. C. 323; 77 L. J. K. B. 847; 99 L. T. 210; 72 J. P. 417; 6 L. G. R. 924; 24 T. L. R. 771.

(21) (1884) 13 Q. B. D. 904; 53 L. J. Q. B. 449; 51 L. T. 148; 32 W. R. 776; 43 J. P. 676.

(22) (1899) 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 231; 15 T. L. R. 175.

(23) (1885) 15 Q. B. D. 572; 55 L. J. Q. B. 48; 50 J. P. 84.

(24) (1895) A. C. 376.

(25) (1867) 2 Wallace 57; 69 U. S. XVII Law. Ed. 818.

(26) (1896) 134 Mo. 392; 32 L. R. A. 857.

(27) (1902) 11 N. D. 289; 58 L. R. A. 775; 95 Am. St. Rep. 720.

(28) (1906) 87 Colo. 243; 8 L. R. A. (N. S.) 422; 86 Pac. 1038.

cases, reference was made with approval to the decisions in *Tunbridge Wells Corporation v. Baird* (4), *Coverdale v. Charlton* (6), *Wednesbury Corporation v. Lodge Hole Colliery Co.* (29), *Lodge H. C. Co., v. Wednesbury Corporation* (20) in support of the view that the intent and purpose of a Municipal Statute is to clothe the city in its governmental capacity with the entire title to the streets, as such, for public use and not for the profit or emolument of the city, in other words, the interest or estate thus conferred upon the Corporation is limited and not absolute, limited by the purposes which the Legislature had in view when the Corporation was created.

In the light of these principles it is obvious that there was no foundation for the claim of the Corporation to include the disputed land within the boundaries of Municipal land. The plaintiffs are accordingly entitled not merely to a declaration of their title, which has been unsuccessfully contested by the Corporation, but also to a perpetual injunction. The injunction will restrain the Corporation, its officers and servants from interfering with the exercise, by the plaintiffs, of their right of ownership in the disputed land, except in so far as such interference may reasonably be required for the control, protection and maintenance of the drain thereon for the use of the public.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside in so far as it dismisses the claim for a perpetual injunction. In supersession of the decree of the Subordinate Judge a decree will be made to the following effect: "The title of the plaintiffs is declared to the disputed land; it is further declared that the drain thereon has vested in the Municipality as a drain. The defendant Corporation, its officers and servants are hereby perpetually restrained from interfering with the plaintiffs in the exercise of their rights as proprietors of the disputed land, except where such interference may reasonably be required for the control, protection and maintenance of the drain for the use of the public."

(29) (1907) 1 K. B. 78; 95 L. T. 815; 71 J. P. 73; 6 L. G. R. 43; 23 T. L. R. 80; 76 L. J. K. B. 68.

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As the plaintiffs have substantially succeeded, they are entitled to their costs in all the Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 90 OF 1915.

July 7, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.
KUNDAN SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

Musummat SURJA KUAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Foreclosure, decree nisi for, against mortgagor—Mortgagor, death of, before decree absolute—Heirs, one of several, brought on record, effect of—Execution—Sale—Interest of other heirs, whether could be sold.

A Hindu widow, who was in possession of a certain share of her husband's property upon partition made among her sons and who lived jointly with one of the latter, mortgaged her share to pay off her husband's debt. The mortgagee obtained a decree nisi on the mortgage against the widow, but the latter died before the decree could be made absolute. The son, who had lived jointly with the widow, was alone brought on the record as her representative, and the property was brought to sale in execution of the decree and was purchased by plaintiffs, who sued all the heirs of the widow for possession:

Held, that the order absolute having been obtained against one out of several heirs of the widow, there was not in existence any decree under which the interests of the other heirs could be sold. [p. 103, col. 2.]

Malkarjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 268; 7 Sar. P. C. J. 739, distinguished.

Appeal, under section 10 of the Letters Patent from the judgment of Mr. Justice Tudball, modifying a decree of the First Additional Judge, Aligarh.

FACTS of the case will appear from the following judgment of Tudball, J.:—

"The facts out of which this second appeal has arisen are as follows:—One Lakhmi, the owner of certain property in the village of Ametha, died leaving three sons, Baldeo, Gulab and Kesri. The three sons mortgaged this property to one Jasram, who on 20th September 1900 got a decree for sale in execution of which the property was sold. Baldeo and Kesri each paid $\frac{1}{3}$ rd of the debt and the sale of their shares was set aside.

Gulab Singh had died leaving a widow and five sons, Ganga Prasad, Pitambar,

Chokhe Singh, Kunjal and Sher Singh. The widow was *Musummat Rukmin*.

The sons partitioned the estate of Gulab and by reason thereof each of them and the widow got a one-sixth in Gulab Singh's share of the *Mauza Ametha*.

This was the state of affairs when the property was sold. Baldeo and Kesri rescued their one-third shares from the sale as stated above.

Gulab's eldest son Ganga Prasad and his widow Rukmin borrowed Rs. 1,700 from one Bhura Singh on 8th October 1900, giving him a simple mortgage of the two one-sixth shares held by them in Gulab's share of Ametha. With the money thus borrowed they paid up the remainder of Jasram's decree and the sale of Gulab's share was also set aside.

The other four sons of Gulab contributed nothing to the rescue of the share from the sale.

Bhura Singh on 15th September 1906 brought a suit for sale on the basis of his mortgage against Ganga Prasad and *Musummat Rukmin*. He also impleaded two prior mortgagees. He obtained a preliminary decree for sale on 17th January 1907 conditional on his paying off the prior mortgages.

On 26th March 1903 he assigned his decree to the present plaintiffs, whose names were brought on the record as decree-holders on 12th July 1909. Then *Musummat Rukmin* died and the case was continued against Ganga Prasad alone, apparently on the ground that he and his mother were living jointly. At any rate the other sons of Gulab were not made parties to the suit. Of these four sons one Pitambar had also died prior to the death of Rukmin. On 8th February 1910 the plaintiffs obtained an order absolute for sale. They paid off the prior mortgagees as directed by the decree. On 20th September 1910 the mortgaged property (*i.e.*, the shares of Ganga Prasad and *Musummat Rukmin*) was put to sale and purchased by the plaintiffs. They then applied for mutation of names after obtaining formal delivery of possession.

They were opposed by the other sons of *Musummat Rukmin*, who pleaded that there had been no partition in the family; that

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the name of Rukmin had been entered for her consolation after the death of Gulab; that she had no share and no legal power to mortgage any share.

The Revenue Court granted mutation in respect only of the one-sixth share of Ganga Prasad and refused it in respect to the one-sixth share which had stood in the name of Rukmin.

The plaintiffs then brought the present suit for possession of the share of Rukmin. They impleaded all the living members of the family, including the widow of Pitambar and also a transferee Durjan Singh, who had purchased the rights of Chokhe Singh (son of Gulab Singh) including the share he had inherited from Rukmin.

They pleaded that after the partition between the sons and widow of Gulab Singh, the widow and Ganga Prasad continued to live jointly and that on her death Ganga Prasad alone inherited her one-sixth share.

In defence it was pleaded that there had been no partition, that Rukmin's name had been recorded for consolation and she had no power to mortgage, and that her other sons were not liable to pay the debt which she had contracted. That in any case they were not bound by the order absolute as they had not been made parties to the suit.

Durjan Singh also pleaded that he had purchased Chokhe Singh's property under a decree on a mortgage prior to that under which the plaintiffs had purchased.

The Court of first instance held

(1) That Rukmin was the owner of the share which stood in her name and that it was her *stridhan*, it having come to her on partition between the sons;

(2) that she had power to mortgage;

(3) that she and Ganga Prasad were not joint;

(4) that the other sons of Gulab not having been made parties to the suit on Rukmin's death were not bound by the decree and the suit, therefore, must fail.

It passed no decision on the 2nd and 3rd issues framed by it and dismissed the suit.

The plaintiffs appealed and pleaded

(1) that the decree in execution of which the property had been sold was based on a bond executed in lieu of a debt due from

Gulab Singh for the payment of which all the heirs of Gulab Singh were liable;

(2) that after the partition Ganga Prasad and Rukmin lived jointly;

(3) that Rukmin's share was not her *stridhan* nor was it inherited by her sons on her death;

(4) that the property having been sold to satisfy an ancestral debt, the other heirs of Gulab Singh were bound by the sale and could not now object and the plaintiffs were entitled to possession.

It was pointed out that the first Court had not decided two of the issues. The lower Appellate Court states in its judgment that the first Court had held the partition not proved. This appears to be an error. The first Court's judgment is not very good, but it clearly held in favour of the partition for it held that Rukmin's share became her *stridhan*. It held it not proved that after the partition Rukmin and Ganga Prasad remained joint and held jointly. The lower Appellate Court held that there had been a partition and that after that the widow and Ganga Prasad remained joint, that the estate which the widow got, in the absence of all evidence to show that she got an absolute estate with the consent of the sons, was an ordinary widow's estate which on her death went to the reversioners of her husband. The Court then concluded its judgment in the following words: "It is complained that the lower Court has not decided the suit on its merits. This is not so; he has held rightly, though he does not give his authority, that *Musammat* Rukmin was not empowered to mortgage and has dismissed the plaintiffs' suit on this ground. The appeal fails and is dismissed with costs."

Here the Appellate Court has again erred. The first Court's decision on the first issue is as follows: "Rukmin's name is recorded in the revenue papers over one-sixth of Gulab's estate. I think she owned and possessed that share and was authorised to mortgage it." The first Court dismissed the suit simply on the ground that the other heirs of Gulab not having been made parties to the suit were not bound by the decree (or rather the order absolute).

The plaintiffs come here on second appeal. They accept the finding that the estate which

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Rukmin took on partition was that of a Hindu widow with limited powers, there being no evidence to show that at the time of partition an absolute estate was granted to her.

It is urged (1) that on the facts found all that the defendants (other than Ganga Prasad) are entitled to, is an opportunity to redeem because they were not made parties to the suit of Bhure Singh on the death of *Musammāt* Rukmin as they ought to have been.

(2) That in any case Ganga Prasad was bound by the decree and he took one-fourth of Rukmin's share on her death, being one of the four surviving sons, one Pitambar having died beforehand leaving only a widow, and that the plaintiffs are entitled at least to recover one-fourth of the share in dispute.

One point is clear. In so far as the one-fourth share which Ganga Prasad took in Rukmin's one-sixth share is concerned, the plaintiff is clearly entitled to a decree for possession. There remain the rights of the other sons and the question is, whether in the circumstances the plaintiffs are entitled to any relief and if so, to what relief as against them. The second issue framed by the Court of first instance requires no decision, for if Durjan Singh purchased at a sale under a mortgage prior to that which *Musammāt* Rukmin created, then that mortgage could not cover *Musammāt* Rukmin's share which is the property now in dispute, a share which only came to Chokhe Singh on Rukmin's death. Moreover Rukmin's mortgage was made to save the estate of Gulab Singh which had been put up to sale under a mortgage created by Gulab Singh himself. It seems to me clear that as regards three-fourths of the property now in suit the plaintiffs' case must fail. No suit could now be brought to enforce the mortgage against the other sons of Gulab as it is apparently barred by time. The order absolute which was obtained against Ganga Prasad alone cannot bind the other three sons who were not made parties. My attention has been called to that decision.

The problem for solution may, shorn of

all unnecessary facts, be briefly stated as follows:—

A Hindu (Gulab Singh) mortgaged his property (one-third of Ametha). He then died leaving five sons and a widow. The sons partitioned the estate and each got a one-sixth share, and a one-sixth went to the widow (Rukmin). The widow and one son continued to live together.

The mortgagee sued the widow and all the sons and got a decree for sale and the property was actually sold. The widow and one son (Ganga Prasad) then mortgaged their own shares, obtained money thereby, paid it into Court and the sale of all six shares was set aside.

The widow clearly mortgaged her share to pay off a debt which was legally binding on the estate and on all her sons, who were reversioners to the share which she had taken on partition and also were co-judgment-debtors of hers. There was thus clear binding necessity.

A decree for sale was obtained against her. She then died and only one of her sons, Ganga Prasad (out of the four who survived her), was made a party as her heir. The order absolute was made as against him and the property has been sold and purchased by the plaintiffs.

As for *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (1), on the basis of which it is pleaded that the decree against Ganga Prasad binds the other heirs of *Musammāt* Rukmin, with all due deference to the learned Judges who decided that case, I cannot agree with them. It is not shown to me that that decision has been followed by the Madras or any other High Court. That decision goes so far as to hold that if on the death of a defendant, on the application of the plaintiff the name of anybody be brought upon the record, though such person may be only one of several legal representatives or may not be the true legal representative, the decree will be binding and good as against legal representatives who have not been made parties, in the absence of fraud. It is possible for a true legal representative to have no knowledge of the suit and if not made a party, he may have no

(1) 26 M. 230; 12 M. L. J. 368.

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opportunity of redeeming a mortgage before execution and final sale of the property.

Prior to the present Civil Procedure Code, under the rulings of this Court, an application for an order absolute under the Transfer of Property Act was held to be an application in execution of the decree for sale and had to be made within three years of the decree. No such application could be made now as against the three other sons of Gulab. Rukmin and Gulab were both dead when the application was made in the present case. The sons of Gulab were the owners of the property in suit. Proceedings ought to have been taken against them all. As regards the rights of those who were not made parties the order absolute and the sale are of no effect. I cannot hold that Ganga Prasad represented their interests. They were separate from him in every way.

The share of Ganga Prasad, however, clearly passed to the present plaintiffs and they are entitled to possession thereof. The result is that I admit the appeal to this extent. I grant the plaintiffs a decree for possession of one-fourth of *Musammāt Rukmin's* one-sixth share. They will recover their proportionate costs in all Courts as against Ganga Prasad. Their claim in regard to the remaining three-fourths must fail and in regard thereto I uphold the decrees of the Courts below.

In the circumstances of the case, however, I direct the defendants to bear their own costs in all Courts."

Mr. Peary Lal Banerji, for the Appellants.

Mr. E. A. Howard, for the Respondents.

JUDGMENT.—The facts connected with this appeal are fully stated in the judgment of the learned Judge of this Court and it is unnecessary to repeat them. Mr. Peary Lal Banerji, on behalf of the appellants, strongly relies upon the ruling in *Malkarjun v. Narhari* (2). In the present case the plaintiffs sued for possession. Their title depends upon an auction-sale in the execution of a mortgage-decree. In the case relied upon the defendant was in possession. In the present case the plaintiff is not in possession but seeks

possession and he must succeed upon the strength of his own title. Furthermore there is this great distinction between the two cases. In the case relied upon the property had been sold in execution of a simple money-decree which had been obtained during the lifetime of the judgment-debtor. In the present case only a decree *nisi* (as it was then called) had been obtained during the lifetime of *Musammāt Rukmin*. It was not until after her death and in the absence of her heirs except one that the order absolute was obtained. It seems to us, therefore, that there was not in existence any decree under which the interests of the other heirs could be sold. We think, therefore, that the decision of the learned Judge of this Court was correct and should be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 103B OF 1915.

July 7, 1916.

Present:—Mr. Stanyon, A. J. C.

DHANOOAL—DEFENDANT—

APPELLANT

versus

Musammāt BAJI—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. III, r. 4.—Pleader, delegation of duty by, to another—Appearance by Pleader not duly appointed, effect of—Appeal, proper presentation of, what constitutes—Power-of-attorney, name of Pleader omitted from body of, effect of—Objection taken at late stage, effect of.

The provisions of Order III, rule 4, of the Civil Procedure Code, 1908, are clear and imperative, and the Courts have no power to relax them. [p. 103, col. 1.]

A Pleader whose name is omitted from the body of a *vakalatnamah* is not a duly appointed Pleader, and an appeal presented by him is not properly presented, even though the omission might be only due to an oversight. [p. 104, col. 2.]

The fact that no objection is taken till a very late stage, does not validate the appointment of a Pleader which was not duly made. [p. 104, col. 2.]

Muhammad Ali Khan v. Sukhu, 19 Ind. Cas. 674; 11 A. L. J. 458; *Mohammad Ali Khan v. Jasram*, 23 Ind.

(2) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739.

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Cas. 464; 36 A. 46; 11 A. L. J. 1015; *Pokhpal Singh v. Damber Singh*, 6 A. L. J. 110 Notes, followed.

An act or appearance by any Pleader, not duly appointed by the person for whom he is to act, is no act or appearance in law. [p. 105, col. 1.]

Where a Pleader, expressly empowered to employ a colleague to act for or with him, makes such appointment, he must strictly comply with the provisions of Order III, rule 4 (1), Civil Procedure Code, unless exempted by clause (3) of the same rule. [p. 105, col. 1.]

Shivdayal Ramcharan v. Khetu Gangu, 20 B. 293; 10 Ind. Dec. (N. S.) 754, referred to.

Appeal against the decree of the Additional District Judge, Akola, dated the 26th November 1914, confirming that of the Munsif, Khamgaon, dated the 4th October 1911.

The Hon'ble Mr. M. R. Dixit, for the Appellant.

Mr. Lal Mohan Vivian Bose, for the Respondent.

JUDGMENT.—In this case the appellant has been the victim of his friends. A decree was passed against him by the Munsif of Khamgaon on the 4th October 1911. An application for copies of the judgment and decree was made on the 30th October 1911, and the copies were prepared and delivered on the 19th December 1911. Mr. G. V. Karnik, a Pleader of Berar, was retained by the appellant, and he prepared the memorandum of appeal and signed it on the 25th January 1912. On the same date a power-of-attorney was executed in his favour and accepted and signed by him. Thereafter instead of doing his work and presenting the appeal, he appears to have delegated that duty to another Pleader, Mr. R. M. Gupte, who irregularly added his signature to Mr. Karnik's power-of-attorney, and, on the same day, persuaded an ill-informed or careless clerk to accept the appeal. The clerk's endorsement reads:—

"Presented by Mr. R. M. Gupte, Pleader, beyond time and duly stamped."

The appeal was then 32 days beyond time, and was rejected by the lower Appellate Court on the 31st January 1912. On the 7th June 1912 the appellant appealed to this Court (Second Appeal No. 144-B of 1912), and, on the 18th January 1913, Hallifax, A. J. C., directed the lower Appellate Court to consider whether there was sufficient cause for the delay in presenting the appeal to

justify an extension of time. After due inquiry the lower Appellate Court extended time, and, on the 14th August 1913, admitted the appeal for hearing. The hearing was fixed for the 27th January 1914, but the appeal was adjourned unheard by two consecutive Judges until it came before a third on the 16th November 1914, when objection was taken that the appeal had not been duly presented. This objection prevailed, and, on the 26th November 1914, the learned Additional District Judge, following the decision in *Muhammad Ali Khan v. Sukhu* (1) [which was confirmed in appeal *Mohammad Ali Khan v. Jasram* (2)], dismissed the appeal. The learned Judges of the Allahabad High Court [following an earlier decision of the same tribunal cited as *Pokhpal Singh v. Damber Singh* (3), which I have been unable to find] held that a Pleader whose name is omitted from the body of the *vakalatnamah* is not a duly appointed Pleader, and an appeal presented by him is not properly presented, even though the omission might be only due to an oversight. It was also held that the fact that no objection was taken till a very late stage would not validate the appointment of a Pleader which was not made properly.

From the above decree the present appeal was made 125 days later, and it is only brought just within time by allowing 36 days as requisite for obtaining copies.

It is obvious that the appellant has no *locus standi*. From such experience as I have had of Berar, a practice appears to me to be growing up among Pleaders of orally delegating their duties to one another. This is a form of laxity which cannot be recognized because it is distinctly illegal, as was pointed out in *Shivdayal Ramcharan v. Khetu Gangu* (4). It is also obviously irregular; and when it goes, as it did in this case, to the extent of delegating the important duty of presenting a memorandum of appeal to a Pleader not appointed by the appellant, who signs a power not given to

(1) 19 Ind. Cas. 674; 11 A. G. J. 453.

(2) 23 Ind. Cas. 434; 3 A. 43; 11 A. L. J. 1015.

(3) 6 A. L. J. 110 Notes.

(4) 20 B. 293; 10 Ind. Dec. (N. S.) 754.

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him, the procedure borders upon professional misconduct. We do not find here, as was the case before the Allahabad Judges, a belated objection to a mere inadvertent omission from the body of the *vakalatnamah* of the name of a Pleader whom the appellant desired to appoint. Here there was no power at all in favour of the Pleader who presented the appeal, but his unauthorized and improper signature on a power given to another Pleader; and objection was taken at the first hearing, *inter partes*. I concur in the views of the learned Judges in the Allahabad and Bombay cases above cited. It makes no difference that Mr. Gupte professedly appeared for the appellant on the 31st January 1912 by himself, and on the 27th January 1914 and 22nd June 1914 with Mr. Karnik. It is obvious that these appearances were equally without authority. But even if they had been duly authorized by a power-of-attorney subsequently obtained from the appellant, that could not have validated the presentation of the appeal. The provisions of Order III, rule 4, of the Civil Procedure Code, 1908, are clear and imperative, and the Courts have no power to relax them. An act or appearance by any Pleader, not duly appointed by the person for whom he is to act, is no act or appearance in law. I do not say that where a Pleader is expressly empowered to employ a colleague to act for or with him he may not make the appointment. But if he does so, he must obey Order III, rule 4 (1), of the Civil Procedure Code. The only exception is that provided by clause (3) of the same rule. Where a Pleader, *duly authorized by a power-of-attorney to act in this behalf*, appoints a legal practitioner of the classes described in clause (3) to act for him, the latter is of course not under any obligation to produce written authority. But if the Pleader appointing him has no express written authority to appoint a Barrister or Advocate, the latter cannot legally appear for him. It will be well if the Bar will give special attention to these provisions of the law, and regulate their practice accordingly, so as to avoid such failures of duty and loss to parties as the unauthorized delegation of work must involve.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 878 OF 1912.

March 21, 1916.

Present:—Mr. Justice Shah Din and
Mr. Justice Chevis.

TILOK CHAND—DEFENDANT—

APPELLANT

versus

RAM CHAND—PLAINTIFF—

RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Declaratory suit—Consequential relief—Mahant, suit for removal of, and declaration of plaintiff's right to nominate successor, maintainability of.

A suit lies for removal of a mahant and for a declaration that plaintiff has the right to nominate a new mahant, without asking any further relief. In such a suit the prayer for removal of the defendant from the office does not imply his physical dispossession, all that is sought being a decree which would enable the successor on appointment to enforce his own right to take possession of the property. [p. 106, ccl. 2.]

Bawa Mangal Das v. Mahant Naringan Das, 56 P. R. 1895, followed.

Abdulkadar v. Mahomed, 15 M. 15; 5 Ind. Dec. (N.S.) 360, distinguished.

Srinivasa Ayyangar v. Srinivasa Swami, 16 M. 31; 2 M. L. J. 139; 5 Ind. Dec. (N.S.) 729; *Srinivasa Swami v. Ramanunja Chariar*, 22 M. 117; 8 M. L. J. 190; 8 Ind. Dec. (N.S.) 82, not followed.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Jullundur, dated the 22nd May 1912.

Messrs. *Mul Chand* and *Rambhaji Datta*, for the Appellant.

Bhagat Govind Das and *Mr. D. C. Ralli*, for the Respondent.

JUDGMENT.—The dispute in this case is as to the mahantship of the institution known as "Murti Ram Wali" *Dharamsala* situated in Katra Nihal Singh, Amritsar.

The late Mahant Tulsi Ram died shortly before the institution of this suit. Defendant is Tulsi Ram's elder brother. Just before he died Tulsi Ram executed a Will in favour of defendant, describing him as his *chela* and leaving everything to him subject to the control of one Bhai Dyal Singh. Defendant has now taken posses-

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sion, and plaintiff who claims to have the right to nominate a successor to the *mahantship* sues to have defendant removed and to have it declared that plaintiff has the right to nominate a new *mahant*. According to plaintiff Tulsi Ram left no *chela*, and plaintiff bases his claim to appoint a successor on two grounds, (1) that he is spiritually related to Tulsi Ram (see the tree on page 8 of the paper-book) and (2) that he is the *mahant* of the parent shrine.

The first Court dismissed the suit. The Divisional Judge on appeal held that the Will, though executed by Tulsi Ram while in his full senses, incorrectly described defendant as *chela*. The learned Divisional Judge disbelieved the oral evidence as to defendant having been appointed a *chela*, and held that the mere execution of the Will gave defendant no right to succeed, and that plaintiff, as *mahant* of the parent institution, had a right to nominate a successor subject to the confirmation of the fraternity. So the Divisional Judge gave a decree declaring that plaintiff had a right to nominate a successor to the *mahantship* subject to the confirmation of the fraternity and to remove defendant from the office of *mahant*.

Defendant appeals, and the first ground of appeal is that the suit in its present form does not lie as a suit for possession could be brought. Rai Sahib Mul Chand cites *Abdul Kadar v. Mahomed* (1), *Srinivasa Ayyangar v. Srinivasa Swami* (2) and *Srinivasa Swami v. Ramanuja Chariar* (3). The first of those rulings is distinguishable, as in the present case plaintiff does not claim that he is entitled to succeed to the *mahantship* himself nor does he seek possession for himself. In *Srinivasa Ayyangar v. Srinivasa Swami* (2) the claim was brought by three of the disciples of a *mutt*, asking (1) for a declaration that defendant was not the duly appointed successor of the late head of the *mutt* and (2) that the Court should fill up the vacancy by appointing a successor. The suit failed as it

was held that plaintiffs could have asked further that the *mutt* and its properties should be handed over to the person appointed as successor and the defendant should be ejected. In *Srinivasa Swami v. Ramanuja Ohariar* (3) a somewhat similar suit was thrown out, it being held that it would be for the disciples to appoint a successor and that the defendant might take objection to the person appointed and then another suit would be necessary, whereas if an appointment was first made and the person appointed brought a suit everything could be settled in the one suit. These rulings seem to be in defendant's favour.

Butin Bawa Mangal Das v. Mahant Narinjan Das (4), a suit in which certain plaintiffs sued to eject a *mahant* for misconduct and for a declaration that they were entitled to nominate a successor, it was held that plaintiffs were not seeking possession for themselves, that the prayer for removal of defendant from the office did not imply his *physical dispossession*, and that all that was sought was a decree which would enable the successor on appointment to enforce his own right to take possession of the property. This ruling seems to us a good guide, and we prefer to follow it rather than the Madras ruling. Heretoo a decree for removal from the post of *mahant* does not necessarily mean defendant's physical removal from the property. When a successor is duly appointed he can eject defendant from possession of the property, bringing a suit if necessary. But there cannot be two *mahants*, and until defendant is removed from the office and the office thus becomes vacant, how can any successor be appointed? It is a good thing to avoid multiplicity of suits as far as possible, but it is the successor, and not plaintiff, who will have a right to claim physical possession, and so long as defendant remains *mahant* no successor can be appointed.

It may be said that defendant is not really the *mahant*, but he is at least *de facto mahant*, at present. Granting that he is only a trespasser and that his presence is no bar to the appointment of a *mahant*, and that the person so appoint-

(1) 15 M. 15; 5 Ind. Dec. (N. S.) 360.

(2) 16 M. 31; 2 M. L. J. 159; 5 Ind. Dec. (N. S.) 729.

(3) 22 M. 117; 8 M. L. J. 190; 8 Ind. Dec. (N. S.) 182.

(4) 56 P. R. 1895.

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ed will be able to sue for possession, the mere fact that in the future another person will be entitled to sue for physical possession seems to us no legal bar to giving plaintiff a declaratory decree in the present case.

The finding that defendant is not a *chela* of Tulsi Ram is one of fact, and cannot be disputed in second appeal. That the *mahant* could not nominate an outsider as his successor merely by Will is a point on which we have no doubt whatever.

But it is urged on behalf of defendant that the lower Appellate Court has found that plaintiff is entitled to nominate on a ground which plaintiff never advanced in the pleadings in the first Court, viz., that plaintiff is the *mahant* of the parent institution. It is denied that plaintiff is the *mahant* of a parent institution, and it is pointed out that there is no evidence to justify a finding that he is. Further it is urged that plaintiff as an Arya Samajist is disqualified from right of appointment. All this is, however, of little real consequence and to order further enquiry would be useless trouble, for any nomination, whether by the plaintiff or by any one else, is subject to the confirmation of the fraternity, so it is really the fraternity who will have the last say in the matter. Each party before us claimed to have the support of the *bhek* behind it. Recognizing that the *bhek* have the last word in the matter, and that without their confirmation plaintiff is powerless, Rai Sahib Mul Chand withdrew opposition to the lower Appellate Court's decree, provided that it was added that defendant should not be dispossessed from the property till a successor had been nominated and the nomination had been duly confirmed.

This is a reasonable settlement of the whole case. If plaintiff has not the support of the *bhek* he is powerless and it is useless for him to move in the matter. If he has the support of the *bhek*, the sooner he nominates a successor and gets his nomination confirmed by the *bhek* the better.

We accept the appeal only to this extent that we add to the decree of the learned Divisional Judge a condition that defendant shall not be deprived of the physical possession of the *dharamsala* and of any

property which may belong to the *dharamsala* until a successor has been duly appointed and the appointment has been confirmed by the fraternity. The plaintiff, if he wished to succeed on the score of being *mahant* of the parent institution, should have stated this clearly in the pleadings, so that proper enquiry on this point might have been made. We, therefore, decline to allow him costs. The parties will bear their own costs in all Courts.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2878 of 1914.

May 19, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

LAL NARUPRAJA SINGH—

PLAINTIFF—APPELLANT

versus

BHABANI TELI—DEFENDANT—

RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), s. 65A—'Protected' gaontia, whether can surrender tenure—Gaontia, power of, to confer permanent rights—Adverse possession, nature and commencement of.

Plaintiff's ancestor, who was *zemindar* of the village in dispute, granted a lease of it in *gaontia* tenure to one D, and fresh leases were in succession granted to his son and grandson, the last named becoming a 'protected' *gaontia* under section 65A of the Central Provinces Land Revenue Act, 1881. On his death in 1900, his second son K was recorded as *gaontia*, and in 1907 the latter surrendered the tenure to the plaintiff. In 1911 plaintiff sued defendants for possession of the lands, and the latter, all of whom belonged to the family of the *gaontia*, resisted the *zemindar's* claim on the grounds that K had no power to surrender the tenure to the plaintiff, that they had been in adverse possession of the lands both as against the *gaontia* and as against the *zemindar* and that the suit was barred by limitation:

Held, (1) that there was nothing in the incidents of the tenure of a "protected" *gaontia*, as set out in section 65A of the Central Provinces Land Revenue Act, 1881, which in any way suggested that a *gaontia* was not entitled to relinquish his rights; [p. 109, col. 1.]

(2) that the suit was not barred by limitation as possession could not be adverse to a person who was not himself entitled to claim present possession, and so long as the *gaontia* tenure subsisted, the *zemindar* was not entitled to actual possession of any portion of the village and the possession of the defendants did not become adverse to the plaintiff until the tenure was relinquished in 1907. [p. 109, col. 2; p. 109, col. 1.]

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A *gaontia* cannot confer rights of a permanent character in the village which would be binding upon the *zemindar* after the *gaontia* tenure ceases to exist. [p. 109, col. 1.]

Second appeal from a decision of the District Judge, Manbhum-Sambalpur, dated the 14th May 1914, affirming that of the Subordinate Judge, Sambalpur, dated the 18th September 1912.

Mr. Janakinath Bose, for the Appellant.

Mr. Priyanath Chatterjee, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This appeal is connected with Second Appeals Nos. 2879 and 2880 of 1914 and this judgment will govern all three appeals.

The appellant brought the three suits out of which these appeals have arisen for the possession of plots of land in Mouza Sargipali, of which the appellant is the *zemindar*. The facts are that in 1845 an ancestor of the appellant leased the village in *gaontia* tenure to one Dhunda. Fresh leases were given in succession to the latter's son Gajadhar and grandson Karuna. The last-named, who became a "protected" *gaontia* under section 65A of the Central Provinces Land Revenue Act, 1881, died in 1900, leaving three sons of whom Mohan was the eldest. Mohan would have succeeded in the ordinary course to the position of *gaontia*, but he resigned in favour of the second son Kuber who was then recorded as *gaontia*. In 1907 Kuber surrendered the tenure to the *zemindar*. The respondent in Second Appeal No. 2878 is a younger brother of Karuna, the respondent in Second Appeal No. 2879 is a nephew of Karuna, and the respondent in Second Appeal No. 2880 is a cousin of Karuna. All three are, therefore, closely related to the men who have held the village as *gaontia*. The plots held by the respondents are part of the *bhogra* land of the village. Here it may be explained that the rent payable by a *gaontia* to his *zemindar* was usually the sum which the *gaontia* was expected to collect from the tenants. His profit or remuneration for collecting the rents was what he could get out of the *bhogra* lands, which appear to be not unlike what are known elsewhere as *sir* lands. Many years ago, it is not known when, the *bhogra* lands were divided up amongst the members of the *gaontia*'s family, probably in order to supply them with separate mainten-

ance. When Kuber relinquished the tenure in 1907, the *zemindar* obtained possession of the *bhogra* plots held by other members of the family, but the respondents to these appeals refused to give up the plots held by them.

The questions for decision are (i) whether the respondents were bound to give the plots up to the *zemindar* and (ii) if so, whether these suits were brought within limitation. The learned District Judge has answered the first question in the affirmative, but the second in the negative.

The learned Vakil for the respondents concedes that a *gaontia* of the kind now in question was, before the passing of Act XII of 1898, by which section 65A was inserted in the Central Provinces Land Revenue Act, 1881, no more than a *thikadar* or farmer of the village. This is in accordance with the opinion expressed by Mr. Nethersole in his Settlement Report. I have had no experience of cases relating to the tenures of a *gaontia* of this kind, but I assume that the learned Vakil is right in saying that a *gaontia* was before 1898 no more than a *thikadar*.

Section 65A provides that the Settlement Officer may in certain circumstances declare a *gaontia* to be "protected" for the purpose of that section, or give him the right of an occupancy tenant in respect of the whole or part of the land in his cultivation. The Settlement Officer may also fix the *jama* payable by the *gaontia*. The incidents of the tenure of a "protected" *gaontia* are set out, namely, that the tenure is heritable but not transferable and descends to a single heir in accordance with certain rules. It is common ground that formerly, at all events, a *gaontia* of this kind could not sublet his rights, and it is clear that he could not create in the village any tenure of a permanent character which would hold good after his lease came to an end.

The respondents say that they have been in possession of the lands in suit for a great many years (an assertion which is not disputed) and that their possession has been adverse not only to the *gaontia* for the time being, but also to the *zemindar*.

But possession cannot be adverse to a person who is not himself entitled to claim present possession. So long as the *gaontia* tenure subsisted, the *zemindar* was not entitled to actual possession of any portion of the village. The possession of the

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respondents did not become adverse to the appellant till the tenure was relinquished in 1907. The presentsuits were instituted in 1911 and were, therefore, within time.

The first Court found that the relinquishment was a collusive transaction and a sham, but the lower Appellate Court found that it was a reality and valid. It was contended before us that a "protected" *gaontia* is unable to relinquish his rights. No authority was cited in support of this contention, and I can discover nothing in the incidents of the tenure of a "protected" *gaontia* as set out in section 65A of the Central Provinces Land Revenue Act which in any way suggests that a *gaontia* is not entitled to relinquish his rights. The land held by the respondents seems to have come into their possession even before Karuna became *gaontia*. Karuna and after him Kuber seem to have held under independent leases. If so, it cannot be said that by relinquishing the tenure Kuber was acting against the interests of his own grantees or the grantees of any person through whom he claimed. This point, however, is not of any importance, for as already stated, a *gaontia* could not confer rights of a permanent character in the village which would be binding upon the *zemindar* after the *gaontia's* tenure ceases to exist.

For these reasons I am of opinion that the respondents are not entitled to retain the lands in suit and these suits are not barred by limitation. I would allow these appeals and decree the claims in these suits with costs in all three Courts. The amount of mesne profit claimed will be ascertained by the Court of first instance.

SHARFUDDIN, J.—I agree.

Appeals allowed.

ODUH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 8 OF 1916.

June 27, 1916.

Present:—Mr. Stuart, J. C.

PRAG—OBJECTOR—APPELLANT

versus

RAM LAL—APPLICANT—RESPONDENT.

Insolvency proceedings—Creditor setting up debtor's

joint family—Debtor denying creditor's assertion—Order based merely on debtor's statement, bad—Practice.

Where a debtor applied to be declared an insolvent and one of the creditors objected, asserting that the debtor and his sons formed a joint Hindu family owning considerable property not notified in the schedule:

Held, that an order of adjudication should not be passed in favour of the debtor merely on his statement as to the non-existence of the joint family, without giving an opportunity to the creditor of proving his assertion.

Appeal against the order of the District Judge Gonda, dated the 18th December 1915.

Babu Bisheshwar Nath Srivastava, for the Appellant.

JUDGMENT.—Ram Lal applied to be declared an insolvent. An order of adjudication has been made by the learned District Judge declaring him to be an insolvent. One of the creditors objected, asserting that Ram Lal and his sons were joint and that the joint family owned considerable property which had not been notified in the schedule. The learned District Judge took the statement of Ram Lal and on that statement decided that he was not joint with his sons. The objecting creditor appeals. I find that the objecting creditor was not given an opportunity of proving that Ram Lal was joint with his sons. While it may be taken that the presumption in favour of a jointness of the Hindu family was removed by the statement of Ram Lal, the objecting creditor should have been given an opportunity of adducing evidence to the contrary.

I accordingly set aside the order of the learned District Judge declaring Ram Lal to be an insolvent, and direct that proceedings be re-opened and that inquiry be made as to whether Ram Lal is or is not a member of the joint Hindu family with his sons and whether that joint family possesses property. Both parties will be permitted to adduce such evidence as they may wish upon the point. Ram Lal will pay his own costs in these proceedings and those of the appellant.

Application accepted.

SATYENDRA NATH DEY v. SECRETARY OF STATE.

CALCUTTA HIGH COURT.

CIVIL RULE No. 959 of 1915.

January 7, 1916.

Present:—Justice Sir Herbert Holmwood, Kt.,
and Mr. Justice Imam.

SATYENDRA NATH DEY—APPELLANT
—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—OPPOSITE PARTY.

*Lunacy Act (IV of 1912), s. 56, order under—Land
Acquisition Judge's power to disregard order—Juris-
diction.*

An order of the District Judge in his lunacy jurisdiction that a certain sum of money, which was in deposit with the Land Acquisition Judge to the credit of a lunatic, should be paid out to his natural guardian who was maintaining the lunatic and his family, is in accordance with section 56 of Act IV of 1912, and the Land Acquisition Judge has no jurisdiction to refuse to pay out the particular sum as directed by the order. [p. 111, col. 1.]

Rule against the order of the Special Land Acquisition Judge, 24-Pergannahs, dated the 1st June 1915.

FACTS appear from the following extracts from the verified petition of the natural guardian of the lunatic and from the orders of the District Judge and of the Land Acquisition Judge:—

(PETITION OF LUNATIC'S GUARDIAN.)

1. That your petitioner is the brother and natural guardian of Babu Jnanendra Nath Dey, a lunatic, who is at present residing in the Lunatic Asylum at Berhampur.

2. That your petitioner has been maintaining the said lunatic and his family at your petitioner's expense and is now finding it difficult to meet the just expenses incurred on those accounts.

3. That the Land Acquisition Collector of Alipur acquired the ancestral dwelling-house of your petitioner and of the said lunatic and made in favour of the lunatic an award of Rs. 592-0-7, being the share of the compensation money due to the said lunatic, and deposited the same with the Land Acquisition Judge of Alipur to the credit of the lunatic.

4. That on the 15th of September 1914, your petitioner applied to the District Judge of 24-Pargannas in lunacy jurisdiction praying for an order that the money deposited with the Land Acquisition Judge might be paid to your petitioner in order to enable your petitioner to meet the expenses of maintaining the said lunatic and his family, and filed

receipts from the Lunatic Asylum for sums actually paid by your petitioner for the maintenance of lunatic.

5. That the learned District Judge granted the said prayer ordering that the sum of Rs. 200 might be paid out to your petitioner for the present, and gave liberty to your petitioner to apply for further sums in future with receipts from the Asylum. A copy of the said order is annexed to this petition and marked A.

6. That thereupon your petitioner applied to the learned Land Acquisition Judge praying for an order allowing your petitioner to withdraw the sum of Rs. 200, all the reversioners of the lunatic joining in the prayer. But the learned Land Acquisition Judge rejected the application, holding that your petitioner was not entitled to withdraw the money inasmuch as your petitioner had not been appointed guardian of the lunatic by the Court, and directed on the 1st of January 1913 that the sum in deposit should be invested in $3\frac{1}{2}$ per cent. Government promissory notes. A copy of this order is annexed hereto and marked B.

(ORDER ON PETITION BY THE DISTRICT JUDGE,
DATED THE 15TH SEPTEMBER 1914.)

A.

I am not prepared to pay over the whole sum to the applicant without some guarantee, although it appears that he has been supporting the lunatic for some months. I allow him to draw Rs. 200 and when he wants more he may apply again with receipts from the Asylum.

(ORDER OF LAND ACQUISITION JUDGE,
DATED THE 17TH APRIL 1915.)

B.

To-day the Pleader for Babu Satyendra Nath Dey renewed his application verbally for orders on his petition of the 18th December 1914. The sum due to the lunatic has now been received. The money can be dealt with under the Lunatic Asylums Act, and I cannot hold that this Court which is a Court of Special Jurisdiction and Subordinate only to the High Court can act contrary to that Act. The only use that can be put with the money is by investing it in land or securities. I will hear the Pleader again on the 24th.

Babu Santosh Kumar Bose, for the Petitioner.

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Babu Atul Chandra Dutt, for Babu Ram Charan Mitra, for the Opposite Party.

JUDGMENT.—The order of the District Judge appears to be in accordance with section 56 of Act IV of 1912, the provisions of which are the same as section 20 of Act XXXV of 1858 on which the learned Judge relies. The Land Acquisition Judge, therefore, has no jurisdiction to refuse to pay out the particular sum directed by the District Judge to be applied by the petitioner for the maintenance of the lunatic or his family. The Rule is, therefore, made absolute and the order complained of is set aside. There will be no order for costs as the Secretary of State leaves the matter in the hands of the Court and does not oppose.

Rule made absolute.

OUDEH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 44 OF 1915.

March 15, 1916.

Present:—Mr. Lindsay, J. C.

RAMADHIN AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

BISHESHAR DAYAL—DEFENDANT No. 1—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Hindu Law—Joint Hindu family, separated members of, suit between—Applicability of s. 66—Appeal, plea of law, whether can be taken for first time in—Law prohibiting institution of certain suits—Partition, what constitutes.

A division of rights between the members of a joint Hindu family is sufficient to constitute a partition without actual physical division of the property itself. [p. 113, col. 1.]

If the law prohibits the institution of certain suits, effect must be given at any stage of a suit to the plea that the suit falls within such prohibition. Thus, a plea to the effect that a suit is barred by the provisions of section 66, Civil Procedure Code, can be raised for the first time in appeal. [p. 112, col. 2.]

The terms of section 66, Civil Procedure Code, do not apply to the case of a suit brought by one member of a joint Hindu family against another, inasmuch as such members are entitled, by operation of law and not by virtue of any private agreement or understanding, to treat as part of common property an acquisition made out of joint family funds. [p. 112, col. 2; p. 113, col. 1.]

But the section applies to a suit between the separated members of a joint Hindu family, irrespective of the fact that when separation took place, certain property belonging to the joint family was not actually divided. [p. 113, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 28th January 1915.

Mirza Sami Ullah Beg, for the Appellants.
Mr. Mohammad Wasim, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought by three plaintiffs Ramadhin, Rameshar and Ram Sukh for the purpose of obtaining a declaration as to their title in certain items of immoveable property mentioned in the plaint. In appeal here we are concerned only with two of these items of property, one being a share in a village called Dharmapur and the other a share in a village named Dhanka. The defendants are related to the plaintiffs in the following way. One Bhagwandin had five sons, namely Ram Dayal, Ram Sukh, Ramadhin, Rameshar and Bisheshar Dayal. Of these Bisheshar Dayal is the first defendant in the case whilst Ramadhin, Rameshar and Ram Sukh are respectively plaintiffs Nos. 1, 2 and 3. The other brother Ram Dayal is now dead and has left four sons who are the second, third, fourth and fifth defendants in the case. The sixth defendant Gajraj is a son of the third plaintiff Ram Sukh. In paragraph 2 of the plaint it was alleged that the joint family to which these parties once belonged separated in the year 1894. It was said that a partition was effected in that year and that most of the joint family property was divided. It was further alleged that certain debts owing to the joint family were retained as joint property, the debts amounting in all to a sum of Rs. 6,000. It was further stated that from time to time certain of these debts had been realised and had been divided among the separated members of the family in accordance with their shares. Seven deeds of mortgage and of further charge were, however, specified in paragraph 2 of the plaint, in regard to which it was said that they still constituted property to which all the members of the family were entitled according to their shares. In the third paragraph of the plaint the case regarding the Dharmapur property was stated. It was alleged that this property had been purchased at a Court sale in the month of April 1897 by the plaintiffs, the first defendant and Ram Dayal, who was the father of the defendants Nos. 2 to 5. The date of the purchase was not specified in the plaint. It was said that these

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parties had contributed the money which was deposited in Court for the purchase of the property, and it is said that the money had been so deposited by the first defendant Bisheshar Dayal as representing the whole of the family and that accordingly the sale-certificate issued in the name of the defendant No. 1 alone. It was further alleged that this Dharmapur property was subject to a mortgage and two deeds of further charge which were mentioned in paragraph 2 of the plaint as still constituting property which had not been divided between the separated members of the family. So far as this Dharmapur property was concerned, Bisheshar Dayal the auction-purchaser set up a plea that he had purchased it out of his own money. The Court of first instance, after considering the documentary and oral evidence, came to the conclusion that the plaintiffs had failed to prove that any money belonging to them had been devoted to the purchase of this Dharmapur property at the time of the auction-sale. The Subordinate Judge held that Bisheshar Dayal was the purchaser and owner of the property in question. At a previous hearing of the suit I held that it was necessary in the interest of justice to admit certain fresh evidence in the case and accordingly the case was adjourned, in order that the original record of the execution proceedings in the course of which the Dharmapur property was sold might be produced before the Court.

I have examined this record carefully and it appears to me that if the learned Judge of the Court below had this evidence before him, his findings of fact would probably have been different from what they are. It seems now that Dharmapur, instead of being purchased on the 20th of April 1897 as stated in the sale-certificate, was as a matter of fact knocked down to Bisheshar Dayal on the 28th of April. It was further proved by a reference to this file that one-fourth of the purchase-money, that is to say, Rs. 250 was deposited by Bisheshar Dayal in the Treasury on the 29th of April 1897. The balance of the purchase-money was paid into the Treasury on the 17th of May in the same year. It had been the case for the plaintiffs that they had contributed to this purchase money and they put forward a bond which was

executed on the 28th of April 1897 for the purpose of raising the Rs. 250 which was deposited in Court on the 29th of that month. The learned Subordinate Judge disbelieved the story about the borrowing of this money and the execution of the bond, on the ground that as the sale had taken place on the 20th of April it was impossible to suppose that the first instalment of the purchase-money could have been raised by loan on the 28th of April, that is to say, some eight days after the sale. The conclusions of the Subordinate Judge on this point are shown to be altogether erroneous by what is forthcoming from the record of the execution proceedings. I do not, however, propose to discuss the merits of the plaintiffs' case regarding this property, for it seems to me that the suit must fail in view of the plea which has been raised on behalf of the respondents to the effect that the suit in so far as it related to this Dharmapur property was absolutely barred by the provisions of section 63 of the Code of Civil Procedure. That section lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. The learned Counsel for the appellants has pointed out that this plea was not raised in the Courts below and he has, therefore, asked me not to allow it to be raised for the first time in appeal. It seems to me, however, that a plea of this kind cannot be ignored merely because it is put forward for the first time in appeal. If the law prohibits the institution of certain suits, I think that if it is made to appear at any stage that the suit in question falls within the prohibition effect must be given to the plea of law. I have, therefore, to examine whether this plea is sufficient to defeat the present suit in so far as it relates to this property which was purchased at the auction-sale. It has, of course, been held and is well established that the terms of section 66 do not apply to the case of a suit brought by one member of a Hindu joint family against another. Their Lordships of the Privy Council have held that the section does not affect the rights of

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members of a joint family who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of common property an acquisition which has been made out of joint family funds. It is not possible for the plaintiffs to withdraw the present case from the purview of section 66 on the ground that the family was a joint Hindu family, for from what is stated in the pleadings it is the common case of both parties that the joint family broke up in the year 1894. It may be a fact that when the separation took place, certain property belonging to the joint family in the shape of debts secured by mortgage and otherwise was not actually divided, but be that as it may, it is perfectly clear that the family after the year 1894 was no longer a joint Hindu family. A division of rights between the members of a joint Hindu family is sufficient to constitute a partition without actual physical division of the property itself. It is not pretended in the plaint that the Dharmapur property was bought with money belonging to a common joint family fund, for there was no such fund in existence. On the contrary, the allegation was that the money which was applied to the purchase of this property was raised by the plaintiffs and by the father of the defendants Nos. 2 to 5, in short that the purchase was made on behalf of the plaintiffs by the defendant No. 1 with money a portion of which they, the plaintiffs, supplied. On this statement of the facts it is quite clear to me that section 66 does apply to this case and bars the suit. The learned Counsel for the plaintiffs pointed out that had the plea been taken in the Court below, it might have been possible for him to establish the existence of facts which would have rendered this section inapplicable. But it appears to me that on the pleadings it would not have been possible for the plaintiffs to make out that this case was one other than a suit which was being brought for a declaration against the holder of the sale-certificate on the ground that the purchase had been made on behalf of the plaintiffs; that, and no other, is the case which was set out in the plaint. I am satisfied, therefore, that the suit as regards this Dharmapur property must fail.

The second item of property which is in dispute consists of a share in a village called Dhanka. According to the evidence this property was purchased in the year 1903 along with certain other property from a Pleader named Babu Shiam Lal. Three separate sale-deeds were executed in respect of three items of property consisting of shares in three villages named Suhela, Kalohra and Dhanka. The plaintiffs' case was that they and the defendants had contributed the money for the purchase of these properties in equal shares. The sale-deed of the share in Dhanka was executed in the name of the first defendant Bisheshar Dayal and of the sixth defendant Gajraj who, as already mentioned, is a son of the plaintiff No. 3. It is as well here to notice how the other sale-deeds were executed. The sale-deed relating to the share in *Mauza* Suhela was executed in the names of Rameshar and Sunder Lal who are respectively plaintiff No. 2 and defendant No. 2. The third sale-deed which relates to the share in Kalohra was executed in the name of Ramadhin, the first plaintiff, and Ram Dayal who is the father of defendants Nos. 2 to 5. The Subordinate Judge held that the plaintiffs had failed to establish that they contributed in equal shares to the purchase-money of this Dhanka property. The principal evidence in the case consists of the statement of the vendor Babu Shiam Lal, and certainly his evidence does not by any means establish the case which the plaintiffs put forward. All he could say in the matter was that he had agreed to sell this property for a sum of Rs. 5,400. He was unable to say which of the parties to the case conducted the negotiations for the sale of these properties, but he treated the whole thing as being a single bargain and he only executed the three sale deeds because he was desired to do so. Half of the purchase-money was paid to him at the time of the sale whilst the balance was allowed to remain on mortgage. It was quite impossible for the witness to say whether the plaintiffs had contributed any portion of the money which was paid to him. On the other hand, there was the statement of the first plaintiff Ramadhin which supported the case set out in the plaint. Ramadhin was asked

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why, if all these parties contributed the purchase-money in equal shares, the sale-deeds were not executed in all of their names. His answers to this question were very unsatisfactory. His first answer was that the three separate sale-deeds were executed because it was so decided among the members of the family. Then it was hinted that the sale-deeds were taken in this peculiar way in order to avoid suits for pre-emption, there being apparently some apprehension that such suits might be brought with respect to the Suhela and Kalohra property. The Subordinate Judge thought that this explanation of the form which the transaction took was very unconvincing, and I agree with him that any defence against a suit for pre-emption which these people might have had would have been equally well open to them if all had joined as parties to the conveyances which were executed. The learned Subordinate Judge also refers to certain facts which in his opinion militated against any theory of a joint purchase. He pointed out that Ram Sukh, the third plaintiff in the present case, was no party to any of the three deeds and that Sunder Lal and his father Ram Dayal were parties each to one of the deeds. From this circumstance the lower Court was led to the conclusion that the parties were purchasing on their own account and in the manner set out in the three deeds of sale. He further pointed out that the plaintiffs could produce no satisfactory documentary evidence of their possession over this property. On the other hand, such documentary evidence as was available was in favour of the defendant Bisheshar Dayal and the sixth defendant Gajraj who were recorded as being in possession. On a careful review of all the evidence in the case I come to the conclusion that the Subordinate Judge's decision regarding the Dhanka property must be upheld. I think the plaintiffs failed to prove what it was necessary for them to establish in order to entitle them to the declaration which they sought. These are the only two questions which arise for decision in the suit and they are both determined against the appellants whose appeal is, therefore, dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2884 of 1915.

March 16, 1916.

Present:—Mr. Justice Rattigan.

BHAG SINGH—PLAINTIFF—

APPELLANT

versus

LABH SINGH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 20 (c), 21—Jurisdiction—Breach of betrothal contract, suit for damages for—Court, jurisdiction of.

A Court has jurisdiction to entertain a suit if the cause of action arose, wholly or in part, within the local limits of its jurisdiction. Therefore, a suit for the breach of a contract of betrothal can be tried by a Court within the local limits of whose jurisdiction the breach took place, even though the defendants reside elsewhere. [p. 115, col. 1.]

A judgment of a Court which had no jurisdiction to try a suit should not be set aside, unless there has been a failure of justice by reason of the suit having been instituted at the wrong place. [p. 115, col. 1.]

Second appeal from the decree of the District Judge, Amritsar, dated the 10th July 1915.

Mr. Mehr Chand, for the Appellant.

Mr. Charat Singh, for the Respondent.

JUDGMENT.—Plaintiff's suit to recover a sum of Rs. 500, as damages for breach of a betrothal contract, was decreed in part by the Munsif, 1st class, Tarn Taran. Defendants appealed to the District Judge, and the first ground urged on their behalf was that the Munsif at Tarn Taran had no jurisdiction to hear the suit. The learned Judge, relying on *Lorinda Mal v. Sewa Singh* (1) and *Buta v. Jagga* (2), has upheld this objection, holding that the suit was cognizable only by the Court of the Sialkot District, where the parents of the girl reside. The learned Judge accordingly set aside the decree of the lower Court and returned the plaint to the plaintiff to be presented to the Court competent to hear and decide the case.

Plaintiff has appealed to this Court and after hearing the learned Pleaders who appeared before me for their respective clients, I must accept the appeal and remand the case for further consideration to the District Judge. The authorities cited by him were decided at a time when the

(1) 57 P. R. 1874.

(2) 147 P. R. 1882.

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Civil Procedure Code of 1877 was in force, and at that time the words "cause of action," as used in section 17 of that Code, were construed to mean merely the infringement of the right. After the decision of the two cases cited, Explanation 3 was added to section 17 of the Civil Procedure Code of 1882 and under section 20 (c) of the present Code a Court has jurisdiction when the cause of action wholly or in part arises within the local limits of its jurisdiction.

It is contended on behalf of plaintiff, and was so found by the Munsif, that the contract of betrothal was made at Tarn Taran and if such was the case, the Court of the Munsif at Tarn Taran would have jurisdiction to hear and decide the suit. Moreover, even if the Munsif at Tarn Taran had no jurisdiction to entertain the suit, his judgment should not have been set aside unless the District Judge was satisfied that there had been a failure of justice by reason of the suit being instituted at the wrong place (see section 21, Civil Procedure Code).

I accordingly set aside the order of the District Judge and direct him to re-consider the appeal before him in the light of the foregoing remarks. The costs in this Court will abide the event.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 418 OF 1914.

May 15, 1913.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

PADMAN LOCHAN MISRA AND OTHERS—

APPLICANTS—APPELLANTS

versus

KRISHNA CHANDRA MISRA—

RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), s. 136G—Partition ordered by Deputy Commissioner—Appeal—Jurisdiction—Sambalpur Civil Courts Act (IV B. C. of 1906)—Deputy Commissioner and District Judge, positions of.

In the Sambalpur District, the District Judge

under the Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887) has succeeded to the position of the Deputy Commissioner under the Central Provinces Civil Courts Act (XVI of 1885). Therefore an order passed by the Deputy Commissioner under section 136D of the Central Provinces Land Revenue Act (XVIII of 1881) must be deemed to be an order of the District Judge and an appeal against it lies to the High Court and not to the District Court. [p. 116, cols. 1 & 2.]

Second appeal from a decision of the District Judge, Sambalpur, dated the 15th July 1914, setting aside an order of the Deputy Collector, Sambalpur, dated the 17th July 1912.

Babus *Ramesh Chundra Mazumdar* and *Janaki Nath Bose*, for the Appellants.

Babu *Prayanath Chatterjee*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The appellants and six others applied to the Deputy Commissioner of Sambalpur, under section 136D of the Central Provinces Land Revenue Act (XVIII of 1881), for partition of some *bhogra* lands in a village. The Deputy Commissioner declined to grant the application as regards six of the applicants, until the question in dispute had been determined by a competent Court. As regards the two appellants before us, he held that they were entitled to partition. There was an appeal to the District Judge, who was of opinion that the Deputy Commissioner had adopted an inconvenient course. He set aside the order of the Deputy Commissioner and remanded the case to him for a fresh decision. The appellants have appealed to this Court on the ground that no appeal lay to the District Judge against the order of the Deputy Commissioner. Section 136H of the Central Provinces Land Revenue Act (XVIII of 1881) provides, that all decrees and orders passed by a Deputy Commissioner under section 136G (the section under which the order of the Deputy Commissioner now in question was passed) deciding the right of partition, shall be held to be decrees and orders of a Court of civil judicature and shall be open to appeal as if passed by the Court of the Deputy Commissioner, acting as a Court of civil judicature of first instance under the Central Provinces Civil Courts Act, 1885. Under section 8 of the Central Provinces Civil Courts Act, 1885, the Deputy Commissioner

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was to be deemed to be the District Judge of the District and his Court to be the District Court or principal Civil Court of original jurisdiction in the District. The Central Provinces Civil Courts Act, 1885, was repealed by the Central Provinces Courts Act (II of 1904), which provided for the establishment of four new grades of Courts, the Divisional Court, the District Court, the Court of the Subordinate Judge and the Court of the Munsif. Section 13, subsection (1) (c), of that Act provided that the District Court should be deemed to be the principal Civil Court of original jurisdiction in the civil district. From this it appears that the District Court was substituted for the Court of the Deputy Commissioner as the principal Civil Court of original jurisdiction in the District. Bengal Act (IV of 1906) repealed the Central Provinces Courts Act, 1904, as regards the District of Sambalpur and extended to that District in its place the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887. Under section 18 of the last mentioned Act the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, to all original suits for the time being cognisable by Civil Courts. But the Court of the District Judge is superior to that of the Subordinate Judge and is the principal Civil Court of original jurisdiction in the District. It is thus clear that the District Judge under the Bengal, N.-W.-P. and Assam Civil Courts Act, 1887, has succeeded to the position of the Deputy Commissioner as District Judge under the Central Provinces Civil Courts Act, 1885. An appeal lies against the decree of a District Judge in a suit of any value, however small, to the High Court. It is contended before us that the decision of the Deputy Commissioner in the present case, which is valued at Rs. 120 only, should be treated as the decision of a Subordinate Judge because, if the suit had been one of a purely civil nature, it would have lain in the Court of the Subordinate Judge. As a matter of fact it appears that it would have lain in the Court of a Munsif, but the value of the suit is irrelevant for the purpose of deciding the present question. In my opinion,

the Court of the District Judge has taken the place of the Court of the Deputy Commissioner as the principal Civil Court of original jurisdiction under the Act of 1885 and, therefore, the decision of the Deputy Commissioner in the present case must be deemed to have been a decision of a District Judge. The appeal, therefore, lay to this Court and not to the District Court. I would allow this appeal, set aside the order of the District Judge and direct that the memorandum of appeal to the District Judge be returned to the respondent for presentation to the proper Court. The respondent must pay the costs of the appellants in this Court.

SHARFUDDIN, J.—I agree.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 199 OF 1915.

May 5, 1916.

Present:—Mr. Stuart, J. C.

RAM SARAN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

SAHEBDIN LAL—PLAINTIFF—
RESPONDENT.

Possession—Suit by one riaya against another for possession of village land appurtenant to dwelling-house, maintainability of.

A *riaya* can maintain a suit for the recovery of possession of village land appurtenant to his dwelling-house against another *riaya* who has ousted him from it. [p. 117, col. 1.]

Basdeo Kai v. Dwarka Ram, 32 Ind. Cas. 346 14 A. L. J. 137; 38 A. 178, referred to.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 16th April 1915, reversing that of the Munsif, Sultanpur, dated the 10th September 1914.

Babu Ishwari Prasad, for the Appellant.

Babu Ram Chandra, for the Respondent.

JUDGMENT.—The plaintiff-respondent on the one side and the defendants-appellants on the other side are *riayas* living in a village and having the ordinary right of *riayas* over their dwelling-houses. The dispute is with regard to a piece of unoccupied land lying

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between the houses of the two parties. The plaintiff-respondent has asserted that this plot of land is land appurtenant to his dwelling-house always used by him and that the defendants-appellants have constructed buildings over a portion of this land and ousted him from its possession. The defendants-appellants, while admitting that they have constructed the buildings, deny any ouster. They state that the land is land appurtenant to their dwelling-house and that the plaintiff-respondent has never been in possession of the same. The learned Subordinate Judge has found that the land in question is land appurtenant to the dwelling-house of the plaintiff-respondent and that the plaintiff-respondent has been in possession thereof within twelve years of the date of suit. He decreed the claim of the plaintiff-respondent for possession of the land and removal of buildings.

The learned Counsel for the appellants has argued that *riya*, such as the plaintiff-respondent is, cannot maintain a suit in ejectment with regard to such land. In support of this proposition he has referred to a recent decision of the Allahabad High Court—*Basdeo Rai v. Dwarka Ram* (1). That decision, however, does not support his view. It lays down a proposition that a licensee who has been ejected by his licensor from the land that he holds under the license cannot sue the licensor for recovery of possession but only for damages. Here the case is absolutely different. A licensee has every right to recover possession from a third party on proof of trespass. I accept as legal the findings of fact to the effect that the land in question is appurtenant to the dwelling-house of the plaintiff-respondent and forms a portion of the land which he holds under license, and further that he has been in possession of this land within twelve years of the date of suit. In the circumstances the plaintiff-respondent has been rightly awarded the relief which he has obtained from the learned Subordinate Judge.

I dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

(1) 32 Ind. Cas. 346; 14 A. L. J. 137; 38 A. 178.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 715
OF 1915.

December 4, 1916.

Present:—Mr Justice Chaudhuri and Mr.
Justice Walmsley.

ESTHER ISAAC EZEKIEL MORDECAI
AND ANOTHER—DEFENDANTS NOS. 1 AND 2
—APPELLANTS

versus

MORTHU MULL AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59, para. 3
—Mortgage by deposit of title-deeds—Registration—
Memorandum, when to be registered.

Where a memorandum creates a mortgage it comes under the operation of the Registration Act, but where there is a deposit of title-deeds independently of it, the deposit creates the mortgage, and the memorandum need not be registered. [p. 119, cols. 1 & 2.]

Kedarnath Dutt v. Sham Lal Khetry, 11 B. L. R. 405; 20 W. R. 150; *Oo Nong v. Mowng Htoon Oo*, 13 C. 322; 6 Ind. Dec. (N. S.) 715; *Gokul Das v. Eastern Mortgage and Agency Company*, 4 C. L. J. 102; 10 C. W. N. 276; 33 C. 410, referred to.

Appeal against the decree of the Additional Judge, Alipore, 24 Parganas, dated the 4th March 1915, affirming that of the Officiating Subordinate Judge, Alipore, 24 Parganas, dated the 13th August 1913.

FACTS of the case will appear from the following extracts from the judgment of the lower Appellate Court:—

"In this case the plaintiffs, who are the heirs and representatives of Sewdutt Roy deceased alleged that on the 15th of December 1908 the defendant Isaac Ezekiel Mordecai took an advance from Sewdutt Roy on a promissory note of Rs. 1,000. On the 1st of February 1909 he took another sum of Rs. 1,000 advanced, and at the end of February he wanted a further advance of Rs. 500. The loans were taken for the benefit of both the defendants Isaac Ezekiel and his wife Esther Isaac Ezekiel Mordecai. It was then arranged that defendant No. 2 who held certain properties at Dum Dum would deposit her title-deeds with Sewdutt Roy as security. Accordingly the title-deeds were deposited on the 1st of March 1909, and a further advance of Rs. 500 was taken, a promissory note being taken at the same time, and after that a memorandum was given to Sewdutt as a further evidence of the equitable mortgage. This transaction took place within the town of Calcutta at No. 2, New China Bazar, the property

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mortgaged being the garden at Dum Dum. The defendant No. 1 states that he alone took the money and executed the handnote and his wife had nothing to do with them. He states that he made over the title-deeds of the property in suit for inspection only, as Sewdutt was thinking of purchasing it.

The defendant No. 2, the wife, supports him. She said she knew nothing of the loan and supports the story of the intention of Sewdutt to purchase. She did not know English properly and signed the *chit* without knowing what she was doing."

The memorandum which Sewdutt took from the two defendants reads thus:—"Dear Sir,—As desired we send herewith title-deeds of our premises at Dum Dum as security against your advance to us. Please hold them as collateral security and oblige. Yours faithfully, Esther I. E. Mordecai, I. E. Mordecai."

Sir *Rash Behary Ghose* (with him *Babu Bepin Behari Ghose*, for the Appellants).—Two main questions are involved in this appeal:—

(1) Whether the deposit of title-deeds made by the defendant No. 1 would create a good and valid equitable mortgage within the meaning of section 59 of the Transfer of Property Act.

(2) Whether a valid equitable mortgage was created on the properties of defendant No. 2 (the wife) by the said deposit of title-deeds by the defendant No. 1 (the husband).

The answer to the first question would depend upon the question whether the document in question, *i.e.*, the memorandum ought to have been registered.

The memorandum embodies the real contract between the parties. The writing interprets the intent and purpose of the deposit of title-deeds and is not a mere statement of fact. The document has been treated as representing the bargain between Sewdutt and the present defendants. If the writing embodying the contract is not registered there cannot be a valid and enforceable equitable mortgage. Refers to *Dwarkanath Mitter v. Sarat Kumari Dasi* (1), *Kedarnath Dutt v. Sham*

(1) 7 B. L. R. 55,

Lall Khettry (2), *Behram Rashid Irani v. Sorabji Rustomji* (3). The object and policy of the Transfer of Property Act will be defeated if persons are not compelled to register instruments by which security on immoveable property is intended to be created.

Notice is the object of the registration of such instruments. Refers to *Fullerton v. Provincial Bank of Ireland* (4), *Pranjivandas Jagjivandas Mehta v. Chan Mah Phee* (5). If the intent to create a security is shown by a written instrument, then that instrument only can be used for establishing an equitable mortgage. Such instrument being inadmissible in evidence for want of registration, no equitable mortgage can be proved in this case as no oral evidence is admissible under section 92 of the Indian Evidence Act.

Then again the title-deeds were delivered on the 25th of February, *i.e.*, prior to the 1st March, the date of the execution of the memorandum. But it is only present advance followed by immediate delivery of title-deeds that can constitute a valid equitable mortgage. Refers to *Shaw v. Foster* (6); *Copland v. Davies* (7). At any rate, with regard to the two previous advances as there was no contemporaneous deposit of title deeds, there was no enforceable equitable mortgage.

The next point is, how can the defendant No. 2, the wife, be made liable? It has been found that she obtained the benefit of the money advanced, so she is liable for her husband's debt. But what was her consideration? In the absence of any consideration given to her, her agreement is void in law and cannot be treated as a binding contract against her.

The wife might be benefited by the loan to the husband, but did she receive any consideration from the plaintiff?

Babu Mohendra Nath Roy (with him *Babu Bhupendra Kumar Mitra*), for the Respondents. —The contention of the defendants is to the

(2) 20 W. R. 150; 11 B. L. R. 405.

(3) 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 35.

(4) (1903) A. C. 309 at p. 317; 72 L. J. P. C. 79; 89 L. T. 79 32 W. R. 238.

(5) 35 Ind. Cas. 190; 43 C. 895 at p. 900; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 24 C. L. J. 314; 8 L. B. R. 458.

(6) 5 H. L. 321 at p. 329; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907.

(7) 5 H. L. 358 at p. 383; 21 W. R. 1,

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effect that as the letter addressed to Sewdutt amounts to a mortgage bond and as it has not been registered, the unregistered mortgage bond is of no effect, and, therefore, a valid equitable mortgage has been created by the letter which embodies the contract between the parties. This contention has no substance.

[CHAUDHURI, J.—We want to hear you only about the wife's liability. How can she be made liable for the debts of her husband?]

The lower Courts have found that both the husband and the wife took the money, and the title-deeds were deposited as security for the money so advanced to them. The finding of the lower Courts on this point is very clear. Although the money was handed over to the husband, it was taken by and for the benefit of both of them.

[CHAUDHURI, J.—What should be the form of the decree?]

The decree shall be against both the defendants Nos. 1 and 2 and for the sale of the mortgaged properties. We want a mortgage decree, pure and simple.

Sir *Rash Behari Ghose*, in reply.

JUDGMENT.—It has been clearly found by both the Courts below that the title-deeds were made over to Sewdutt Roy on the 25th February 1909 for the purpose of ascertaining whether there was sufficient security for the advances already made and a further advance to be made and which had been asked for by the 1st defendant, Mr. Mordecai. The learned Subordinate Judge in his judgment says that he cannot avoid the inference that the security offered was approved and accepted and then the advance was made on the 1st March. As to the memorandum (Exhibit IV) he says, "it might be signed on the 1st March or two or three days after." The learned Judge in appeal was satisfied that the title-deeds were made over for the purpose of inspection of the property on the 25th February, that a good mortgage was created by the deposit of the title-deeds and that the memorandum was purely a memorandum which did not need registration.

The law on the subject has been laid down for years in this Court and it is clear that when a memorandum creates a mortgage, it comes under the operation of the Registration Act; but when there is a deposit

of title-deeds independently of it, the deposit creates the mortgage and the memorandum need not be registered. That has been enunciated in the case of *Kedarnath Dutt v. Sham Lal Khetry* (2), followed subsequently in numerous cases, among them *Oo Noun v. Mouny Htoon Oo* (8), *Gokul Das v. Eastern Mortgage and Agency Company* (9).

The second point urged before us also fails upon the findings arrived at by the Courts below. We think that the decree made is good in form and in law.

The appeal is dismissed with costs.

Appeal dismissed.

(8) 13 C. 322; 6 Ind. Dec. (N. S.) 715.

(9) 4 C. L. J. 102; 10 C. W. N. 276; 33 C. 410.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2887 OF 1915.

March 21, 1916.

Present:—Mr. Justice Rattigan.

Musammam AISHAN—DEFENDANT—

APPELLANT

versus

MUHAMMAD DIN—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, expl. IV, O. II, r. 2—Res judicata—Matters which ought to have been made grounds of attack in previous suit—"Intentionally relinquishes a portion of his claim," meaning of—*Ignorantia juris haud excusat*, "applicability of—Custom—Khanadama—Gujars of Gujrat District.

A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as "a portion of his claim" which can be "intentionally relinquished" within the meaning of Order II, rule 2, Civil Procedure Code. [p. 122, col. 1.]

Denobundhoo Chowdhry v. Kristomonee Dossee, 2 C. 152; 1 Ind. Dec. (N. S.) 393 *Amanat Bibi v. Imdad Husain*, 15 I. A. 105 at p. 112; 15 C. 800; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; *Rafique and Jackson's P. C.* No. 103; 7 Ind. Dec. (N. S.) 1117, referred to.

The word *jus* used in the maxim "*ignorantia juris haud excusat*" denotes general law and not a private right. [p. 122, col. 1.]

Cooper v. Philbs, (1867) 2 H. L. 149 at p. 170; 16 L. T. 678; 15 W. R. 1049, referred to.

Where plaintiff sued as one of several joint plaintiffs seeking a declaration of their alleged reversionary rights and not claiming possession, and on the dismissal of that suit, he claimed possession on an alleged exclusive title which would have been inconsistent with the claim preferred by him and his co-plaintiffs in the previous suit and of which he had no knowledge until the decision in the former suit:

Held, that the subsequent claim was not barred under explanation IV of section 11, Civil Procedure

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Code, as it could not have been brought forward by the plaintiff as a ground of attack in the former suit. [p. 121, col. 2.]

Muhammad Din v. Rahim Gul, 6 P. R. 1886; *Kura v. Madho*, 31 Ind. Cas. 159; 68 P. R. 1915; 151 P. W. R. 1915, referred to.

Held, also, that the subsequent suit was not barred under rule 2, Order II. [p. 122, col. 1.]

Quære.—Whether in a suit to recover possession of property a plaintiff is bound to support the claim made by him by bringing forward every title which he has, or claims to have, in respect of such property. [p. 121, col. 2.]

Denobundhoo Chowdhry v. Kristomonee Dossec, 2 C. 152; 1 Ind. Dec. (N. S.) 393; *Bheeka Lall v. Bhuggoo Lall*, 3 C. 23; 2 Ind. Jur. 173; 1 Ind. Dec. (N. S.) 607; *Sultrin Ahmed v. Maula Bakhsh*, 4 A. 21; A. W. N. (1881) 110; 2 Ind. Dec. (N. S.) 609; *Haji Hasan Ibrahim v. Mancharam Kaliandas*, 3 B. 157; 2 Ind. Dec. (N. S.) 91; *Guddappa v. Tirkappa*, 25 B. 189; 2 Bom. L. R. 872; *Masilamania Pillai v. Thiruvengadam Pillai*, 31 M. 385; *Pala Mal v. Maya*, 146 P. R. 1890; *Bhiste Shankar v. Ramchandrarav Raghunath Jahagir-dar*, 8 B. H. C. R. A. C. J. 89; *Sadaya Pillai v. Chinni*, 2 M. 352; 4 Ind. Dec. 341; 1 Ind. Dec. (N. S.) 514; *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*, 4 M. 308; 5 Ind. Jur. 407; 1 Ind. Dec. (N. S.) 1050; *Allunni v. Kunjusha*, 7 M. 264; 8 Ind. Jur. 135; 2 Ind. Dec. (N. S.) 768; *Ramaswami Ayyar v. Pythinatha Ayyar*, 26 M. 700; 13 M. L. J. 448; *Veerana Pillai v. Muthukumara*, 27 M. 102; *Zamorin of Calicut v. Narayanan Mussad*, 22 M. 323; 8 Ind. Dec. (N. S.) 230; *Babu Lal v. Ishri Prasad Narain Singh*, 2 A. 582; 1 Ind. Dec. (N. S.) 563; *Sheo Ratan Singh v. Sheo Sahai Misr*, 6 A. 358; A. W. N. (1884) 115; 4 Ind. Dec. (N. S.) 3; *Balbhadar Nath v. Ram Lal*, 1 A. L. J. 228; 26 A. 501, referred to.

Among Gujars of Gujrat District the custom of *khanadamadi* is very prevalent. [p. 120, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 18th August 1915.

Mr. *Devi Dial*, for the Appellant.

JUDGMENT.—The parties are Muhammadan Gujars of the Gujrat District and the following table will help to explain the facts:—

HASHAM==	
married Musammam Bhag Bhari.	
┌──────────────────┴──────────────────┐	
Musammam Aishan	Musammam Said
(defendant), married	Bibi, (dead), married
Sher Muhammad,	Muhammad Din
dead.	(plaintiff).

It has been found in this case, and was held to be established in *Raja v. Musammam Jannat Bibi* (1), that among Gujars of the Gujrat District the custom of *khanadamadi* is very prevalent, and it is not surprising, therefore, to find that Hasham during his

(1) 13 Ind. Cas. 409; 40 P. R. 1912, 79 P. W. R. 1912, 94 P. L. R. 1912.

lifetime made a gift of his estate, half to his daughter *Musammam Aishan* and half to his daughter *Musammam Said Bibi*, and had mutation effected in their respective names.

Musammam Said Bibi died about 1907 and on her death the land given to her was taken possession of by Hasham and mutation was effected in his favour, Muhammad Din, present plaintiff, apparently acquiescing in the proceedings. Hasham died some three years before institution of the present suit and on his death his widow, *Musammam Bhag Bhari*, applied to the Revenue Authorities to effect mutation of the land left by him (i.e., the half of the estate that had been originally given to *Musammam Said Bibi*) in favour of her daughter *Musammam Aishan*. Upon this plaintiff and other collaterals of Hasham sued *Musammam Bhag Bhari* and *Musammam Aishan* and prayed for a declaratory decree, to the effect that the said act on the part of *Musammam Bhag Bhari* (which was described as a gift by her to *Musammam Aishan*) would not affect their reversionary rights on the death of *Musammam Bhag Bhari*. This suit failed, the Courts holding that *Musammam Aishan* was the *khanadamad* of her late father, and thereafter plaintiff instituted the present suit in which he claims to recover possession from *Musammam Aishan* on the ground that after the death of *Musammam Said Bibi*, his late wife, he was entitled to succeed to the property given to his wife.

It is contended by defendant that the present suit is barred under section 11 and Order II, rule 2, of the Civil Procedure Code. This contention was overruled by the Munsif on the ground that the cause of action in the present suit is distinct from the cause of action in the previous suit; that in the former suit the cause of action was the alienation by *Musammam Bhag Bhari*, whereas in the present suit the cause of action upon which the claim is based is the death of plaintiff's wife and his consequent right to succeed to a life-estate; and that, therefore, Order II, rule 2, of the Code cannot apply.

The District Judge on appeal, while practically conceding that in law the cause of action in the present suit is the same

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as the cause of action in the former suit (*viz.*, the death of plaintiff's wife), holds that the present suit is not barred because "these people know very little about their rights;" and the plaintiff in common with most agriculturists was under the impression that he could not recover the land until Hasham's widow died and did not discover his mistake until the decision of the former suit. In these circumstances he holds that plaintiff should be allowed to sue afresh on the cause of action which he discovered when the first suit was dismissed. On the merits the learned Judge held that plaintiff was clearly entitled to succeed and dismissed defendant's appeal with costs.

The sole question before me on this second appeal is whether the present suit is barred by either section 11, explanation 4, or Order II, rule 2, of the Civil Procedure Code and upon this point I have heard Mr. Devi Dial for the appellant, the respondent being unrepresented by Counsel and naturally unable to argue the law point for himself.

There is a conflict of authority as to whether in a suit to recover possession of property a plaintiff is bound to support the claims made by him by bringing forward every title which he has, or claims to have, in respect of such property. In a large number of cases it has been held that he must put forward all his titles, and that if he does not do so and fails in his suit, a subsequent suit to recover that property from the same defendant based upon a different title, will be *res judicata* by reason of the provisions of section 11, explanation 4, of the Code [see *Denobundhoo Chowdhry v. Kristomonee Dossee* (2) *Bheeka Lall v. Bhuggoo Lall* (3), *Sultan Ahmad v. Maula Bakhsh* (4), *Haji Hasam Ibrahim v. Mancharam Kaliandas* (5), *Guddappa v. Tirkappa* (6), *Masilamania Pillai v. Thiruvengadam Pillai* (7), *Pala Mal v. Maya* (8)]. The contrary opinion has been expressed in a still larger number of reported cases [see Garth, C. J., in *Denobundhoo*

Chowdhry v. Kristomonee Dossee (2), *Bhisto Shankar Patil v. Ramchandrarav Raghunath Jahagirdar* (9), *Sadaya Pillai v. Chinmi* (10), *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed* (11), *Allunni v. Kunjusha* (12), *Ramasivami Ayyar v. Vythinatha Ayyar* (13), *Veerana Pillai v. Muthukumara Asary* (14), *Zamorin of Calicut v. Narayanan Mussad* (15), *Babu Lal v. Ishri Prasad Narain Singh* (16), *Sheo Ratan Singh v. Sheo Sahai Misr* (17), *Balbhadar Nath v. Ram Lal* (18)].

In the present case that question does not arise, inasmuch as Muhammad Din was only one of several joint plaintiffs in the former suit who were seeking merely a decree declaratory of their alleged reversionary rights and were not claiming possession of the property, and in that suit the present claim, based upon plaintiff's alleged exclusive title to present possession of the land, would have been inconsistent with the claim preferred by him and his co-plaintiffs as reversioners jointly entitled to the property on the death of *Musammat Bhag Bhari*. Explanation 4 of section 11 is thus clearly inapplicable, as the present claim could not have been brought forward by Muhammad Din as a ground of attack in the former suit [see *Muhammad Din v. Rahim Gul* (19), *Kura v. Madho* (20)].

Moreover, it has been found as a fact by the District Judge that Muhammad Din had no knowledge of his right to succeed on a life-estate to the property left by his wife until the decision in the former suit made it clear to him that his wife was no less a *khanadamad* of her father than her sister, *Musammat Aishan*, and that he was, therefore, the person entitled by law and custom to

(9) 8 B. H. C. R. A. C. J. 89.

(10) 2 M. 352; 4 Ind. Jur. 341; 1 Ind. Dec. (N. S.) 514.

(11) 4 M. 308; 5 Ind. Jur. 407; 1 Ind. Dec. (N. S.) 1050.

(12) 7 M. 264; 8 Ind. Jur. 137; 2 Ind. Dec. (N. S.) 763.

(13) 26 M. 760; 13 M. L. J. 448.

(14) 27 M. 102.

(15) 22 M. 323; 8 Ind. Dec. (N. S.) 230.

(16) 2 A. 582; 1 Ind. Dec. (N. S.) 563.

(17) 6 A. 358; A. W. N. (1884) 115; 4 Ind. Dec. (N. S.) 3.

(18) 1 A. L. J. 226; 26 A. 501.

(19) 6 P. R. 1886.

(20) 31 Ind. Cas. 159; 63 P. R. 1915; 151 P. W. R. 1915.

(2) 2 C. 152; 1 Ind. Dec. (N. S.) 393.

(3) 3 C. 23; 2 Ind. Jur. 173; 1 Ind. Dec. (N. S.) 607.

(4) 4 A. 21; A. W. N. (1881) 110; 2 Ind. Dec. (N. S.) 609.

(5) 3 B. 137; 2 Ind. Dec. (N. S.) 91.

(6) 25 B. 189; 2 Bom. L. R. 872.

(7) 31 M. 385.

(8) 146 P. R. 1830.

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hold the property for life. In these circumstances he cannot be said to have "intentionally relinquished" any part of his claim, within the meaning of Order II, rule 2, Civil Procedure Code.

As remarked by Garth, C.J., in *Denobundhoo Chowdhry v. Kristomonee Dossee* (2), "It must constantly happen that until the differences between contending parties have been ventilated and discussed in a Court of Law, the litigants themselves are entirely ignorant of what their legal rights and position may be," and in *Amanat Bibi v. Imdad Husain* (21), their Lordships of the Privy Council observed that "a right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as 'a portion of his claim'."

No doubt, everybody is presumed to know the law and ignorance of law cannot be urged as an excuse for a mistake made by a person. But as pointed out by Lord Westbury, Lord Chancellor, in the maxim *ignorantia juris haud excusat*, "the word *jus* is used in the sense of denoting general law, the law of the country. But when the word *jus* is used in the sense of denoting a private right that maxim has no application," *Cooper v. Phibbs* (22).

For the reasons given I hold that the present suit is not barred either by section 11, explanation 4, or by Order II, rule 2, of the Civil Procedure Code and I accordingly dismiss the appeal. Respondent has incurred no costs.

Appeal dismissed.

(21) 15 I. A. 106 at p. 112; 15 C. 800; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique and Jackson's P. C. No. 103; 7 Ind. Dec. (N. S.) 1117.

(22) (1867) 2 H. L. 149 at p. 170; 16 L. T. 673; 15 W. R. 1049.

PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.
June 23, 1916.

Present:—Lord Shaw, Lord Parmoor and Mr. Ameer Ali.

FATEH CHAND—DEFENDANT NO. 1—

APPELLANT

versus

Pandit RUP CHAND—PLAINTIFF—

RESPONDENT.

Will, construction of—Devise of whole estate to one person coupled with devise of particular village to another—Repugnancy—Alienation, powers of, reservation of, by testator, effect of on devise.

A testatrix described herself as the "sole owner and possessor" (*malik-o-qabiz*) of her deceased husband's entire estate and in possession of all proprietary powers under his Will, and bequeathed the entire estate to one F. C. subject to certain conditions, one of which was that she would continue to be in possession of the entire estate, having full powers of alienation, and another was a devise of a particular village to one G. who would be its "sole owner and possessor" (*malik-o-qabiz*) after the testatrix's death:

Held, (1) that the words *malik-o-qabiz* signified a full ownership in property; [p. 125, col. 1.]

(2) that the devise in favour of G. was an absolute devise of the village; [p. 125, col. 1.]

(3) that the reservation of powers of alienation by the testatrix in her own favour was a mere surplusage, and neither abated from nor fortified the completeness of her ownership and possession, and [p. 125, col. 1.]

(4) that inasmuch as the entire estate devised to F. C. was subject to conditions, an absolute gift of the village in question to G. was an exception but not repugnant to the devise in favour of F. C. [p. 125, col. 1.]

Surajmani v. Rabi Nath Ojha, 12 C. W. N. 231 (P. C.); 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 50 A. 84; 35 I. A. 17, approved and followed.

Consolidated appeals from two decrees of the Allahabad High Court, dated the 5th February 1913, varying a decree of the Court of the Subordinate Judge, Saharanpur, dated the 11th March 1911.

FACTS.—The main question in this appeal was the construction of the Will of *Musammatt Gomti Kunwar*. The material clauses of the Will were as follows:

"*Musammatt Gomti Kunwar*, widow of Lala Sri Kishun Das, *rais* of Ohhaper, and daughter of Lala Ganpat Rai, caste *mahajan*, *rais* and resident of Saharanpur, declares as follows:—

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Under the Will of my husband I am the sole owner in possession of his entire estate and possess all the proprietary powers. I have no male or female issue, and life is uncertain and not everlasting. Hence, through foresight and with a view to avoid future troubles and disputes, I, in a sound state of body and mind, bequeath the entire estate of my husband to Fateh Chand, son of Lala Sri Ram Das, who is related to me as the son of my *jeth* (husband's elder brother) subject to the following conditions:

1. So long as I live, I shall continue to be the owner in possession of the entire estate, the subject of the Will, and possess all the powers, such as (those) of making sales, mortgages, gifts, etc.

2. After my death, the said person (the legatee) shall become the owner in possession of the entire estate of my husband and he, too, shall possess all powers of alienation like myself.

* * * * *

4. I have bequeathed *Manza Khudda*, with all the property, to *Musammât Gomi*, the daughter of my priest (*prohit*) whose marriage was celebrated by my father-in-law and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in *Mauza Khudda* aforesaid."

The suit was brought by the respondent, a purchaser from *Musammât Gomi*, for possession of *Mauza Khudda* with mesne profits. The Subordinate Judge held that there was a repugnancy in the general and particular devises, and that the most obvious solution would be to treat the particular devise as an exception to the general bequest,—it would be a more enlightened explanation to rely upon the testatrix's use of a certain set of words by way of conferring an absolute estate on the general devisee Fateh Chand and her "significant omission" of such words in the case of the particular devisee *Musammât Gomi*. He held that on the true construction of the Will *Musammât Gomi* took a life-estate only, and decreed the suit to the extent of such life-interest.

Both parties appealed to the High Court, which delivered the following judgment:—

"This appeal is connected with the First Appeal No. 111 of 1911, in which we have just now delivered judgment. The question which is involved in this appeal is, *first*, whether a decree in favour of the plaintiff, Rup Chand, should be limited to an estate during the lifetime of *Musammât Gomi*, and *secondly*, whether the plaintiff should have mesne profits for the period anterior to the institution of the suit.

The first question depends upon the construction to be placed upon the Will of *Musammât Gomi*. The Will commences by reciting that the testatrix was entitled to all her husband's estate and that she, while in a sound state of body and mind, bequeathed the entire estate of her husband to Fateh Chand. Then occur these words "I covenant in writing that I shall abide by the following conditions." Clause (2) and clause (4) are as follows. The other clauses are not material. * * *

After setting out the clauses, the judgment proceeds:—

"The learned Subordinate Judge has, for reasons which he has given in his judgment, held that on the true construction of the Will as a whole, *Musammât Gomi* only took an estate for her life. He lays a good deal of stress upon the words in clause (2) giving all powers of alienation to Fateh Chand and to the omission of words of the same nature in clause (4). He then goes on to say that by reading clause (4) as conferring merely a life-estate, he can reconcile both clauses of the Will. We cannot agree with this view. Having regard to the recent ruling of their Lordships of the Privy Council, if clause (4) stood alone, we certainly would have to hold that *Musammât Gomi* took an absolute interest and not merely a life-interest.

We have then to see whether there is anything also in the Will to lead us to believe that merely a life-interest was intended. The case cannot be put more forcibly than it was put by the learned Subordinate Judge. We, however, think that his reasoning is not quite complete, because interpreting clause (4) as giving merely a life-estate would not reconcile the two clauses or give effect to clause (2). Clause

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(2) provides that, after the death of the testatrix, Fateh Chand should at once become the absolute owner in possession of the entire estate. It is impossible to reconcile this clause with clause (4), which undoubtedly gives at least a life-estate to *Musammam Gomi*. We are bound to consider each clause by itself, and we must hold that under clause (4) an absolute estate is conferred upon *Musammam Gomi*. There are no words in clause (4) or in any other part of the Will save as already mentioned, which could in any way limit the estate conferred upon *Musammam Gomi* to a mere life-estate.

The question of mesne profits has not been seriously pressed.

The result is that we set aside so much of the decree of the Court below as in any way limits the estate of the plaintiff in the property in dispute. We make no order as to the costs of this appeal. The appellant will have his full costs in the Court below."

The appellant then appealed to His Majesty in Council.

Mr. De Gruyther, K. C. (with him Mr. J. M. Parikh), for the Appellant.—The substantial question in this appeal is the construction of *Musammam Gomi's* Will. The true construction is that which the Subordinate Judge has placed upon it. The words "*malik-o-qabiz*" in themselves no doubt denote absolute ownership: *Surajmani v. Rabi Nath Ojha* (1).

But these words are not conclusive that the devisee is to take an absolute estate: the instrument has to be looked at as a whole, and other parts of it negative that supposition. In a similar case of *Punchoo Money Dossee v. Troylucko Mohiney Dossee* (2), it was held that a widow of whom the same words were used took only a limited estate. In each case we must endeavour to ascertain what the testator really intended.

[LORD SHAW referred to *Ohunilal Parvatisankar v. Bai Samrath* (3).]

Sir W. Garth and Mr. Dube, for the Respondent, were not called upon.

JUDGMENT.

LORD SHAW.—In these consolidated appeals it has been admitted in the argument submitted to the Board by the Counsel for the appellant that substantially only one question falls now to be determined. That question has reference to the construction of a Will, dated the 18th September 1901, of one *Musammam Gomi Kunwar*. In that document there is a description of the title of the testatrix given in the following words: "I am the sole owner in possession of his [her husband's] entire estate and possess all the proprietary powers." Their Lordships note that throughout this Will, the term thus translated "sole owner in possession" or "owner in possession" is "*malik-o-qabiz*."

Having thus described the property she proceeds to bequeath "the entire estate of my husband to Fateh Chand." There is, however, appended to this bequest of the entire estate the subjection of the whole of the estate "to the following conditions," and a covenant in writing by herself that she would abide by those conditions. One of those conditions is in the following terms: (4) "I have bequeathed *Mauza Khudda*, with all the property, to *Musammam Gomi*, the daughter of my priest (*prohit*) whose marriage was celebrated by my father-in-law, and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in *Mauza Khudda* aforesaid."

Their Lordships hold that there can be but little doubt that under the first sentence of condition 4 there would have been a competent bequest of *Khudda*, the village, with the totality of rights falling under the designation "*umla-i-hakiat*."

Under the second part of condition 4 which says that the village is to be owned in possession, their Lordships cannot hold:

(1) 35 I A. 17; 12 C. W. N. 231 (P. C.); 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 141; 30 A. 84.

(2) 10 C. 342; 8 Ind. Jur. 440; 5 Ind. Dec. (N. S.) 229.

(3) 23 Ind. Cas. 645; 38 B. 399; 18 C. W. N. 844; 26 M. L. J. 647; 19 C. L. J. 563; 16 Bom. L. R. 366; 16 M. L. T. 59; 12 A. L. J. 742; (1914) M. W. N. 441; 1 L. W. 762 (P. C.).

THAKUR DAS v. RADHA KISHAN.

that there has been any abatement of the force of the words employed. Those words are "*malik-o-qabiz*." Translated "owner in possession," they truly are "owner and possessor of." There can, according to their Lordships' view of this Will, if condition 4 were alone under construction, be therefore no doubt, under either branch of it, that that village now belongs under this Will to *Musammât Gomi*.

The argument presented to the Board, however, was that while that same form of expression was used in earlier portions of the Will, there were appended to it certain conditions or elaborations of which a sample may be given from condition 1. "I shall continue," says that portion of the Will, "to be the owner in possession of the entire estate the subject of the Will," and then there are added these words "and possess all the powers such as (those of) making sales, mortgages, gifts," etc.

In their Lordships' opinion these expressions do not abate from the completeness of the ownership and possession, nor do they fortify it in any way whatever. Accordingly condition 4, omitting the words which are thus surplusage, has to be given effect to, and it must be given effect to in the full sense recognised by law.

Their Lordships are of opinion that with regard to that sense there is now in the Indian law no doubt whatever. The judgment of Lord Collins in *Surajmani v. Rabi Nath Ojha* (1) attaches to the word "*malik-o-qabiz*" unquestionably a signification of a full ownership in property. Such an ownership in property in their Lordships' view was thus conveyed in this village to *Musammât Gomi*, and their Lordships will only conclude these observations by saying that in their view there is no repugnancy in such a construction. It is perfectly true that the entire estate was conveyed in the first place to Fateh Chand, but it was subject to conditions. On a perusal of those conditions, No. 4 occurs to the effect that as an exception from the conveyance of the entire estate this village is conveyed. This is not a repugnancy in the proper sense of the term, and taking the clauses of the Will together it simply means that Fateh Chand takes the entire estate, with the exception of this village, while it, in

proper conveyancing terms, is disposed of in favour of *Musammât Gomi*.

Their Lordships are accordingly of opinion that there is no ground for the argument which would upset the judgment of the learned Judges of the High Court. Their Lordships agree with that judgment, and they also agree with the observations made as to the judgment of the Subordinate Judge who, with much care, had arrived at a different conclusion. The views of the High Court are shared by this Board, and accordingly they will humbly advise His Majesty that these appeals be dismissed with costs, including the costs of the petition for special leave to appeal.

Appeals dismissed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

Solicitors for the Respondent: Messrs. Barrow, Rogers and Neville.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1718 OF 1914.

March 25, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

THAKUR DAS—PLAINTIFF—
APPELLANT

versus

RADHA KISHAN—DEFENDANT—

RESPONDENT.

Mortgage—Redemption—Appeal—Lower Court's decree, failure to comply with, whether bars appeal—Mortgagee, failure of, to keep accounts of additions and repairs, effect of—Compensation.

Failure to deposit the redemption money in compliance with the decree of the lower Court does not necessarily bar the hearing of an appeal from that decree. [p. 126, col. 1.]

Umrao Singh v. Muhammad Karim Baksh, 161 P. R. 1890, approved.

Sheonarain v. Chuni Lal, 23 A. 88; A. W. N. (1900) 209; *Ram Dhani Sahu v. Lalit Singh*, 2 Ind. Cas. 220; 31 A. 328; 6 A. L. J. 251; *Venkata Krishna Ayyar v. Thiagaraya Chetti*, 23 M. 521; 10 M. L. J. 145; 8 Ind. Dec. (N. S.) 766, distinguished.

It is the duty of a mortgagee to keep accounts of expenditure on additions to and repairs of the mortgaged property, and if he fails to do so, all presumptions will be made in favour of the mortgagor, but such failure does not *ipso facto* defeat a claim for compensation which is proved in other ways. [p. 126, col. 2.]

NADIR CHAND SAHA v. BIRENDRA NATH DUTT.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 15th June 1914.

Messrs. Oertel and Mukerji, for the Appellant.

Mr. Broadway, Bhagat Gobind Das and Bakhshi Tek Chand, for the Respondent.

JUDGMENT.—This is a redemption suit in which possession was decreed by the first Court to the mortgagor's vendee on payment of Rs. 11,664, a sum which was enhanced by the Appellate Court to Rs. 12,232.

Respondent raises a preliminary objection that as the appellant has not deposited the redemption money in Court within the time ordered by the lower Appellate Court, there is no decree for redemption subsisting in his favour.

Sheonarain v. Ohuni Lal (1), *Ram Dhani Sahu v. Lalit Singh* (2), *Venkata Krishna Ayyar v. Thiagaraya Ochetti* (3) are quoted by the respondent, but these authorities are not in point, and we approve of the principle enunciated in *Umrao Singh v. Muhammad Karim Baksh* (4) that failure to comply with the decree of the lower Court does not necessarily bar the hearing of the appeal.

The appeal, however, fails on the merits. The first ground is withdrawn and appellant's main contention is that, on a proper interpretation of the mortgage-deed, interest accrues on the principal not from date of the deed but from a date 20 years posterior to the date of the mortgage. Having carefully consulted the document, we find no strength in this contention.

The next point is that the conditions of the mortgage are too onerous to justify their enforcement. The conditions are undoubtedly onerous, but we have no doubt that they were made so expressly, by consent of parties, whose intention clearly was that there should be no redemption. In fact the mortgage was a sale in disguise, and the plaintiff knowingly purchased a law suit.

The last point was that defendant was not entitled to compensation for additions and repairs, as he had kept no accounts and has not accounted for income from the property.

It is, no doubt, the duty of a mortgagee to keep accounts of such expenditure, and if he does not, all presumptions will be made in favour of the mortgagor, but failure to keep accounts does not *ipso facto* defeat a claim for compensation which is proved in other ways.

The value of the additions and the cost of repairs are matters of fact which we, as a Court of second appeal, cannot touch, and the intention of the parties to the mortgage was that the mortgagee should enjoy the income.

With regard to the prayer for extension of time for complying with the lower Appellate Court's decree, we see no reason to interfere, for the appellant clearly had no intention of complying with it, if the redemption money remained at the figure computed by the lower Appellate Court.

The question of Court-fee has already been decided and is not mentioned before us and the defendant's cross-appeal is withdrawn.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1104 AND 1180 TO 1187 OF 1913.

July 28, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

NADIR CHAND SAHA AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BIRENDRA NATH DUTT CHOWDHURY

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—*Landlord and tenant—Covenant in kabuliya on assurance by landlord that it would not be enforced, whether binding.*

Where a tenant executes a *kabuliya* containing a stipulation, which the landlord has told him will not be enforced, the tenant cannot be held to have assented to it and the *kabuliya* is not the real agreement between parties. [p. 127, col. 2.]

Semble.—The enumeration in the first proviso to section 92 of the Evidence Act of the circumstances which may invalidate a document or entitle a person to a decree or order relating thereto is not exhaustive. [p. 127, col. 2.]

(1) 23 A. 88; A. W. N. (1900) 209.

(2) 2 Ind. Cas. 220; 31 A. 328; 6 A. L. J. 251.

(3) 23 M. 521; 10 M. L. J. 145; 8 Ind. Dec. (N. S.) 766.

(4) 161 P. R. 1890.

NADIR CHAND SAHA v. BIRENDRA NATH DUTT.

Appeal against the decree of the District Judge, Sylhet, dated the 7th December 1912, modifying that of the Munsif, 3rd Court, Habigunge, dated the 14th May 1912.

Babus Mohendra Nath Roy and Gopal Chandra Das, for the Appellants.

Babus Dwarka Nath Chakravarty and Hemendra Kumar Das, for the Respondents.

JUDGMENT.

SECOND APPEAL No. 1104 OF 1913.

This is an appeal by the defendant in a suit for recovery of arrears of rent on the basis of a *kabuliyat* executed on the 11th April 1895, for a term of one year. The *kabuliyat* provided that rent would be paid on the 30th July and that on default, the arrear would carry interest at the rate of 75 per cent. per year. The year expired and the tenant held over. Rent is claimed in this suit for the years 1909-10 and 1910-11, and the only question in controversy is, at what rate is interest payable on the arrears. The defendant pleaded that before the *kabuliyat* was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent. per annum would not be enforced, and it was on the faith of this assurance that he agreed to the insertion of the clause in the document. The Court of first instance found that the allegation of the defendant was true and held that the landlord was not entitled to claim interest on the arrears at the rate of 75 per cent. per year. On appeal the District Judge has expressed no opinion upon the question of fact, but has decreed interest at the rate claimed, on the ground that oral evidence was not admissible to contradict the terms of the *kabuliyat*. He has referred to proviso (4) of section 92 of the Indian Evidence Act, and has concluded that as that proviso deals with a subsequent oral agreement, it has no application to the case before us, while none of the other provisos was of avail to the defendant.

On the present appeal, reliance has been placed by the defendant upon the first proviso to section 92, which is in these terms: "Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity

in any contracting party, want or failure of consideration, or mistake in fact or law." We may parenthetically observe that this is not an exhaustive enumeration of the circumstances which may invalidate a document or may entitle a person to a decree or order relating thereto.

The appellant contends that the execution of the *kabuliyat* was secured by fraud or imposition, in respect of the clause for payment of interest, and in support of this view refers to the decision of the Judicial Committee in *Pertap Ohunder Ghose v. Mohendranath Purkait* (1). Sir Richard Couch observed in that case that where one party induced another to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. Consequently, where a tenant executes a *kabuliyat* containing a stipulation which the landlord has told him will not be enforced, the tenant cannot be held to have assented to it, and the *kabuliyat* is not the oral agreement between the parties. A similar view was taken by this Court in the cases of *Kashi Nath Chukerbati v. Brindaban Chukerbati* (2) and *Beni Madhub Gaurani v. Lalmoti Dassi* (3). The test is, whether the tenant can maintain a suit for rescission, cancellation or variation of the contract; if he can, he may successfully resist the claim on the basis of the contract. There is no room for controversy in this case that such a suit could be maintained by the tenant. But it has been ingeniously argued on behalf of the respondent that as the *kabuliyat* in this case was for a term of one year only and as since the expiry of the term the defendant has held over, he is bound by the terms entered in the document. This contention is obviously fallacious. As there was an agreement that this particular clause in the deed would not be enforced, the relative position of the parties is the same as if the clause was deleted from the document, and tenant must be deemed to have held over according to what constituted the true terms of the agreement between

(1) 17 C. 291; 16 I. A. 233 (P. C.); 5 Sar. P. C. J. 444; 13 Ind. Jur. 370; 8 Ind. Dec. (N. S.) 733.

(2) 10 C. 649; 8 Ind. Jur. 617; 5 Ind. Dec. (N. S.) 437.

(3) 6 C. W. N. 242.

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him and his landlord. [*Bajinath Prosad v. Raghunath Rai* (4), *Durgi Nikarini v. Goberdhan Bose* (5)]. The tenant could, after the expiry of the term, be made liable for interest only if there was a subsequent agreement to pay interest at the specified rate. None such is alleged in this case.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. The appellant will have his costs in this Court, but the parties will bear their own costs before the District Judge.

We may add that the respondent has not insisted upon a remand in view of the small amount in controversy, otherwise a remand would have been necessary for a determination of the question of fact which was raised in the Court of first instance and decided against the plaintiff but has been left undecided by the District Judge.

This judgment will govern Second Appeal No. 1185 of 1913; in that case also, the decree of the District Judge will be set aside and that of the Court of first instance restored; there will be the same order for costs as in the other case.

SECOND APPEALS NOS. 1180, 1181, 1182, 1183, 1184, 1186 AND 1187 OF 1913.

These appeals are obviously incompetent under section 102 of Act VIII of 1869 (B. C.). They are, therefore, dismissed with costs.

Appeals Nos. 1104 and 1185 allowed; Other appeals dismissed.

(4) 14 Ind. Cas. 817; 16 C. W. N. 496.

(5) 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 525.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1038 OF 1915.

March 23, 1916.

Present:—Mr. Justice Rattigan.

JITA SINGH—PLAINTIFF—

APPELLANT

versus

HARI SINGH—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r.

1—*Appeal, withdrawal of, without express permission to bring fresh suit—Subsequent suit, whether barred.*

In order to satisfy the provisions of Order XXIII, rule 1, the permission given by the Court to bring a fresh suit must be in express terms and cannot be implied. [p. 129, col. 1.]

Ghulam Ali Shah v. Shahabul Shah, 3 P. R. 1905; 87 P. L. R. 1905, referred to.

Plaintiff sued for a declaration that a mortgage executed by the widow of a collateral of his should not affect his reversionary rights. His suit was dismissed, and he appealed to the Divisional Judge. During the pendency of the appeal the widow died, and the plaintiff prayed to be allowed to withdraw the appeal, as he was now entitled to sue for possession. The Divisional Judge granted his request and dismissed the appeal. He brought a suit for possession based on the same allegations as the previous suit.

Held, that the suit was barred by Order XXIII, rule 1, as express permission to bring a fresh suit had not been given in the order dismissing plaintiff's appeal and the claim was based on the same cause of action as in the prior suit. [p. 129, cols. 1 & 2.]

Kamini Kant Roy v. Ram Nath Chuckerbutty, 10 Ind. Dec. (N. S.) 809; 12 C. 265, *Thakur Das v. Jaswant Rai*, 1 P. R. 1904; 41 F. L. R. 1904, referred to.

Gopal Chandra Banerjee v. Purna Chandra Banerjee, 4 C. W. N. 110, *Machana Ujjhala Dikshatulu v. Gorugantulu Yaggamma*, 8 Ind. Cas. 1086; (1910) M. W. N. 782; 9 M. L. T. 468, *Senmaya Reddiar v. Vankatachala Reddiar*, 28 Ind. Cas. 91; 2 L. W. 177, distinguished.

Second appeal from the decree of the District Judge, Amritsar, dated the 16th January 1915.

Messrs. *Manohar Lal* and *D. C. Ralli*, for the Appellant.

Bakhshi Tek Chand, for the Respondent.

JUDGMENT.—The facts are simple. *Musammat Kishen Kour*, a widow, mortgaged certain land to one *Hari Singh* for Rs. 600, whereupon her husband's collateral heir, *Jita Singh*, brought the usual suit for a declaratory decree. His suit was dismissed by the Munsif on the ground that necessity and consideration for the mortgage had been duly proved. He then appealed to the Divisional Judge and while his appeal was pending *Musammat Kishen Kour* died. He accordingly prayed to be allowed to withdraw his appeal and stated that he had a fresh cause of action as he was now entitled to seek possession of the land. The Divisional Judge thereupon passed the following order:

"I grant plaintiff's request to withdraw the appeal Appeal dismissed." This order is dated 17th March 1914.

GANGA PRASAD v. NANDU RAM.

On the 9th June 1914 Jita Singh instituted the present suit in which he claims to recover possession of the land mortgaged by Musammat Kishen Kour, on the ground that the mortgage was effected for no necessary purpose and for no consideration and is, therefore, not binding upon him as the heir of the mortgagor's husband. The defendant, Hari Singh, pleaded that the present suit as framed was barred by Order XXIII, rule 1, of the Civil Procedure Code, and that plaintiff's sole remedy was to redeem the mortgage on the expiry of its term (20 years from date of mortgage).

The Munsif dismissed the present suit on the ground that when plaintiff's appeal to the Divisional Judge in the former suit was dismissed, the findings of the first Court in that suit became final and binding and that consequently it must now be held that the mortgage impugned was valid and enforceable against plaintiff. On appeal the District Judge held that as the plaintiff had not in the first suit obtained the Divisional Judge's permission to institute a fresh suit, the present claim was barred under Order XXIII, rule 1, Civil Procedure Code.

Plaintiff has appealed to this Court, but after hearing all that Mr. Manohar Lal had to urge on his behalf, I am satisfied that the suit has been rightly dismissed.

Mr. Manohar Lal's first contention was that in the former case the Divisional Judge had *impliedly* granted permission to plaintiff to bring another suit. But it has been held by a Division Bench of this Court [*Ghulam Ali Shah v. Shahabul Shah* (1)] that in order to satisfy the provisions of section 373 of the Civil Procedure Code of 1882 (which correspond with the provisions of Order XXIII, rule 1, of the present Code), the permission given by the Court must be in *express* terms and cannot be implied. This decision is binding upon me and I must follow it.

The learned Counsel next urged that the words in Order XXIII, rule 1, "in respect of the subject-matter of such suit or such part of a claim," refer merely to the relief sought, and that if the relief sought in

the second suit is different from the relief sought in the first suit, the rule in question is no bar to such second suit. In this connection he relies upon *Kamini Kant Roy v. Ram Nath Chuckerbutty* (2), *Thakur Das v. Jaswant Rai* (3) and *Gopal Chandra Banerjee v. Purna Chandra Banerjee* (4). These cases in no way support the proposition put forward, as all that was held in them was that a second suit, based upon an entirely different cause of action, was not barred merely because the parties and the property involved were the same as in the previous suit that had been withdrawn.

In the present case the parties and the property involved are admittedly the same and the cause of action against defendant, namely, the mortgage which plaintiff seeks to get rid of, is also the same.

The rulings cited by Mr. Tek Chand [*Machana Uahala Dikshatulu v. Gorugantulu Yaggamma* (5) and *Sennava Reddiar v. Venkatachala Reddiar* (6)] are directly in point and are authorities for holding that Order XXIII, rule 1, of the Code is a bar to the present suit.

I must accordingly dismiss this appeal with costs.

Appeal dismissed.

(2) 21 C. 265; 10 Ind. Dec. (N. S.) 839.

(3) 1 P. R. 1904; 41 P. L. R. 1904.

(4) 4 C. W. N. 110.

(5) 8 Ind. Cas. 1066; (1910) M. W. N. 782; 9 M. L. T. 463.

(6) 28 Ind. Cas. 91; 2 L. W. 177.

PATNA HIGH COURT.

CIVIL REVISION NO. 46 OF 1916.

June, 12, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

GANGA PRASAD—PLAINTIFF—

PETITIONER

versus

NANDU RAM—DEFENDANT—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Provincial Small Cause Courts Act (IX of 1887), s. 25—High Court, power of, to interfere in revision or in superintendence—Jurisdiction—Discretion of lower Court when to be interfered with.

(1) 3 P. R. 1905; 87 P. L. R. 1905.

GANGA PRASAD v. NANDU RAM.

Under section 115 of the Civil Procedure Code, a High Court can only interfere if the question be one of jurisdiction. A High Court's powers under the Charter Act are ordinarily exercised only in cases where jurisdiction has been exceeded or a Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law, and this power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right. [p. 130, col. 2.]

Where a discretion is vested in a Court, it is not open to interference by the High Court unless it has been exercised ignorantly or perversely. [p. 130, col. 2.]

Rule against the order of the Subordinate Judge, exercising powers of a Small Cause Court Judge, Patna, dated the 17th March 1916.

Khan Bahadur *Fakhruddin* and Mr. *Nirsu Narayan Singh*, for the Petitioner.

Rai *Tribhuban Nath Sahay*, for the Opposite Party.

JUDGMENT.—In this matter we are asked to interfere either under section 25 of the Small Cause Courts Act or section 107 of the Government of India Act with an order made by a Small Cause Court Judge under section 23 (1) of the Provincial Small Cause Courts. Act. The preliminary objection is taken that an order made under section 23 (1) is not covered by section 25. Two cases have been quoted, one on either side. In *Subal Ram Dutt v. Jagadanunda Mazumdar* (1) the judgment was one to which my learned brother was a party. I agree with the conclusions arrived at therein with regard to the meaning of the word "decided", even though in *Umesh Chandra Paladhi v. Rakhal Chandra Chatterjee* (2) its correctness was questioned. I would lay emphasis on the distinction between disposing of a case and deciding a case, but would concede that the meaning of the word "case", as commentaries on section 115 of the Civil Procedure Code indicate, is not without difficulty. A case is something less definite than a suit, and it may be argued that a proceeding in which a Small Cause Court Judge discusses and decides the question whether a plaint should be returned may be regarded as constituting in itself a case. It is not in the matter before us necessary to go deeply into this question, for whether we

regard ourselves as taking action under section 25 of the Small Cause Courts Act or section 115 of the Civil Procedure Code, or section 107 of the Government of India Act, the point in issue seems to me to be the same point.

Under section 115 of the Civil Procedure Code we could only interfere if the question were one of jurisdiction. From the earliest days of High Court at Fort William when Mr. Justice Norman introduced superintendence to the notice of his colleagues as a term having "a legal force and significance well known to the Legislature", the Court's powers under the Charter Act have been exercised, with few exceptions, only in case where jurisdiction has been exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law. As I read the judgments in *Chandi Roy v. Kirpal Roy* (3) and in *Amjad Ali v. Ali Hussain Johar* (4), even this limited power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right. In the case before us no irreparable injury is being caused. The plaint has been returned. The plaintiff has an ample remedy in the Courts of ordinary jurisdiction.

Nor would I interfere under section 25 of the Small Cause Courts Act, had I power to do so. Section 23 (1) is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to our interference unless it has been exercised ignorantly or perversely. Whether we look at the matter from the point of view of superintendence or revision, the question in issue is whether the Judge has acted ignorantly or perversely.

(3) 10 Ind. Cas. 308; 15 C. W. N. 632.

(4) 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519.

(1) 1 Ind. Cas. 288; 13 C. W. N. 403.

(2) 10 Ind. Cas. 8; 15 C. W. N. 666; 14 C. L. J. 118.

SURADHANI DEBYA v. CHANDRA NATH.

In *Umesh Chandra Paladhi v. Rakhal Ohandra Chatterjee* (2), the Divisional Bench declined to believe that there could be any intricate question of title in a dispute over the carcass of a goat.

In the case before us, the suit is for house rent. If title in the house was in good faith disputed, the Judge would have been most unwise to adjudicate upon it summarily. The Judge heard the Pleadings and decided that the title of the plaintiff had been challenged in good faith. I see no reason for believing that his decision was either ignorant or perverse.

The application should be rejected with costs—hearing-fee two gold *mohurs*.

Application rejected.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1264 of 1914.

March 23, 1915.

Present:—Mr. Justice N. R. Chatterjee and
Mr. Justice Mullick.

SURADHANI DEBYA—PLAINTIFF—
PETITIONER

versus

CHANDRA NATH PRAMANIK AND OTHERS

—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1 (2)—Court, whether can order withdrawal of suit without permission to institute fresh suit—Revision.

Where the plaintiff makes an application to withdraw from a suit with liberty to bring a fresh suit and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application and then proceed with the trial of the suit. In such a case it is not competent to the Court to make an order allowing the application for withdrawal without permission to institute a fresh suit on the same cause of action.

Rule against the order of the Subordinate Judge, Rajshahye, in Title Suit No. 516 of 1912, dated the 18th September 1914.

Babus Sasadhar Roy (junior) and Surendra Mohan Ghose, for the Petitioner.

Babu Ramakanta Bhattacharyya, for the Opposite Parties.

JUDGMENT.—The petitioner was the plaintiff in a suit in the Court of the Subordinate Judge of Rajshahye. It appears that, on the date finally fixed for the hearing, the plaintiff applied for postponement on several grounds. That application was rejected. Then the plaintiff applied for leave to with-

draw from the suit with liberty to bring a fresh suit on the same cause of action. The learned Subordinate Judge held that there were no sufficient grounds for allowing the plaintiff to withdraw from the suit with liberty to bring a fresh suit, and he made an order allowing the application for withdrawal without permission to institute a fresh suit. It appears that subsequently several applications were made by the plaintiff for setting aside that order, the last application being dated the 10th of August 1914 by which he treated the suit as not disposed of by the previous order and prayed the Court to proceed with the suit. That was rejected. Now the Court having been of opinion that leave should not be granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, it ought to have dismissed the application for withdrawal. As pointed out by Sir Lawrence Jenkins, Chief Justice, in the case of *Mahant Bihari Dasji v. Parshotamdas* (1): "Where a plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application." And as the Court had disallowed the application for adjournment it ought to have dismissed the suit. Had that course been followed, the plaintiff would have had a right of appeal, and if there were sufficient grounds, the Appellate Court might have allowed the appeal and directed a trial of the case. The order, however, which was passed was not a proper one and, under the circumstances, we think that that order should be set aside and the suit proceeded with from the stage where it was on the 22nd August. But this must be conditional upon the plaintiff paying to the opposite party the sum of Rs. 170 as costs incurred by the latter up to date within one month of the arrival of the record in the lower Court. This amount will not be considered as costs in the cause. In default of payment of the said amount within the time specified, this Rule will stand discharged with costs, three gold *mohurs*.

Rule discharged.

(1) 32 B. 345; 10 Bom. L. R. 293.

SHARAF ALI KHAN v. JAGANDAR SINGH.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 569 OF 1914.

March 24, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Scott-Smith.

SHARAF ALI KHAN—DEFENDANT—

APPELLANT

versus

JAGANDAR SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b), (c)—Agreement to sell and acknowledgment of earnest money, whether require registration—Evidence Act (I of 1872), s. 91—Oral evidence to prove payment of earnest-money, admissibility of.

An agreement to sell land which begins with the words: "I have absolutely sold the land" and after acknowledging receipt of Rs. 600, earnest-money, proceeds: "I will take the remaining money at the time of the completion of the sale-deed. I shall get the sale-deed completed after going to the spot," is only a promise to sell by means of a regular deed plus an acknowledgment of receipt of earnest-money and does not require registration under section 17 (1) (b) of the Registration Act. [p. 132, col. 2.]

Sardar Partab Singh v. Karm Chand, 184 P. R. 1889, referred to.

Ram Chand v. Chatar Singh, 6 Ind. Cas. 645; 73 P. L. R. 1910; 57 P. W. R. 1910, distinguished.

The receipt of the earnest-money, however, does require registration under section 17 (1) (c) of the Registration Act, but this does not affect the present case inasmuch as the portion of the document containing the receipt is separable from the agreement part and oral evidence of payment of the earnest money is admissible under section 91 of the Evidence Act. [p. 132, col. 2; p. 133, col. 1.]

Waman Ramchandra v. Dhondiba Krishnaji, 4 B. 126; 5 Ind. Jur. 37; 2 Ind. Dec. (N. S.) 593, referred to.

First appeal from the decree of the District Judge, Lyallpur, dated the 24th February 1914.

Messrs. *Fazl-i-Husain*, *Shuja-ud-Din* and *Abdul Rashid*, for the Appellant.

Messrs. *Beechey*, *Ralli* and *Ram Chand*, for the Respondents.

JUDGMENT.—Plaintiffs' suit is for possession of two-and-a-half squares of land and an *ahata* on the basis of an agreement to sell, executed on 10th January 1913 by defendant. The lower Court took the pleadings and framed 7 issues, as stated in its judgment, the first four being issues on technical points raised. The findings briefly were—see judgment and also order of 11th August 1913—that the deed (Exhibit P 1) is a contract to sell and that the Rs. 600 acknowledged in it is not part payment of price, and so the document did not require registration; that plaintiffs did

not need to sue for a sale-deed, but are right in suing for possession of the land; that defendant certainly executed Exhibit P 1; that Rs. 600 earnest-money certainly passed; that the *ahata* is not proved to have been sold along with the squares.

Plaintiffs acquiesce in the dismissal of the claim for the *ahata*, but defendant has appealed against the decree for the two-and-a-half squares.

In our opinion Exhibit P 1 is certainly not a sale-deed of the land. No doubt it begins by saying, "I have absolutely sold the land," but this is merely in a manner of speaking: the real meaning comes out in the words: "I will take the remaining money at the time of the completion of the sale-deed. I shall get the sale-deed completed after going to the spot on the 15th February 1913." The document is really only a promise to sell by means of a regular deed, plus an acknowledgment of receipt of Rs. 600 earnest-money. Such documents have never in the Punjab been held as coming under section 17 (1) (b), Registration Act *Sardar Partab Singh v. Karm Chand* (1).

But Counsel for defendant argues further that clause (c) covers the case, and quotes in support *Ram Chand v. Chatter Singh* (2) and *Waman Ramchandra v. Dhondiba Krishnaji* (3). The former ruling is one by a single Judge, and whether correct or not, is easily distinguishable, for there the sale had already taken place and was complete, while here no sale had been yet effected. The Bombay case, however, is authority for the view that a receipt for earnest-money in the case of a sale of property worth more than Rs. 100 comes under clause (c) aforesaid, and must be registered to be admissible in evidence; but on the other hand, two considerations emerge in the present case to save plaintiffs from the consequences of this dictum—first, the agreement part of Exhibit P 1, which does not require registration, is separable from the receipt part, which does; secondly, under section 91, Indian Evidence Act, oral evidence

(1) 184 P. R. 1889.

(2) 6 Ind. Cas. 645; 73 P. L. R. 1910; 57 P. W. R. 1910.

(3) 4 B. 126; 5 Ind. Jur. 37; 2 Ind. Dec. (N. S.) 593.

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of the payment of Rs. 600 earnest-money is admissible even if the acknowledgment contained in Exhibit P 1 is excluded by section 17 (1) (c), Registration Act. For the latter proposition we have as authority the same Bombay ruling.

It is argued, on the merits, that defendant never executed Exhibit P 1 or received the Rs. 600 and that he was ill and incapable of transacting business at the time. The marginal witnesses to the paper are Manne Khan, Maya Ram and Sardar Kirpa Singh. The second and third of these have been called and fully support the plaintiffs' case, both as to execution of document and of payment of cash; and we are unable to see any indication pointing to bad faith in them. The affair occurred at Chak No. 130, some two miles or less from Chak No. 132, where plaintiffs and these witnesses live. It was natural for plaintiffs to take these two respectable men to witness an important transaction like this. Maya Ram is a shopkeeper, in no way specially dependent on plaintiffs, and Kirpa Singh is a substantial farmer, renting land at an annual rate of Rs. 1,850. Diwan Chand, School Master of Chak No. 132, corroborates, and one plaintiff Narinjan Singh goes into the box and swears to his own case. No doubt Manne Khan was not called, but this was unnecessary, if defendant thought he was against plaintiffs, why did he not call him himself?

Defendant's evidence is chiefly negative, and an attempt is made to show that defendant was ill and incapable. The doctor only shews defendant had pneumonia about 18th or 20th December 1912, and we place no reliance upon the other witnesses who pretend that defendant was desperately ill all through December, January and February. And another strong reason for believing in plaintiff's *bona fide* is the fact that the bargain is by no means a very good one for him, as the price fixed, Rs. 13,000, is apparently a very high one.

For these reasons we think the lower Court's decision is correct and we dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE No. 52 OF 1915.

April 26, 1916.

Present:—Mr. Stuart, J. C., and
Mr. Kanhaiya Lal, A. J. C.

Rani DIL AFZA BEGAM—DECREE-HOLDER
—APPLICANT—APPELLANT

versus

DEPUTY COMMISSIONER, BAHRAICH,
MANAGER OF COURT OF WARDS, NANPARA
ESTATE—JUDGMENT-DEBTOR—OPPOSITE
PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1903), s. 51, O. XXI, r. 10—Execution of decree—Stranger benefited under compromise filed in suit, position of—Compromise, from what time enforceable—Presumption—Court, duty of—Court-fee to be charged.

Section 51 and Order XXI, rule 10, of the Code of Civil Procedure contemplate that an application for execution can only be made by the holder of a decree [p. 136, col. 2.]

A decree was passed in the terms of a compromise, which granted certain monthly allowances to some of the parties to the suit as well as to a stranger, and provided that if its terms were not complied with in favour of the parties to the suit to whom the allowances were granted, they would be entitled to take proper proceedings as regards such non-compliance. Subsequently, these persons, including the stranger, applied to the Court in which the suit had been instituted to recover their monthly allowances from the date of the compromise by execution of the compromise decree. The Court allowed execution to proceed in favour of each of the applicants for the allowances claimed from the date of the decree, on the finding that they were not entitled to claim the same from the date of the compromise:

Held, (1) that the stranger applicant, who was no party to the suit or the decree, had no right to apply for execution, though he was entitled to bring a separate suit based on the portion of the compromise relating to him: [p. 135, col. 2.]

Ponnambala Tambiran v. Sivagnana Desika Gnana Sambandha Pandara Sanadhi, 17 M. 343; 21 I. A. 71; 6 Sar. P. C. 434; 6 Ind. Dec. (N. S.) 238 and *Vishnu Sakharan Nagarkar v. Krishnarao Malhar*, 11 B. 153; 11 Ind. Jur. 258; 6 Ind. Dec. (N. S.) 101, distinguished.

(2) that, in the absence of anything to the contrary appearing in the compromise, the presumption was that such of the applicants as were parties to the suit, were entitled to claim their allowances from the date of the compromise. [p. 135, col. 1.]

No Court can sanction an irregularity the effect of which is to perpetrate a fraud on the Government revenue and to deprive the state of the Court-fee that is legitimately its due. [p. 137, col. 1.]

Appeal against the order of the Subordinate Judge, Mohanlalganj, dated the 30th November 1915.

Mr. H. C. Dutt, for the Appellant,

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Babu *Nagendra Nath Ghosal*, for the Respondent.

JUDGMENT.—The question for consideration in these appeals is whether Rani Saltanat Begam, Rani Dil Afza and Muhammad Kazim are entitled to the allowances mentioned in the compromise of the 22nd August 1912, in accordance with which a decree was subsequently passed by this Court, from the date of the compromise or from the date of the decree. The compromise aforesaid was filed in this Court in First Civil Appeal No. 162 of 1911 instituted by Rani Saltanat Begam and First Civil Appeal No. 41 of 1912 instituted by Rani Dil Afza Begam from a decree passed in an interpleader suit relating to the Nanpara Estate. In that suit Rani Saltanat Begam claimed the entire estate under a Will executed by her husband, Raja Muhammad Siddiq Khan, and as the senior *ahl-e-biradari* widow of the late Raja under section 22 of Act I of 1869. She claimed in the alternative her share in the estate of her husband under the Muhammadan Law and a dower of three lacs of rupees. By a subsequent application she put forward an additional claim to an allowance of Rs. 4,000 per month under the Will of her husband. Rani Dil Afza claimed a one-sixteenth share of the estate under section 22 of Act I of 1869, an allowance of Rs. 4,000 per mensem under the terms of the aforesaid Will, besides her unpaid dower and certain jewellery. The learned Subordinate Judge, who tried the suit, treated the claims for dower and allowances as outside the scope of the interpleader suit within the meaning of section 88 of the Code of Civil Procedure, and on the evidence adduced before him came to the conclusion that Rani Saltanat Begam and Rani Dil Afza were not entitled to any portion of the estate. Rani Saltanat Begam and Rani Dil Afza appealed, but during the pendency of their appeals entered into a compromise with some of the contesting respondents, including those now represented by the Manager of the Court of Wards in charge of the Nanpara Estate. It is stated that Rani Saltanat Begam and Rani Dil Afza had assigned a portion of their interests to

Muhammad Kazim during the pendency of the interpleader suit, but it does not appear that the name of Muhammad Kazim was ever brought on the record either in the Court of first instance or during the pendency of the appeals in this Court, and the decrees prepared by the Court of first instance and on appeal by this Court show that Muhammad Kazim was no party to them. The compromise filed by Rani Saltanat Begam and Rani Dil Afza, to which Muhammad Kazim as a private purchaser of a portion of their interests had assented, was to the effect that in consideration of an immediate payment of Rs. 1,87,500 to Rani Saltanat Begam, Rs. 50,000 to Rani Dil Afza, and Rs. 1,87,500 to Muhammad Kazim, the delivery of certain ornaments to the two former, the provision of a bungalow for the residence of Rani Saltanat Begam, and the payment of monthly allowances of Rs. 4,000 to Rani Saltanat Begam, Rs. 1,000 to Rani Dil Afza, Rs. 250 to Muhammad Kazim and of other amounts to nine other persons, the said Ranis gave up their entire claims to the *talukdari* and non-*talukdari* properties in dispute, moveables unpaid dower-debts, past maintenance, allowances and costs. There was a provision in the compromise that if any portion of it was not carried out in favour of the "appellants," or if there was undue delay in complying with the same, the "appellants" would be entitled to take proper proceedings in respect of the portion not complied with or for the enforcement of their rights for the period of the delay, and that the respondents Rani Qamar Zamani Begam, Rani Sarfaraz Begam, Rani Kaniz Begam and Muhammad Saadat Ali Khan, who were parties to the compromise, would be responsible for the costs and damages which might be incurred in connection with such proceedings and shall have no objection to pay the same.

The hearing of the appeals against the other respondents continued, and ultimately on the 10th February 1914, a decree allowing the appeals of Rani Saltanat Begam and Rani Dil Afza to the extent mentioned in the compromise was passed by this Court.

The present appeals have arisen out of

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the applications made by Rani Saltanat Begam and Rani Dil Afza and Muhammad Kazim for the recovery of the arrears of their allowances, by execution of the decrees passed by this Court.

On the application of Muhammad Kazim, the learned Subordinate Judge drew the attention of the office and the *munsarim* to what he described as an elementary principle that a person who was not a party to the decree could not execute it and asked the office to report whether the applicant, Muhammad Kazim, was a party to the decree under execution. The office reported that he was not a party to the interpleader suit in which the application for execution was made, but was a party to certain suits for dower. The learned Subordinate Judge allowed notices to issue and his successor, without going into the office report, allowed execution to proceed in favour of each of the applicants for the allowances claimed from the date of the decree, on the finding that they were not entitled to claim the same from the date of the compromise.

It is obvious, however, from the terms of the compromise that the intention was that the said ladies were to get their maintenance allowances from the date of the compromise provided the said compromise was sanctioned by the Court. In the compromise the ladies stated that in lieu of what was conceded to them, they gave up their claim to the past maintenance allowances (*guzashta guzara*), implying thereby the allowances claimable by them under the Will for the period antecedent to the compromise. Their right to recover future allowances, that is from the date of the compromise, was in effect recognized by the compromise. The effect of the sanction of the compromise was to render every one of its terms enforceable, so far as the parties to the appeals who had assented to the compromise were concerned, and the said ladies are, therefore, entitled to claim their maintenance allowances from the date on which that compromise was entered into. The compromise did not state that the allowances were to be paid from a future specified date or from a date to be fixed by the Court, and the presumption, therefore, is that they became payable from the date when the compromise was entered into. Whether the decree was merely declara-

tory as to the said allowance or was enforceable in execution it is immaterial to consider, for no objection has been taken on that score to the order of the Court below on behalf of the respondent.

The appeals of Rani Saltanat Begam and Rani Dil Afza are, therefore, allowed and they are declared entitled to the maintenance allowances granted to them from the date of the compromise. As the Court of Wards had no objection to pay the said allowances and was merely anxious to have the correct interpretation of the decree determined, we direct the parties to these two appeals to bear their own costs throughout.

As regards Muhammad Kazim, it is obvious that he had no right to execute the decree passed by this Court in the interpleader suit because he was no party to it. The decree aforesaid was passed in favour of Rani Saltanat Begam and Rani Dil Afza, the appellants in the said appeals, and by virtue of clause 7 of the compromise the right to take legal proceedings and to enforce it in case of breach or delay was conceded only to the "appellants." The compromise became a part of the decree of this Court, only so far as it related to Rani Saltanat Begam and Rani Dil Afza. As regards Muhammad Kazim and the nine other persons for whom monthly allowances were fixed and who were no parties to the appeals, the compromise contained at best only an agreement or promise which could possibly form the basis of a cause of action for a suit, if its terms were not complied with. None of them had any right to execute the decree, because no decree was passed in favour of any persons other than the appellants.

It is contended, however, on behalf of Muhammad Kazim that a suit for the recovery of the arrears of the allowances would have lain in the same Court in which the application for execution was made, and that the judgment-debtor mainly concerned, namely the Court of Wards, had waived the irregularity by submitting to the jurisdiction of the Court. In support of that contention reliance is placed on the decision in *Ponnambala Thiruvirar v. Sivagnana Desika Gnana Sambandha Pandara Sannadhi* (1) and *Vishnu Saktharam Nagarkar v. Krishnarao*

(1) 17 M. 343; 21 I. A. 71 (P. C.); 6 Sar. P. C. J. 434; 6 Ind. Dec. (N. S.) 238.

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Malhar (2). In the former case the religious chief of an institution had obtained a decree for the removal of a certain person from the office of *tambiran* or manager of the property of certain *mutts*. The decree ordered that the Subordinate Judge should direct the religious chief to name a *tambiran* from among those initiated at his institution, competent to discharge the duties of a manager, and that if the Judge saw no objection to the fitness of the person so named for the office, he was to appoint him: but that in case the Judge should object to the person named, he was to select as well as to appoint and to direct the religious chief to make the investiture, and to certify it, whereupon the Judge should put the person so appointed and invested in possession of the *mutts* and their endowments. In the course of the proceedings, arising out of the execution of that decree, certain disputes arose as to the proper person to be appointed.

The religious chief nominated a person and died. His successor sought to withdraw that nomination and appointed another. The Subordinate Judge made an enquiry as to the fitness, making the nominees parties to the proceeding, and confirmed the appointment of the first nominee. The new religious chief appealed to the High Court, making the first nominee a party to his appeal. The High Court reversed that order, whereupon the first nominee appealed to the Privy Council. In reply to an objection that the first nominee was no party to the decree under execution, their Lordships observed that having been made a party to the nomination proceedings arising out of the execution of that decree in both the Courts below, it was too late to object that he had no right to file an appeal from an order passed adverse to him. They further said that since the power of appointment was vested in the Subordinate Judge, the only mode in which relief could be granted was by execution of the decree, and not by suit. As pointed out in *Prayaga Doss Jee Varu v. Tirumala Purisa Srirangacharyulu* (3), this is one of the natural consequences where a scheme of management is propounded by a decree.

Such is not the case here. There is no question connected with the execution of any decree so far as Muhammad Kazim is concerned, for there is no decree granting an allowance to him. A regular suit is, moreover, maintainable on the basis of that portion of the compromise which relates to Muhammad Kazim and he has no right to apply for execution.

The second case referred to is one in which from time to time execution of a decree passed by the Court of the Agent for Sirdars was granted by a British Court without objection. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of the representatives of the decree-holder. In a later execution proceeding an objection was raised that the decree of the Agent could not be executed by mere transfer to an ordinary Court, and the High Court in refusing to accept that objection observed that had there indeed been no jurisdiction over the subject-matter, the acquiescence of the parties concerned could not create it, but as there was jurisdictional power and *the questions at issue were investigated and determined*, the irregularity was covered by the consent with which the High Court, under whose orders execution was carried on, had acted. In this case this is the first application for execution so far as the monthly allowance is concerned. No previous application for execution for the recovery of such allowance was either made, determined or granted, and there has been no final order of the highest Court allowing such execution. It is open, therefore, to this Court to nip the mischief in the bud, that is, to stop the irregularity and to direct persons, other than the decree-holders, to seek redress in the manner provided by law.

Section 51 and Order XXI, rule 10, of the Code of Civil Procedure, contemplate that an application for execution can only be made by the holder of a decree. Muhammad Kazim holds no decree, and his learned Counsel frankly admits that the object of his client in seeking redress by execution is to avoid the payment of Court-fees now and hereafter. It is difficult at this stage to say whether a suit for the recovery of the arrears of monthly allowances due to him would have lain in

(2) 11 B. 153; 11 Ind. Jur. 258; 6 Ind. Dec. (N. S.) 101.

(3) 31 M. 406; 4 M. L. T. 92.

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the Court of the Subordinate Judge at Lucknow or Bahraich, or in the Court of the Subordinate Judge in charge of Tahsil Mohanlalganj, but assuming for the sake of argument that a suit could lie in the Court of the Subordinate Judge in charge of Tahsil Mohanlalganj, in which the application for execution was made, no Court can sanction an irregularity, the effect of which would be to perpetrate a fraud on the Government revenue, and to deprive the State of what is legitimately its due. It is not open to this Court to direct the application for execution to be treated as a plaint, for a portion of the order of the Court below has already become final. The only course open, therefore, is to refuse to recognise the validity of the execution proceedings leaving it open to Muhammad Kazim to seek redress by suit, if he chooses.

The appeal of Muhammad Kazim is dismissed, but no order is made as in the other appeals as to the costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 3449 OF 1915.

July 20, 1916.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

RAM PARSHAD AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

HARNAM AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Custom—Succession, collateral—Pichhlag son succeeding step-father without objection; whether acquires right of collateral succession—Adoption—Alienation.

Where the members of a family make no objection to a man's being succeeded by his *pichhlag* son, the latter does not thereby acquire the right to succeed collaterally in the family generally. [p. 137, col. 2.]

In matters of adoption and alienation a *pichh'og* son is in no better position than a stranger. [p. 137, col. 2.]

Second appeal from the decree of the District Judge, Rohtak at Karnal, dated the 6th March 1915, reversing that of the Senior Subordinate Judge, Rohtak, dated the 1st October 1914, decreasing plaintiffs' claim,

Mr. Nand Lal, for the Appellants.

JUDGMENT.—In this case a complete pedigree table, to be found in the judgment of the first Court, explains the relationship of the parties. The suit was by plaintiffs, as reversioners of one Harnam, defendant No. 1, to have it declared that defendant No. 2 is not the adopted son of defendant No. 1; that defendant No. 1 had not the power to adopt him; that the gift of the 14th February 1912 of land by defendant No. 1 to defendant No. 2 should not take effect against the plaintiffs, and so forth.

The first Court held that Surja is not a nephew of Harnam in the proper sense of the word, the fact being that plaintiffs' father was the son of a certain woman Nahnji, who, no doubt, married Moti but who had already given birth to Surja's father Nauba. It follows that there is no relation whatever between Harnam and Surja and both the Courts are agreed on this point. The first Court went on to hold that the adoption of a stranger like Surja was invalid, that the gift in favour of Surja was also invalid, and that, therefore, the plaintiffs must have a decree.

The lower Appellate Court, however, finally agreed with the first Court that there was no blood relationship between Harnam and Surja, holding that, inasmuch as Nauba, father of Surja, had been treated by Moti as his son and has been recognised as the heir of Moti by all the family, therefore, Nauba and, through him his son Surja, became, for all purposes, members of the general family and can inherit collaterally.

In my opinion there is no foundation for this idea. The property is ancestral property, and I am not aware of any authority to the proposition that, because the members of a family make no objection to a man's being succeeded by his *pichhlag* son, therefore the *pichhlag* son acquires the right to succeed collaterally in the family generally and, of course, it is obvious that, if Surja was not to be treated as one of the family, his adoption and gift to him are both invalid.

Respondents have not appeared though served and I, therefore, hear the appeal *ex parte*.

For the reasons given above I accept the appeal and restore the decree of the first

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Court and direct that the defendants do pay the plaintiffs' costs throughout.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 6 OF 1915.

July 21, 1916.

Present:—Mr. Stuart, J. C.

KASHI SINGH AND OTHERS—DEFENDANTS—

APPELLANTS

versus

RAM NARAIN AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Evidence Act (I of 1872), s. 32 (5)—Pedigree—Admissibility in evidence—Settlement, genealogical table put in at time of, value of.

Some papers were put in at the time of the settlement of a village. The first of them was a genealogical table. At the end of the papers were the names of some of the persons whose names appeared in the said table. None of them affixed their signatures. It was stated that the village *patwari* signed on behalf of the majority and that certain other persons signed on behalf of the remainder. The Settlement Officer in charge affixed at the end a statement that the owners of the village had verified the correctness of the statements. This verification took place after the *khewat* of the village had been prepared, so that the entries in the genealogical table could not be deemed to have been utilised in any way for the preparation of the *khewat*. It was not clear whether the attached names were placed at the end of the papers to record acceptance of the correctness of all or of only the last of the papers. Nor was this fact made clear by the Settlement Officer's order recording the verification:

Held, that under the above circumstances the genealogical table was not admissible in evidence. [p. 140, col. 1.]

Ubilack Rai v. Dallial Rai, 3 C. 557; 1 Ind. Dec. (N. S.) 939, referred to.

Ram Din v. Kayesth Pathshala, Allahabad, 25 Ind. Cas. 823, 1 O. L. J. 447, distinguished from.

Appeal from the decree of the District Judge, Fyzabad, dated the 12th October 1914, modifying the order of the Subordinate Judge, Fyzabad, dated the 13th June 1913.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellants.

Babu Kam. Chandra, for Respondent No. 1.

JUDGMENT.—The suit out of which this appeal arises was brought by plaintiffs Nos. 1 to 4, the sons of Ram Nihal Singh, and by plaintiff No 5, Tikai

Singh, for possession of a two-fourteenth share of property, which had originally belonged to a certain Subhdan Singh. Their allegations were that Subhdan Singh was a Hindu governed by the Mitakshara Law who had died separate, that he had been succeeded by his widow Musammat Jhanjha who obtained the ordinary estate of a Hindu widow in the property, that on the date of her death there were fourteen persons entitled to succeed as reversioners in equal shares, and that Ram Nihal Singh and Tikai Singh were two of these reversioners. The defence was *inter alia* that Ram Nihal Singh and Tikai Singh were not reversioners and that Subhdan Singh had left a daughter who had had a son. The plaintiffs in replication stated that daughters and daughters' sons were excluded from inheritance under a custom prevailing in the family.

The suit was instituted in the Court of the Subordinate Judge of Fyzabad, who decreed it. The learned District Judge on appeal upheld his decree with a small modification.

In order to succeed it was necessary for the plaintiffs to establish (apart from other points) that they were related to Subhdan Singh as they asserted in their plaint. The learned District Judge has found that the oral evidence which they adduced to prove this relationship is unreliable. That finding is a finding of fact which cannot be assailed in second appeal. He found in their favour on the point, however, on the strength of the entries in a certain genealogical table. The main point taken in second appeal is that the evidence contained in this document is inadmissible. The genealogical table in question forms one of a series of papers which were put in the year 1871 at the time of the settlement of the village in which the property is situated. The first of these papers is the genealogical table in question. It contains a very large number of names. The second of these papers is a short history of the village. The third contains an agreement as to division of profits and other matters of a similar nature. Then at the end of the papers are the names of some of the

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persons whose names appear in the genealogical table. None of these persons, however, affixed their signatures. It is stated that the village *patwari* signed on behalf of the majority. It is stated that other persons have signed on behalf of the remainder. The Settlement Officer in charge affixed at the end a statement that the owners of the village had verified the correctness of the statements.

The first thing to be noted with regard to these documents is that the verification took place after the *khewat* of the village had been prepared. There is nothing to show that the entries in the genealogical table were utilised in any way for the preparation of the *khewat*. In so far as an inference can be drawn from the materials at this Court's disposal, it would appear that the *khewat* was prepared first and that the genealogical table was prepared afterwards. The next point to be noted is that the genealogical table has no connection with the history of the village or the record of the arrangement as to the division of the profits etc. For the purposes of the Revenue Authorities the papers would have remained in a complete and coherent form if the genealogical table had been omitted. In fact a further division could be made. The history of the village is one separate entity. The arrangement as to the recording of the profits, etc., is another. It is not clear whether the attached names (which the plaintiffs argue are signatures) have been placed at the end of the document, to record acceptance of the correctness of the genealogical table, of the history of the village, and of the readiness of the persons whose names are recorded to abide by the condition of the arrangement for the division of the profits, etc., or whether they are intended merely to convey the readiness of those persons to conform to the provisions of the arrangement. Nor is the Settlement Officer's order recording the verification clear. It may well be read as a note that the parties concerned have verified the arrangement for the division of the profits. In these circumstances can it be said that this genealogical table is admissible in evidence as proving the relationship of the plaintiffs and their ancestors to Subhdan

Singh? The learned Counsel for the appellants has brought to my notice that in a previous case filed by other persons claiming to succeed as reversioners of Subhdan Singh to this very property this genealogical table was produced in evidence and found to be inadmissible by Mr. Evans, Additional Judicial Commissioner. That case is reported as *Kashi Singh v. Balraj Singh* (1). The decision of the learned Additional Judicial Commissioner is not, of course, binding in the present case, but it deserves notice. I do not know whether the learned District Judge was aware that this very genealogical table had been produced previously in this Court and had been found to be inadmissible. (He would not, of course, have been precluded from finding it admissible by virtue of that decision.) If this genealogical table were admissible in evidence at all it could only be under the provisions of section 32, clause 5, of the Evidence Act as a statement made by deceased persons relating to the existence of relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the persons making the statement had special means of knowledge and when the statement was made before the question in dispute was raised. In the first place, there is no evidence that the alleged signatures of the *patwari* and the other persons who are stated to have signed the document were actually their signatures. It can, however, be presumed that under the provisions of section 90 of the Evidence Act, as the document is thirty years old and has been produced from proper custody, the signatures of the *patwari* and the other persons which purport to be in their handwriting are in their handwriting. But it cannot be presumed under any provision of the Evidence Act that they had authority to sign on behalf of others. That proposition is rightly laid down in *Ubilack Rai v. Dalliial Rai* (2). Thus we have it that in absence of evidence of such authority there is no proof that the persons in question made the statement. Further, even if it were proved that the persons who affixed their

(1) 10 Ind. Cas. 199.

(2) 3 C. 557; 1 Ind. Dec. (N. S.) 939.

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signatures had authority, it is not clear that they signed anything more than the agreement to divide the profits, etc. I am not satisfied that the signatures were intended to support the accuracy of the entries in the long and complicated genealogical table.

The learned District Judge, in support of his decision that these statements are admissible in evidence, has referred to a decision to which I was a party, *Ram Din v. Kayesth Pathshala, Allahabad* (3). There a Bench of this Court decided that the entries in a pedigree put forward in settlement proceedings could be admitted in evidence. That pedigree had been prepared by a person who was neither a member of the family nor an official whose duty it was to record such pedigree and it was not signed by any member of the family. But there was evidence that its contents were adopted by the members of the family who were privy to its preparation and that upon its basis the entries in the *khewat* made at the time of the settlement were recorded. The Bench considered that there was sufficient proof of its acceptance to justify the admissibility of the statements with regard to the existence of the relationship between the persons as to whose relationship the persons making the statement had special means of knowledge. Here, however, the case is different. I do not know who prepared the genealogical table in question. It is not established that it was prepared by a member of the family or an official whose duty it was to record it. There is no evidence that any member of the family was privy to its preparation or that its contents were adopted by the members of the family and there is evidence that entries in the *khewat* made at the time of settlement were not recorded upon its basis. In these circumstances the authority of that decision affords no justification for the admission of this genealogical table in evidence. I find that the statements in the genealogical table in question are not statements relating to relationship made by persons having special means of knowledge and that the genealogical table is inadmissible in evidence. As has been already noted, the appellants attempted to prove their relationship by oral evidence

and by production of this genealogical table. They having failed on the oral evidence and the genealogical table being inadmissible in evidence, their suit must be dismissed. It is unnecessary to go into other points raised in the appeal.

I, therefore, decree this appeal and direct that the suit stand dismissed. The respondents will pay their own costs and those of the appellants in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.
ORIGINAL CIVIL JURISDICTION SUIT NO. 531
OF 1915.

January 17, 1916.

Present:—Mr. Justice Macleod.

SHAVAKSHA DINSHA DAVAR —
PLAINTIFF

versus

TYAB HAJI AYUB—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3, Sch. II—Arbitration without intervention of Court—Award, filing of—Procedure—Arbitration Act (IX of 1899).

Under section 89 of the Civil Procedure Code, 1908, the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court is not excluded and, therefore, comes under the provisions which deal with arbitration without the intervention of the Court. [p. 141, col. 2.]

A party applying to a Court for a decree on an award is bound, if the case does not come within the provisions of the Indian Arbitration Act, 1899, to apply under the Second Schedule of the Civil Procedure Code. There is no other law in force under which such an application can be made. [p. 142, col. 1.]

Order XXIII, rule 3, of the Civil Procedure Code, 1908, only refers to the adjustment of suits wholly or in part by any lawful agreement or compromise and no application can be made to obtain a decree on an award under that Order. [p. 141, col. 1.]

Mr. Jardine (Advocate-General), for the Plaintiff.

Mr. Strangman, for the Defendant.

JUDGMENT.—This is a motion taken out by the plaintiff for an order that the adjustment of the suit arrived at between

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the plaintiff and the defendant, as stated in the plaintiff's affidavit, should be recorded and that a decree in accordance therewith should be passed.

The suit was filed on the 11th of June 1915, the plaintiff praying that the defendant might be ordered and decreed to pay to the plaintiff the sum of Rs. 5,353-9-6 as the price of goods sold. On the 31st August 1915, the parties, without the intervention of the Court, agreed to refer the matters in dispute between them concerning the contract referred to in the plaint to the arbitration of Motilal Dayaram and Ramji Meghji. The arbitrators made their award on the 28th of October 1915. The award was filed on the 10th of December. In my opinion, a wrong procedure has been adopted. Order XXIII, rule 3, of the Civil Procedure Code of 1908 under which the application is made only refers to the adjustments of suits wholly or in part by any lawful agreement or compromise. No application can be made to obtain a decree on an award except as provided for in section 89 of the Code. That is entirely a new section. It runs as follows:

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule."

If it had been intended that a party might apply for a decree on an award under Order XXIII, rule 3, that rule would have been mentioned in section 89 along with the provisions of the Second Schedule.

It is suggested that Order XXIII, rule 3, comes under the description of 'any other law for the time being in force' but there is no reference in Order XXIII, rule 3, to arbitration proceedings. I am aware of the decision in *Pragdas v. Girdhardas* (1), but since the Civil Procedure Code of 1908 came into force, I do not think that decision can be any longer binding on me. It seems that the opinion former-

ly held good, as stated by Farran, C. J., in *Ghellaibhai v. Nandubai* (2), that there was no section of the Civil Procedure Code of 1882 which specially enabled a Court to take cognizance of a submission to arbitration of a matter in issue in a suit made pending the suit other than a submission through the Court, or of an award made upon such a submission, and that such a submission and award could only be taken cognizance of in the same suit as an adjustment under section 375 of the Civil Procedure Code of 1882 now represented by Order XXIII, rule 3. However that may be, it seems clear that under section 89 the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitration without the intervention of the Court. I do not see myself why the words "without the intervention of the Court" should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties to a suit, and, in my opinion, section 89 is now conclusive on the question.

It seems obvious that if an application for a decree on an award could be made under Order XXIII, rule 3, as soon as it has been proved to the Court that there has been an agreement to refer and an award, the Court would be bound to order the award to be recorded as an agreement or compromise, and would be bound to pass a decree in accordance therewith, excluding all the provisions of the Second Schedule relating to the powers of the Court when an application is made for a decree on an award. Paragraph 20 and the following paragraphs of the Second Schedule refer to arbitration without the intervention of the Court and under paragraph 21, where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, *and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved*, the Court shall order the award to be filed and shall pro-

(1) 26 B. 76; 3 Bom. L. R. 431.

(2) 21 B. 335 at p. 341; 11 Ind. Dec. (N. S.) 227.

In re ALI MUHAMMAD.

ceed to pronounce judgment according to the award. Paragraph 14 gives the Court power to remit the award under certain circumstances to the arbitrator. Paragraph 15 gives the Court power on certain grounds to set aside an award. Therefore, in my opinion, there is no other law at present in force except the Indian Arbitration Act of 1899 and a party applying to the Court for a decree on an award is bound, if the case does not come within that Act, to apply to the Court under the Second Schedule.

The defendant now disputes the legality of the award on two grounds:—*first*, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide, and, *secondly*, that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence, they published their award without giving him any such opportunity. I think the defendant is entitled to raise those objections and be heard upon them. Therefore, the application by consent is now to be treated as an application under paragraph 21 of the Second Schedule and can be set down for hearing on *præcipe* in order to decide those questions. Costs to be costs in the application.

ODDH JUDICIAL COMMISSIONER'S
COURT.

MISCELLANEOUS APPLICATION No. 340
OF 1916.

September 8, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C., and
Mr. Kendall, A. J. C.

In re Syed ALI MUHAMMAD—

APPLICANT.

Legal Practitioner—Counsel engaged for one party,
whether should be allowed to appear for opposite party
—Practice.

It is not desirable, except under very exceptional circumstances, that a Counsel, who has been engaged to conduct a case from start to finish for one party, should be allowed to appear for the opposite party.

Application of Saiyid Ali Muhammad, Vakil for the Appellant, in First Civil Appeal No. 85 of 1915, *Fakhr Jahan Begam* Defendant v *Abdul Ghani Khan*, Plaintiff, for permission to withdraw from the side of Appellant and to accept the case for the other side.

JUDGMENT.—Mr. Ali Muhammad states that he received the grounds of appeal drafted by Syed Wazir Hasan and that he got the memorandum of appeal ready for the filing and signed it, and filed it after accepting the *vakalatnama* which was brought to him duly signed by the appellant by the clerk of Syed Wazir Hasan. He also says that he got no instructions from his client and had no other hand in the matter. Syed Wazir Hasan who appears for *Musammatt* Fakhr Jahan Begam, states that the husband of the lady had given him instructions from the very beginning, and that about three days ago had come to him on the receipt of the notice of this petition, and that when he was asked whether he had any objection to the application, he said that he had none.

It is not desirable except under very exceptional circumstances that a Counsel, who has been engaged to conduct a case from start to finish for one party, should be allowed to appear for the opposite party. At the same time we have no reason to doubt the *bona fides* of Mr. Ali Muhammad in this particular instance. We consider it, however, preferable that having been once engaged, he should stick to the side on behalf of which he was retained. Mr. Ali Muhammad states that he has no objection to this.

The application is, therefore, rejected and will be filed with the record.

Application rejected.

MCGOWAN, W. E. v. J. D. MCGOWAN.

ALLAHABAD HIGH COURT.

MATRIMONIAL JURISDICTION SUIT NO. 2 OF 1916.

June 7, 1916.

Present:—Mr. Justice Walsh.

W. E. MCGOWAN—APPLICANT

versus

J. G. MCGOWAN—OPPOSITE PARTY.

Divorce Act (IV of 1869), s. 37—Decree nisi for divorce—Alimony—Wife living with co-respondent—Discretion of Court.

The grant of alimony to a wife against whom the husband has obtained a decree nisi for divorce on the ground of adultery is a matter of discretion. [p. 144, col. 1.]

Kelly v. Kelly, 5 B. L. R. 71, referred to.

Where there was no suggestion that the husband's conduct led to the wife's misconduct, and the wife was living with the co-respondent, the Court refused to exercise its discretion. [p. 144, col. 1.]

Holt v. Holt and Davis, 1 P. 610; 38 L. J. P. 33; 19 L. T. 662; *Winstone v. Winstone*, 2 Sw. & Tr. 246; 30 L. J. Mat. 109; 3 L. T. 895; *Otway v. Otway*, (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153, referred to.

FACTS of this case are briefly as follows:—

John McGowan instituted a suit against his wife Winnifred McGowan and her father claiming a divorce from his wife on the ground of her incestuous adultery with her own father. The wife Winnifred McGowan brought a counter-claim against her husband John McGowan for judicial separation on the ground of cruelty. The charge of cruelty against the husband was not established in Court and the suit of the wife for judicial separation was dismissed.

In the suit of John McGowan, incestuous adultery with the father was proved and consequently a decree nisi for divorce was made in favour of the husband, by Walsh J., on the 23rd May 1916. The wife Winnifred McGowan and her father appealed under section 10 of the Letters Patent. The appeal was still pending when the present application was made for alimony pending the confirmation of the decree nisi under section 16 of the Indian Divorce Act, IV of 1869.

Mr. E. A. Howard, for the Petitioner (the wife).—Under section 36 of the Indian Divorce Act the wife is entitled to be supported by the husband till the confirmation of the decree nisi. Moreover, we have filed an appeal against the decree nisi. The *lis* between the parties has not yet come to an end. Even if the wife is

guilty of adultery she is entitled to alimony so long as the decree does not become absolute against her.

The case was then argued on the merits.

Mr. Saila Nath Mukerji, for the Opposite Party (the husband).—The wife has been found guilty of adultery and we have obtained a decree nisi for divorce against her. So far as this Court is concerned the *lis* is at an end.

The woman is still living with the co-respondent, presumably in incestuous adultery, and he is maintaining her. She is, therefore, entitled to no alimony: *Holt v. Holt and Davis* (1).

Under the circumstances of the present case she cannot pledge the credit of her husband. Her petition for alimony should, therefore, be dismissed: *Gordon v. Gordon* (2).

The case was then argued on the merits.

Mr. A. E. Howard, in reply.—In this unfortunate case the father happens to be the co-respondent. The wife is a very young girl and in a very delicate condition. She has got no mother. Where is she to go? Refers to *Kelly v. Kelly* (3).

JUDGMENT.—The case relied upon, namely that of *Holt v. Holt and Davis* (1), is the one really in point. That was an application for alimony *pendente lite* and it was held that even *pendente lite* when it was shown that the wife was living with the co-respondent, whether they were living in adultery or not, alimony should not be ordered against the husband during that period. But for the purpose of an application by a wife for alimony it is always assumed that the wife is innocent. The practice of the Divorce Court seems to be uniform on the question of alimony after the wife has been convicted of adultery. The absence of any statement in the text books is probably due to the fact that it is taken for granted that an ecclesiastical Court would never listen to an application by a wife who has been convicted of adultery. I find the following authorities on the subject. In *Winstone v. Winstone* (4), which was of course an ecclesiastical decision, the petition by a wife for alimony after a

(1) 1 P. 610; 38 L. J. P. 33; 19 L. T. 662.

(2) 3 B. L. R. App. 13.

(3) 5 B. L. R. 71.

(4) 2 Sw. & Tr. 246; 30 L. J. Mat. 109; 3 L. T. 895.

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decree *nisi* had been passed against her was ordered to be taken off the file. This was in 1861. In 1888 the Court of Appeal in *Otway v. Otway* (5), which was a decision with regard to costs, observed—"her adultery prevented her from pledging the credit of her husband and prevented her from getting any alimony or allowance from the husband." It, therefore, appears to me that there is decision by the ecclesiastical Court that a wife against whom a decree *nisi* for divorce has been passed on the ground of adultery, is not entitled to apply for alimony and that this was the view taken by a Court of Appeal in 1888. In the absence of any authority to the contrary it would be my duty to refuse to entertain the present application.

In this country, however, having regard to the decision in *Kelly v. Kelly* (3) by Sir Barnes Peacock, it appears to be a matter of discretion. But in the case before me, there being no suggestion in the suit which I tried that the husband's conduct led to the wife's misconduct and the wife being in fact at the present moment under the roof of the co-respondent, I think I ought not to exercise my discretion in the manner in which it was exercised by Sir Barnes Peacock for the reason given by him. The application is, therefore, dismissed.

Application dismissed.

(5) (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 25 OF 1916.

November 23, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji.

BHAGELU SAHAI AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

RAM AUTAR SHUKUL—DECREE-HOLDER—RESPONDENT.

Decree, construction of—Decree conditional upon payment of an amount within 30 days of decree becoming final—Payment, validity of, after 30 days but before expiry of time of appeal.

A decree was obtained conditional upon the plaintiff's paying into Court a certain sum of money within "thirty days of the decree becoming final". The plaintiff deposited the money after thirty days but before the expiry of the appeal time:

Held, that the money was paid within 30 days of the decree becoming final.

Appeal, under section 10 of the Letters Patent, from the decision of the Hon'ble Mr. Justice Walsh, dated the 24th of March 1916, reported as 34 Ind. Cas. 204.

The Hon'ble Dr. Tej Bahadur Sapru, for the Appellants.

Mr. Haribans Sahai, for the Respondent.

JUDGMENT.—In this case the plaintiff obtained a decree conditional upon his paying into Court a certain sum of money within "thirty days of the decree becoming final." Thirty days is the time allowed for filing appeals. But this time is extended by section 12 of the Limitation Act which provides that the time necessary for obtaining a copy of the judgment shall be excluded in computing the thirty days. The plaintiff did not deposit the money within thirty days but he did deposit the money before the time had expired within which the defendant might appeal. The question, therefore, which arises for decision is this: Was this money paid in within 30 days of the decree becoming "final". A learned Judge of this Court has decided in the affirmative. We think that his view is correct. There is no doubt a considerable conflict of authority and we are entitled, therefore, to deal with the case upon the view that we think to be correct. The whole object of the provision in the decree giving the plaintiff thirty days after the decree had become final, was to obviate the plaintiff having unnecessarily to bring money into Court and allow it to remain there idle during all the time that an appeal against the decree would be pending. The object, therefore, of the provision in the decree would be defeated if the plaintiff was obliged to bring his money into Court before the time had expired within which the defendant might prefer an appeal. We dismiss the appeal with costs.

Appeal dismissed.

SIT HON v. EMPEROR.

CHARU CHANDRA MAJUMDAR v. EMPEROR.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 222 OF 1916.

July 19, 1916.

Present:—Mr. Justice Twomey.

SIT HON—APPLICANT

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 106—Breach of peace—Penal Code (Act XLV of 1860), ss. 441, 442—Criminal trespass—Panachut or outer verandah, whether part of dwelling-house.

The *panachut* or outer verandah where shoes are taken off is part of a Burmese dwelling-house and a person who commits criminal trespass on a *panachut* under the circumstances set forth in section 441, Indian Penal Code, commits house-trespass, and it is an offence involving breach of the peace within the meaning of section 103, Criminal Procedure Code, where the object is to cause hurt to one of the persons in the house.

Tarini Charn Mundle v. Gourikant Biswas, 7 C. W. N. 25, referred to.

JUDGMENT.—The *panachut* or outer verandah where shoes are taken off is part of a Burmese dwelling-house, and I see no reason to doubt that a person who commits criminal trespass on a *panachut* under the circumstances set forth in section 441, Indian Penal Code, commits house-trespass.

The learned Sessions Judge in his order of reference raises the further question whether the order requiring security to keep the peace under section 106, Criminal Procedure Code, is valid, seeing that the offence of which the accused was convicted, *i.e.*, house-trespass, is not an offence of which breach of the peace is a necessary ingredient. It is clear, however, in the present case that the criminal trespass was committed with the sole object of causing hurt to one of the persons in the house and I think it is, therefore, correct to hold that the particular offence committed by the accused in this case was one "involving a breach of the peace" within the meaning of section 106, Criminal Procedure Code. I am fortified in this opinion by the ruling of the Calcutta High Court in *Tarini Charn Mundle v. Gourikant Biswas* (1), in which the facts resembled those of the present case.

Proceedings are returned.

Revision rejected.

(1) 7 C. W. N. 25.

CALCUTTA HIGH COURT.

FULL BENCH.

CRIMINAL REVISION No. 848 OF 1916.

CRIMINAL MISCELLANEOUS CASE No. 92 OF 1916.

December 4, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., Justice Sir Asutosh Mookerjee, Kt., Mr. Justice Chaudhuri and Mr. Justice Newbould.

CHARU CHANDRA MAJUMDAR—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 185, 527—Construction and scope of sections—Jurisdiction—Form of order—Penal Code (Act XLV of 1860), ss. 409, 420.

Per *Curiam* (Woodroffe, J., dissenting).—Section 185, Criminal Procedure Code, is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but includes cases in which the doubt arises as to the suitability of one Court as compared with another (by which the offence shall be enquired into or tried), from the point of view of convenience or expediency. [p. 146, col. 2; p. 152, col. 1; p. 157, col. 2; p. 158, col. 2.]

Rajam Binod Chakravarti v. All India Banking and Insurance Company, 22 Ind. Cas 192; 41 C. 305; 17 C. W. N. 1207; 15 Cr. L. J. 48, dissented from.

Hiran Kumar Chowdhury v. Mangal Sen, 20 Ind. Cas 222; 17 C. W. N. 761; 14 Cr. L. J. 395 and *Emperor v. Chaichal Singh*, 2 Ind. Cas 361; 9 Cr. L. J. 531; 5 L. B. R. 17, approved.

Per Sanderson, C. J. and Newbould, J.—The jurisdiction under section 185 should be exercised sparingly by a High Court, when proceedings against an accused residing within the local limits of the Criminal Appellate jurisdiction of that Court have been instituted in a Court of competent jurisdiction subordinate to another High Court. [p. 152, col. 2; p. 159, col. 1.]

Per Woodroffe, J.—The "doubt" referred to in section 185 is a doubt as to the competency or jurisdiction of a Court and does not include a doubt whether one or another Court should enquire into or try a case on the ground of convenience or expediency. [p. 153, col. 2.]

Section 185 is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful. [p. 153, col. 2.]

The doubt as to what are the acts which are said to constitute the offence and where they were committed is not the "doubt" which is referred to in section 185, Criminal Procedure Code. [p. 154, col. 2.]

Per Mookerjee, J.—Jurisdiction cannot be conferred by consent of parties where there is an entire absence of jurisdiction. [p. 155, col. 2.]

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Scopes of sections 185 and 527 explained. [p. 156, cols. 1 & 2.]

A narrow construction should not be placed upon section 185. [p. 156, col. 2.]

The High Court has jurisdiction to make an order under section 185 in respect of an enquiry instituted or trial commenced in a Court not subordinate to itself. [p. 156, col. 1.]

Where proceedings against the accused residing within the criminal appellate jurisdiction of the High Court of Calcutta were instituted in respect of alleged offences under sections 403 and 420, Indian Penal Code, in a Court within the Presidency of Bombay, on an application by the accused a Full Bench of the Calcutta High Court (*Woodroffe and Newbould, JJ.*, dissenting), in consideration of the circumstances of the case and the convenience of the parties, made an order under section 185 declaring that the case against the accused should be enquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta.

The form of the order under section 185, Criminal Procedure Code, in such a case laid down. [p. 147, col. 1; p. 152, col. 2.]

FACTS of the case appear from the following order of reference, dated 16th November 1916:—

CHAUDHURI AND NEWBOULD, JJ.—This is a Rule calling upon the District Magistrate of Karwar in the Presidency of Bombay to show cause why the proceedings against the petitioner should not be transferred to the Court of the Chief Presidency Magistrate, Calcutta, and the alleged offence enquired into and tried in Calcutta, or why such other order should not be passed as to this Court may seem fit and proper.

This Rule was issued in exercise of the Court's powers under section 185 of the Code of Criminal Procedure, and one of the points to be considered is, what powers we have under this section. The section is in the following terms: "Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be enquired into or tried, the High Court within the local limits of whose jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried." In the case of *Rajani Binod Chakravarti v. All India Banking and Insurance Company* (1) it was held by a Divisional Bench of this Court consisting of their Lordships Imam and Chapman, JJ., that section 185, Crimi-

nal Procedure Code, did not warrant interference by this Court on the ground of convenience, when two Courts were equally competent to exercise jurisdiction in the matter. But in the case of *Hiran Kumar Chowdhury v. Mangal Sen* (2) another Divisional Bench of this Court consisting of their Lordships Chitty and Richardson, JJ., granted a similar application. They held that they might properly make an order under this section transferring a case from the Court in another Province where it had been instituted to a Court in this Province on the ground of convenience, when the Court at either place would have jurisdiction. The only other ruling on this point that we have been able to discover is that of *Emperor v. Chaichal Singh* (3), which was cited on behalf of the petitioner. In that case it was held that the section is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but includes cases in which the doubt is on the point whether the choice between the two Courts, both of which have jurisdiction, should be decided on the ground of general convenience. In our opinion this view is correct. We think with due respect that the learned Judges who decided the case of *Rajani Binod Chakravarti v. All India Banking and Insurance Company* (1) overlooked the effect of the words "should under the preceding provisions of this chapter be enquired into or tried" in section 185. A reference to the preceding sections shows that a question of doubt as to jurisdiction can seldom arise, as provision is made that in the event of circumstances which otherwise would have made it doubtful where the trial should be held, it can be held in any of the several Courts to whom jurisdiction is given by these sections. But these provisions giving jurisdiction to more Courts than one for the same offence must necessarily create a possibility of doubt as to which Court can more conveniently in the interests of public justice exercise that jurisdiction. It seems to us that "the doubt as to the Court by

(2) 20 Ind. Cas. 222; 17 O. W. N. 761; 14 Cr. L. J. 393.

(3) 2 Ind. Cas. 361; 5 L. B. R. 17; 9 Cr. L. J. 581.

(1) 22 Ind. Cas. 192; 41 C. 305; 17 C. W. N. 1207; 15 Cr. L. J. 48.

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which any offence should under the preceding provisions be enquired into or tried" includes, in the ordinary sense of the words, a doubt as to the suitability of one Court compared with another and is not limited to a doubt as to jurisdiction. We are, therefore, substantially in agreement with the decision of this Court in the case of *Hiran Kumar Chowdhury v. Mangal Sen* (2). Our only doubt is as to the correctness of the form of the order made in that case, that is to say, whether we could expressly order the transfer of the case from a Court outside our jurisdiction to one within it. If we made an order under this section we think it ought to be of a declaratory nature, leaving it to the prosecution to take the necessary steps to enable the Court of the Chief Presidency Magistrate to assume jurisdiction.

As this case involves an important question of jurisdiction when the two reported decisions of this Court have taken practically opposite views, we think it is a fit case for reference to a Full Bench of this Court, under Part II, Chapter V, rule 5 of our rules, for such orders as to such Bench may seem fit.

We have also to state that we are not agreed on the question of convenience and append our separate judgments on that point.

We agree that as the matter is being referred to a Full Bench that Bench should also consider the question of convenience, if necessary to decide it, instead of having a separate reference to a third Judge. The points, therefore, for the determination of the Full Bench are as follows:—

(1). Is the decision in *Rajani Binod Chakravarti v. All India Banking and Insurance Company* (1) correct?

(2) Is the form of the order in *Hiran Kumar Chowdhury v. Mangal Sen* (2) correct?

If not, what is the correct form of the order?

The further point for consideration is:—

(3) Has the accused made a sufficient case for an order under section 185, Criminal Procedure Code, on the ground of convenience?

CHAUDHURI, J.—I would make the Rule absolute and transfer the case on the following grounds:—

I do not clearly understand what the

charge really is against the petitioner. The explanation of the Magistrate of Karwar on this point is vague and somewhat shadowy. The notes made by the District Superintendent of Police contained in a document headed "points to refute" do not give much help. Mr. Camell appearing on behalf of the Crown states he has not sufficient instructions in the matter and can give no further help. The accused has not been able to get from the prosecution any particulars relating to the nature of the charge. The record of the criminal case consists of the charge-sheet which does not state the case. I consider the evidence of the witnesses mentioned by the Magistrate is likely to be of a formal nature. Admittedly the case depends mostly on documentary evidence and the books of the Company. The accused is the principal officer in charge of the Company which has its main office in Calcutta. His removal and the removal of his books would mean the stoppage of the business, which involves the interests of a large number of policy-holders. The affairs of the Company are also under investigation by the Registrar in Calcutta. Weight ought to be attached to the offer of the defence to bear the expense of the examination of necessary witnesses in Calcutta. The accused also suggests that a commission may be issued for the examination of the Karwar witnesses. The prosecution has been undertaken and the expense is being borne by the Crown. It is to be noted that section 185 provides a safeguard as far as the accused is concerned, namely, to prevent his harassment. The case against the sub-agent was started sometime ago at Karwar, and it seems to me that the prosecution had ample time to be able to frame or indicate the nature of the case against the accused. The indefinite character of the case taken with the other circumstances, specially the stoppage of the business of the Company, appears to me to be sufficient ground for transferring the case to Calcutta, specially as the doubt on the question of jurisdiction arises from the failure on the part of the prosecution to define the nature of the charge.

NEWBOULD, J.—I hold that on the merits the Rule must be discharged. I quit

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appreciate that it will be far more convenient for the petitioner to be tried in Calcutta. But we have to consider the balance of convenience and the interests of justice and it would be a greater hardship to the prosecution witnesses to compel them to attend a trial here, on the following grounds :—

A large number of these witnesses are poor and illiterate and not conversant with any language except their mother tongue, while the petitioner is an educated gentleman of means. He has offered through his Counsel to bear the extra expense that the trial of the case in Calcutta would involve. But the trouble that will be caused to witnesses of this class by keeping them in a strange country, 1,800 miles from their home, for a considerable period could not be suitably remedied by monetary compensation. It is contended that they are not important witnesses and might be examined on commission. Our attention has been drawn to a remark of the Magistrate, Karwar town, in his order of the 31st July to the effect that the case against the petitioner seems to depend mostly on documentary evidence. In passing this order the Magistrate was, it appears, only considering the question of bail. I do not think the Magistrate meant more than that the proof of criminal liability of the petitioner would principally depend on documentary evidence. It will have to be proved in the presence of the petitioner, before he can be convicted, that the offences charged have been committed, as well as his personal criminal liability. Proof of the commission of those offences will depend directly on the evidence of these ignorant witnesses and I do not think that this issue could be fairly tried on evidence taken on commission. As regards the removal of the books of the Company, whether the case is tried in Calcutta or at Karwar there must be serious interference with the work of the Company. The extra inconvenience that will be caused by removing the books to a Court at a greater distance is not, in my opinion, sufficient to justify the transfer of the case.

I am, therefore, of opinion that a transfer of this case will neither promote the ends of justice, nor tend to the general convenience

of parties or witnesses and I would accordingly discharge this Rule.

Mr. Norton, (with him Messrs. Ayeboom and K. N. Chowdhury and Babus Atulya Charan Bose, Monmotho Nath Mookerjee, Jatindra Nath Roy Chowdhury and Charu Chandra Biswas), for the Petitioner.—In this case the petitioner has been charged with offences under sections 409 and 420, Indian Penal Code, and the case has been instituted in Karwar in the Bombay Presidency. The petitioner being a resident of Calcutta and carrying on business here is entitled to invoke your Lordships' interference under section 185, Criminal Procedure Code, and have the case transferred to Calcutta. Section 185, Criminal Procedure Code, applies to this case, because there is a doubt, having regard to the facts alleged, as to which Court would have jurisdiction to try the petitioner. There are conflicting rulings on the question of the jurisdiction of Courts in a case like this. Refers to *Queen-Empress v. O'Brien* (4), *Mahadeo v. Emperor* (5), *George Langridge v. Grace Atkins* (6), *Ganesh Lal v. Nand Kishore* (7), *Rumbilas, In re* (8), *Krishnamachari v. Shaw Wallace and Company* (9), *Gokal Chand v. Phul Chand* (10), *Babu Lal v. Ghansham Das* (11). This conflict of authorities is itself a sufficient reason for raising a doubt as to the jurisdiction of the Courts to try the petitioner, and entitles him to invoke the aid of section 185, Criminal Procedure Code.

The section also applies to this case because on grounds of expediency and balance of convenience the case ought to be tried here. That the High Court, under section 185, can interfere on grounds of convenience.

(4) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72.

(5) 6 Ind. Cas. 563; 32 A. 337; 7 A. L. J. 319; 11 Cr. L. J. 372.

(6) 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856.

(7) 15 Ind. Cas. 319; 34 A. 487; 10 A. L. J. 45; 13 Cr. L. J. 479.

(8) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1916) M. W. N. 894; 15 Cr. L. J. 638; 29 M. L. J. 175.

(9) 25 Ind. Cas. 331; 39 M. 576; 18 M. L. T. 25; (1915) M. W. N. 418; 29 M. L. J. 178; 16 Cr. L. J. 491.

(10) 5 Ind. Cas. 830; 11 Cr. L. J. 253; 7 P. R. 1910 Cr.; 7 P. W. R. 1910 Cr.; 172 P. L. R. 1910.

(11) 5 A. L. J. 333; 7 Cr. L. J. 194; A. W. N. (1908) 115.

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was decided in *Hiran Kumar Chowdhury v. Mangal Sen* (2). No doubt a contrary view was taken in a recent case reported as *Rajani Binod Chakravarti v. All India Banking and Insurance Company* (1) by Imam and Chapman, JJ. But I submit that the ruling in *Hiran Kumar Chowdhury v. Mangal Sen* (2) lays down the correct law on the point, and that ruling is supported by a decision of the Chief Court of Lower Burma reported as *Emperor v. Chaichal Singh* (3).

The element of convenience, although not expressly mentioned in any of the preceding sections of the chapter, is still implied in every one of them. In some of them there can be no doubt whatever as to the *venue*, excepting as to the balance of convenience. Besides, the words "should be tried" instead of the words *could be tried* clearly indicate that the "doubt" is not confined merely to the question of jurisdiction of the Court which *could* try the case, but extends to the question as to which Court *should* try the case, having regard to the considerations of expediency and convenience.

Mr. Camell, Deputy Legal Remembrancer, for the Crown.—The "doubt" contemplated by section 185, Criminal Procedure Code, must be one in relation to "the preceding provisions of the chapter", which deal exclusively with the question of jurisdiction of Courts. The "doubt", therefore, must be with regard to the jurisdiction and nothing else. The question of convenience has been expressly dealt with in section 526, which provides for the transfer of cases, on the ground of convenience amongst others, from one Court to another under the same High Court, and in section 527 under which the Governor-General can transfer cases on the ground of convenience from one Court to another under a different High Court. It could not, therefore, be held that the ground of convenience is to be implied in section 185 although there is no mention of it in that section while there is express mention of it in some other sections of the Act.

[MOOKERJEE, J.—Take, for instance, section 182, first sentence. Where an offence is committed partly in one place and partly in another it can be tried at either place, so there could be no doubt in such a case as

to jurisdiction. How could section 185 apply to such a case unless there be a doubt as to the most convenient Court to try the offence?]

In such a case as there can be no doubt as to jurisdiction, my answer is that section 185 would not apply. Such a doubt may not arise in each of the cases contemplated by the preceding sections referred to in section 185. Only in those cases in which a doubt as to jurisdiction arises section 185 applies.

As to the significance of the word "should" it merely means "shall", and indicates mere futurity without the sense of "ought to". In the marginal note to the section the word "shall" is used. When a word is used in an Act which in popular language is capable of two meanings the word must have that meaning which gives only so much power as is necessary to carry out the object of the Act and not any unnecessary powers. *Vide Wandsworth Board of Works v. United Telephone Co.* (12). The Governor-General having been vested with necessary powers of transfer by section 527, Criminal Procedure Code, in a case like this, it is quite unnecessary for the High Court to have the power of transferring a case pending in another Province under section 185 on the grounds of convenience and expediency. The changes in the wording of the section and of its position in the successive Codes are significant and clearly indicate that the Legislature did not intend the question of convenience to be a factor in section 185. Section 185 of the present Code corresponds to section 69 of Act X of 1872 and section 23 of Act IV of 1877. In the Code of 1872 the various sections dealing with the transfer of cases on the ground of convenience were kept in the same chapter with section 69, which corresponds to section 185 of the present Code. But in section 69 the words "under the preceding provisions of this chapter" did not occur. But in the present Code of 1898 sections 64 and 64A of the old Code which related to transfer on the ground of convenience have been taken away from the chapter in which section 185 occurs and relegated to another chapter, and at the same time the words "under the preceding provisions of this chapter" have been added in

(12) (1884) 13 Q. B. D. 904 at p 920; 53 L. J. Q. B. 449; 51 L. T. 148; 32 W. R. 776; 43 J. P. 676.

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the body of section 185, which corresponds to section 69 of the Code of 1872 in which no such words could be found. Hence it is clear that the Legislature intended that the question of convenience is not to be an element in the "doubt" contemplated by section 185. As to the doubt on the question of jurisdiction in the present case, there can be none about the charge under section 420, Indian Penal Code. The offence under that section was committed at Karwar, the false representation and delivery of money both having taken place there. There can be some doubt as to the charge under section 409. That being so, the High Court cannot decide where the trial of the offence under section 420, Indian Penal Code, is to take place. It can only decide about section 409. Its power under section 185, Criminal Procedure Code, is to decide where a particular "offence" is to be tried, and not where the whole case is to be tried. The trial of the offence under section 420, Indian Penal Code, at Karwar will not prejudice the accused, because he cannot again be tried in Calcutta on the same facts under section 409, as such a trial would be barred under section 403, Criminal Procedure Code.

Mr. Norton briefly replied.

JUDGMENT OF THE FULL BENCH.

SANDERSON, C. J.—In this case a Rule was issued by this Court on the 14th August 1916 calling upon the District Magistrate of Karwar (in the Presidency of Bombay, District North Canara) to show cause why the proceedings should not be transferred to the Court of the Chief Presidency Magistrate in Calcutta and the alleged offence enquired into and tried in Calcutta, or why such other order should not be passed in the matter as to this Court may seem fit and proper on the grounds mentioned in the petition:

With a direction that the Rule should be sent to the Registrar of the High Court in Bombay for favour of its transmission by him to the District Magistrate.

The Rule was served with the assistance of the Registrar of the Bombay High Court upon the local Magistrate and the Rule came up for argument before Chaudhuri and Newbould, JJ., during the vacation.

The questions at issue were (1) whether the learned Judges had jurisdiction under

section 185 of the Code of Criminal Procedure to make the Rule absolute, (2) if they had such jurisdiction, whether it should be exercised and (3) if it were so exercised, in what form the order should be made.

The learned Judges were agreed on the question of jurisdiction but were unable to agree as to the manner in which it should be exercised. They expressed the opinion that as the case involved an important question of jurisdiction, and as the Court in two reported decisions, *viz*, *Hiran Kumar Chowdhury v. Mangal Sen* (2) and *Rajani Berod Chakravarti v. All India Banking and Insurance Company* (1) had apparently taken opposite views, they considered it a fit case for reference to a Full Bench, and expressed the view that as the matter was being referred to a Full Bench, that Bench should also consider the second question, *viz*, the question of convenience, upon which they were not agreed; a course in which the learned Counsel engaged in the case before the Full Bench have concurred.

The questions for the determination of the Full Bench were stated as follows:—

"1. Is the decision in *Rajani Binod Chakravarty v. All India Banking and Insurance Company* (1) correct?

2. Is the form of the order in *Hiran Kumar Chowdhury v. Mangal Sen* (2) correct? If not, what is the correct form of the order.

The further point for consideration is:—

3. Has the accused made a sufficient case for an order under section 185, Criminal Procedure Code, on the ground of convenience?"

The applicant for the Rule is the managing agent and a Director of the Bharat Luxmi Provident Company, Ltd., carrying on business at its registered Head Office at 81, Clive Street, Calcutta, and he resides within the local limits of the Appellate Criminal Jurisdiction of this High Court.

Proceedings against him and one of the Company's agents were instituted at a place called Karwar in the Canara District of the Presidency of Bombay.

The charges made against the applicant for the Rule are vague and indefinite.

Two charge-sheets have been produced before us written in the Kanarese language, and after very considerable trouble, which would have been avoided if proper steps had been taken by those instructing learned

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Counsel for the prosecution, the officials of the Court have succeeded in obtaining a translation.

These show the charge to be as follows:—

“(1) The charge is that the Company effected Life Assurance and granted marriage policies stipulating in both cases to pay more than the money invested by the assured, but has failed to do so. Accused stand charged under sections 420 and 409 of the Indian Penal Code.”

“(2) Charged with swindling persons effecting insurances without proper return according to the regulations of the Company.”

Such statements do not give much, if any, indication of what the real nature of the criminal charges is against the managing agent, and indeed taken by themselves the statements might almost be said to amount to allegations of a civil liability against the Company rather than a criminal charge against the applicant personally. The District Superintendent of Police of Kanara, however, has forwarded a statement, entitled “Points to refute the statement made by Charu Chandra Majumdar in his application to the Calcutta High Court”.

This statement is almost as vague as the statements in the charge-sheet, but it purports to allege that the Company on false representations and assurances led the public to become subscribers of the Company and to obtain policies, and failed to carry out the promises with the ultimate result that the policies lapsed and the managing agent managed the accounts in such a way, by withholding proper receipts, that he appropriated the money subscribed by the policy-holders and “allowed the policies to lapse directly or indirectly” and thereby managed to profit the Company and himself.

With such statements only before us, it is difficult to understand what is the real nature of the charge made against the managing agent; the conclusion I come to is, that the prosecution intend to allege some system of fraud against the Company to which the managing agent was a party and that they do not know what it will be until they have had an opportunity of investigating the books of the Company.

I am confirmed in this opinion by the fact that we were informed that the prosecution have demanded the production of the Company's books for the years 1911 to 1915, and that as regards the managing agent, the Magistrate has expressed the opinion “that the case against him seems to depend mostly on documentary evidence.”

(1) as regards the *first* point, *viz.*, jurisdiction, it is not disputed by the learned Counsel for the Crown that if it could be shown on the facts that the Court at Karwar had no jurisdiction to try the case against the managing agent, this Court would have jurisdiction under section 185, Code of Criminal Procedure, to decide by which Court the alleged offence should be enquired into or tried, and it has also been conceded by him that if on the facts there is a doubt where the offence was committed this Court could exercise the powers given by section 185. He has argued, however, that on the facts the alleged offence under section 420, Indian Penal Code, must have been committed (if committed at all) partly within the jurisdiction of the Karwar Court, and that as regards the alleged offence under section 409, Indian Penal Code, there may be a doubt whether the Karwar Court has jurisdiction.

He argued, therefore, that as regards the alleged offence under section 420, Indian Penal Code, at all events this Court could not exercise powers contained in section 185.

In view of the conclusion at which I have arrived upon the question of “convenience,” and to which I will refer hereinafter, I do not think it necessary to decide the point whether such a state of affairs as set out above would be sufficient to give the Court jurisdiction under section 85, and in my judgment it would not be desirable in this case to express any opinion thereon, unless it was necessary so to do, having regard to the vagueness and indefiniteness of the charges: the state of uncertainty in which the Court is left both as to the charges and the facts upon which they are alleged to be based make it very difficult to arrive at any definite conclusion without further investigation.

The main point, however, on which the question of jurisdiction was argued, was that of “convenience”.

It was argued on behalf of the applicant that this Court could exercise the powers

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given by section 185 merely on the ground of "convenience" and "expediency." This was strenuously denied in argument by the learned Counsel for the prosecution. This question depends upon the proper construction of section 185.

That section says:

(1) Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be enquired into or tried, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried."

The words in the section "should under the preceding provisions of this chapter" necessitate a reference to sections 177 to 184, and a consideration of those sections leads me to the conclusion that in some cases, mentioned in those sections, *e.g.*, where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried it must involve a doubt as to the suitability of one Court as compared with another from the point of view of "convenience and expediency."

I, therefore, agree with the construction placed upon the section by Chaudhuri, J., and Newbould, J.

This is in accordance with the judgment of Chitty, J., and Richardson, J., in *Hiran Kumar Chowdhury v. Mangal Sen* (2) and *Emperor v. Chaichal Singh* (3) and consequently, in my judgment, the decision in *Rajani Benod Chakravarti v. All India Banking and Insurance Company* (1) was not correct.

(2) I take next the question whether from the point of view of general convenience the case against the managing agent should be tried in Calcutta or at Karwar. This is a question by no means free from difficulty, as is evidenced by the fact that different views have been taken by Chaudhuri, J., and Newbould, J. I have come to the conclusion, however, that the balance of convenience is in favour of the case being tried in Calcutta, and, therefore, with great deference to the opinion expressed by Newbould, J., I really need say no more than that I agree with the conclusion arrived at by Chaudhuri, J.

The learned Judge has set out the main grounds for his conclusion in his judgment, and I need not repeat them.

I will add this, that although it is alleged that a considerable number of witnesses who are policy-holders will be necessary to prove a "system" on the part of the Company, the evidence of such witnesses must necessarily be of a formal nature and perhaps undisputed, whereas the real crux of the case will depend upon a close investigation of the books of the Company, and upon an enquiry as to how the money subscribed by the policy-holders has been applied. This will necessitate, as we have been told and as I assume, the evidence of expert accountants on the one side and the other and this is the part of the case which, in my judgment, will be likely to occupy the greater portion of the time devoted to the enquiry. The prosecution allege that the books for five years will be necessary and the Magistrate, as already mentioned, states that the case will depend mostly on documentary evidence.

If such books and the managing agent are to be taken to Karwar and to remain there for weeks and perhaps months, it is possible that this may create a great hardship on the Company, and it is alleged that it will amount virtually to a stoppage of the business of the Company.

I think that this jurisdiction in cases of this kind should be exercised sparingly, but with respect to this matter, in my judgment, it is impossible to leave out of consideration the fact that the prosecution have failed to define the real nature of the criminal charges alleged against the managing agent, although it must have been obvious that on such an application as this it was essential that the Court should have as definite information thereon as is possible—a fact which I think may be taken to render this case an exceptional one.

(3) As regards the form of the order, in my judgment it should follow the words of section 185 and it should be limited to a declaration that the Court's decision is that the case against Charu Chandra Majumdar should be enquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta. This will leave it open to the

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prosecution or the applicant to take such steps as they may be advised.

I desire to take this opportunity of expressing our obligation to the Chief Justice and Judges of the Bombay High Court for their courteous assistance to us in this matter.

WOODROFFE, J.—The referring judgment holds that this Court has extra-territorial jurisdiction under section 185 and this is not disputed by the Crown and, therefore, I need not consider the section upon this point.

The question then before us is, whether the "doubt" referred to in the section is a doubt as to competency or jurisdiction, or whether it is a "doubt" whether one or another Court should enquire into or try a case on the ground that an accused alleges that it will be inconvenient for him if one of these Courts does so. There is no question but that this matter of convenience is dealt with by the Criminal Procedure Code, as regards Courts within the jurisdiction under section 526, and without the jurisdiction under section 527. We are then asked to say that though the Code provides that the Government may transfer a case which is in a Court outside the jurisdiction on the ground of convenience, section 185 gives a similar power to the High Court, with this difference that whereas the Government can make an order of transfer this Court cannot, but can only pass a "decision" in the nature of a declaratory order to which comity of Courts will give effect. It is not usual for the Legislature to duplicate procedure in this way and one result of holding that it has done so, will make it possible for this Court under section 185 and the Government under section 527 to pass conflicting orders. Further, as Mr. Camell has shown, the course of legislation is against the view that section 185 is intended to cover questions of convenience of this kind. For under the Code of 1882 the present section 185 and sections 526, 527 were placed within the same chapter, whereas now the two latter sections have been removed to another chapter, and the words "under the preceding provisions of this chapter" have been inserted in section 185. Thus to take an instance appropriate to the present case, under section 181 (2) criminal breach of trust may be

tried by a Court within the local limits of whose jurisdiction any part of the property was received or retained or the offence was committed. There might be a doubt on the facts whether what was done constituted a receiving or retention within a particular jurisdiction or whether the offence was committed in another local area. Under these circumstances the assistance of the Court might be invoked to determine the matter under section 185. But if there is no such doubt and it is clear that property was retained within one jurisdiction, and the offence committed in another, the Court has no power to interfere under section 185 on the ground that it is more convenient to the accused that he should be tried in one jurisdiction and not in another. To hold otherwise would be to cut down the clear provisions of section 181 (2) and to give the Courts of one Province power to interfere with action taken in the Courts of another Province, upon grounds which may occur in any and every case. This I think was never intended, nor that the High Court should determine that one Court is more suitable than another if there is no doubt that there is jurisdiction in either. Section 185 is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful. There must also be facts on which a doubt can arise. These provisions deal with jurisdiction and not with convenience. We may speak of a "doubt" whether one Court or another has jurisdiction, but it is straining language to say that there is a "doubt" (not a "question") whether it is convenient to an accused to be tried in one Court or another. The word "should" is possibly ambiguous and may apply to the suitability of a particular Court as well as its competency. For the reasons, however, above stated, I think that section 185 does not deal with transfer of cases on the ground of mere convenience raised by the accused but with doubt as to competency. As the question of convenience can be raised in a very large number of cases, a contrary construction may lead to an obstruction of administration. Where proceedings are started in Bengal applications can be made in Bombay, Madras, Allahabad and elsewhere and *vice versa*. There is nothing

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to prevent an accused leaving one jurisdiction and going to another to make such an application. If it is not a *bona fide* application it may be rejected, but meanwhile proceedings are delayed and the prosecution obstructed. I am of opinion we cannot under this section consider the question of convenience merely, but if we could, I agree with Mr. Justice Newbould that this is not a case in which we should make an order having the effect of removing the proceedings from Bombay. In a matter of convenience we must consider not only the interests of the accused but also of the prosecution and its witnesses. The return of the Magistrate states the grounds which, I think, support the view which Mr. Justice Newbould has taken. The complainants are poor illiterate persons and to ask them and their witnesses to travel to Calcutta will, I have little doubt, result, as Mr. Camell says, in the prosecution falling through: though (without prejudging the case against the accused) there is material on the record to show that it is possible that this is one of the too numerous cases in which persons allege that they have been defrauded by the indigenous provident societies and insurance offices which have sprung up in India in recent years. If we accede to the general contentions urged in this case, the result is likely to be as follows:—Such societies generally have their head office in the larger towns and sometimes, as here, in the capital of another Province than that in which the insurances are effected. In such cases to call upon poor illiterate persons to go to the expense and trouble of travelling far from the place where the offence was committed may amount to a denial of justice. As is well known, the Courts are as a rule averse to issuing commissions in criminal cases, and the main point urged by the accused that his books are wanted is met in part by the fact that they will be required wherever the suit is tried, and if it be said that the inconvenience will be less here than in Bombay, the answer is that all that the prosecution require are the entries relating to the Khanapur Agency and of these only copies are required, on which being given the books may be returned.

I come now to the next contention that apart from the question of convenience a "doubt" arises as to the competency of the Bombay High Court. It is conceded that no such doubt exists as regards the offence under section 420, which the Bombay Courts are empowered to try. It is said, however, and this is not denied, that there may be a doubt whether the Bombay Court has jurisdiction to try the offence charged under section 409. It is noteworthy that this point is not mentioned in the referring judgment. If we examine this point closely we find that what is meant to be said is not that there are allegations of fact on which a doubt arises which Court should try the offence, but that the facts alleged are insufficient to show what are the acts which are said to constitute the offence and where they were committed. If this be so, the obvious course is not to ask us for an impossible decision whether the case should be tried here or in Bombay, but to take the necessary proceedings open to the accused in the Bombay Court. The nature of these proceedings would, according to Mr. Norton, be to quash the charge as regards section 409. His client does not propose to go to the Court which alone can do this, but he wishes to put section 185 to an indirect use and get the proceedings over here and then make an application which, if well founded, should be made now in the Bombay Court.

This is not such a "doubt" as is referred to in the section. How on these facts could we decide that the case under section 409, the facts of which we are ignorant of—should be tried in Calcutta or anywhere else? Mr. Norton's real contention is that the case should not be tried anywhere upon the present charge at all.

If, however, we interpret the prosecution statements as definite enough to show that an offence may have been committed either in Bombay or at Calcutta, then we must first consider whether we can pass a decision which shall affect the proceedings under section 420, even though it is conceded no "doubt" arises with reference thereto. There is nothing in the section which authorises us to say that there is no doubt as to one offence but doubt as to another, and as the offences arise on the same facts, give a decision which shall affect

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both charges. Nor, assuming we have such a power, is there any necessity to do so. The Bombay Court has clearly jurisdiction as regards section 420 of which it should not be deprived.

It is not clear when or on what materials an application under section 185 should be made, but it is to be noted that the want of definiteness is in part at least due to the fact that specific charges have not been formulated after evidence taken. This evidence may disclose either that the Court has jurisdiction to try an offence under section 409 or a charge of abetment of such offence. If so, there is no reason why the Court selected by the prosecution within whose jurisdiction the complainants are, should not try the offence. If the evidence discloses that no offence was committed within the jurisdiction, the accused will be acquitted on that ground. I am satisfied that there is a great probability that as the result of holding otherwise the charges made will not be tried anywhere or at all. And this result and not a trial in any particular one of two Courts (as to which there may be a "doubt") is doubtless the object of the present application which seeks to put section 185 to an use for which, in my opinion, it was not intended.

I would, accordingly, answer the questions referred to us as follows:—

(1) Yes.

(2) The matter does not arise for decision on my judgment.

(3) Mere convenience either of the accused or prosecution is not a ground for action under section 185, and if it were, the proceedings in the present case should under the circumstances be left where they now are.

MOOKERJEE, J.—Two important questions of law arise on this reference, namely, *first*, is section 185, Criminal Procedure Code, restricted to cases instituted in a Court subordinate to the High Court to which the application is made and, *secondly*, is section 185 restricted to cases where a doubt arises as to the jurisdiction of the Trial Court by reason of some uncertainty regarding the facts or the law applicable to the case. If both these questions are answered in the negative, the point will

require consideration, whether the circumstances of the case before us justify an order in favour of the accused under the first sub-section of section 185, which is in these terms:—

"Whenever any doubt arises as to the Court by which any offence *should, under the preceding provisions of this chapter*, be enquired into or tried, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried".

The first of the two questions formulated above relates to the jurisdiction of the High Court to make an order under this section in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits. Upon this matter, there is no divergence of judicial opinion. That the answer should be in the affirmative was assumed in the case of *Hiran Kumar Chowdhury v. Mangal Sen* (2) and *Rajani Benod Chakravarti v. All India Banking and Insurance Company* (1). The question, however, was expressly raised and decided in the affirmative in the case of *Emperor v. Chaichal Singh* (3). In the case before us, the point was not taken before the Division Court, and Counsel for the Crown has not contended before us that if the case was otherwise within the scope of section 185, that provision was inapplicable by reason of the circumstance that the proceedings are pending in a Court subordinate to another High Court. This admission by Counsel for the Crown would not, however, justify the assumption of jurisdiction by this Court, if section 185, upon its true construction, has no application to proceedings in what may be called extra-territorial Courts; for it is an elementary rule that jurisdiction cannot be conferred by consent of parties, where there is an entire absence of jurisdiction. We must further bear in mind that on this reference not merely the question whereupon there is divergence of judicial opinion, but the entire case is, under the Rules of Court, before the Full Bench. It is for these reasons incumbent upon us to satisfy ourselves as to the applicability of section 185 to a proceeding instituted in a Court subordinate to another

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High Court before we consider the case on the merits.

Upon a careful examination of the provisions of section 185, I have arrived at the conclusion that the section is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question, within the local limits of whose appellate criminal jurisdiction the offender actually is. It is plain that such High Court may not be, in a particular case, the High Court superior to either of the Courts competent to try the offence "under the preceding provisions of the chapter" mentioned. It is not necessary for my present purpose to determine whether the Legislature contemplated the commission of an offence under circumstances which make it triable in either of two Courts subordinate to two different High Courts, followed by an application under section 185 to a third High Court within the territorial limits of the appellate criminal jurisdiction whereof the offender ordinarily resides or is actually present at the time of the application. This, at any rate, is plain from the terms of the section that if the offence is triable by any one of two or more Courts subordinate to different High Courts, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, is competent to entertain the application. I do not feel pressed by the fact that section 527, Criminal Procedure Code, authorises the Governor-General-in-Council to direct the transfer of any criminal case from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court. The scopes of sections 185 and 527 are obviously different. Under the former section, the High Court, within the limits of whose appellate criminal jurisdiction the offender actually is, merely decides by which Court the offence shall be enquired into or tried. The order made is not in terms an order for transfer, though no doubt the resultant effect may be the same, as it is extremely improbable that one High Court should disregard such a determination by another High Court. Section 527, on the other hand,

invests the Governor-General-in-Council with power to make an actual order for transfer. In my opinion, section 185 is comprehensive enough to be applicable to cases instituted in Courts beyond the local limits of the appellate criminal jurisdiction of the High Court where the offender actually is. The first question formulated above must consequently be answered in the negative.

The second of the two questions formulated at the outset relates to the true scope of section 185, where it is applicable. Upon this matter, there is a divergence of judicial opinion in this Court, which has rendered necessary this reference to a Full Bench. In *Hiran Kumar v. Mangal Sen* (2) Chitty and Richardson, JJ., adopted the view that where an offence is triable in either of the two Courts, the High Court may make an order under section 185 on the ground that the offence may be enquired into or tried more conveniently in one of those Courts than in the other. On the other hand, in *Rajani Binod Chakravarti v. All India Banking and Insurance Co.* (1) Imam and Chapman, JJ., put a restricted interpretation on the section and treated it as limited in application only to cases where a doubt arises as to the jurisdiction of the Court by which the offence may be enquired into or tried. Chaudhuri and Newbould, JJ., have expressed themselves in favour of the more liberal construction of the section. Upon a minute scrutiny of the relevant provisions of Chapter XV of the Code of Criminal Procedure, I feel convinced that a narrow construction should not be placed upon section 185. This chapter comprises sections 177—199, and is divided into two parts; the first whereof is headed: "Place of enquiry or trial," and includes sections 177—189. Section 177 formulates the general principle that the ordinary place of enquiry and trial is the Court within the local limits of whose jurisdiction the offence is committed. Section 178 authorises the Local Government to order cases to be tried in different Sessions Divisions. Sections 179—184 embody provisions in the nature of exceptions or alternatives to section 177. Section 179 recognises the doctrine that the accused is triable either in the District where the criminal act is done or in the District where the consequence thereof ensues. Section 180 pro-

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vides that where the act is an offence by reason of relation to another offence, the trial may take place in either of the Courts competent to try the accused for either of the offences. Section 181 deals with four classes of cases. The first class refers to *thugs* and dacoits who are liable to be tried by a Court within the local limits of whose jurisdiction the person charged is. The second class includes criminal misappropriation and criminal breach of trust; in the case of these offences, the offender can be tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person. The third class refers to stealing, and here the offender is made liable to be tried by a Court within the local limits of whose jurisdiction the property was stolen or was possessed by the thief or by a receiver of stolen property. The fourth class comprises kidnapping and abduction; here the offence may be enquired into or tried by the Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained. Section 182 again refers to four classes of cases; namely, first, where there is an uncertainty in respect of the local area where the offence is committed; secondly, where the offence has been committed partly in one local area and partly in another; thirdly, where the offence is continuously committed in more than one local area; and fourthly, where the offence committed consists of acts done in different local areas; in each of these cases, the offence is made triable by a Court having jurisdiction over any of such local areas. Section 183 treats of an offence committed by a person in the course of performing a journey or voyage and makes the offender liable to be tried by a Court through the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence has been committed passed in the course of the journey or voyage. Section 184 makes an offence against Railways, Telegraphs, Post Office and the Arms Act triable in a presidency town where such offence may or may not, have been committed, pro-

vided the offender and all the witnesses necessary for his prosecution are to be found within such town. The group of sections, just analysed, is followed by section 185 with which we are primarily concerned. That section relates to cases where any doubt arises as to the Court by which any offence should, "*under the preceding provisions of this chapter*", be enquired into or tried. Full effect must plainly be given to the expressions "should" and "under the preceding provisions of this chapter". The contention on behalf of the Crown is that the "doubt" mentioned is a doubt as to the jurisdiction of the Court by which the offence may be enquired into or tried; but this narrow construction would clearly make section 185 inapplicable to all cases comprised in the previous sections, except the particular case contemplated in the first clause of section 182, which speaks of uncertainty with regard to the local area where an offence has been committed. In the events mentioned in the other sections as also the remaining clauses of section 182, no question can arise as to the competency of the particular Court to hold an enquiry or trial for the alleged offence. In very many instances, for example, in the classes of offences comprised in section 181 or section 184, the only possible question which can arise on an application under section 185 is that of expediency or convenience; under the rules laid down, the enquiry or trial may be held in one of two or several Courts; the problem for solution is, where *should* the trial actually take place. Indeed, if all cases, where an order is sought under section 185 on the ground of convenience, were excluded from its scope, the reference therein to "*the preceding provisions of this chapter*" would become, in a very large measure, entirely nugatory. I am confirmed in my conclusion by the fact that the Legislature uses the term, "*should*". I am not prepared to accede to the contention of the Counsel for the Crown that "should" here is equivalent to "could." I do feel reluctant to impute to the Legislature an ignorance of the meaning of this familiar word; on the other hand, I take "should be tried", in its ordinary sense, as equivalent to

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"ought to be tried", for "should" clearly implies a choice between two or more available alternatives. In fact there would have been no room for controversy if the Legislature had used the term "question" instead of the word "doubt". I am not impressed by the argument that if section 185 was intended to have such a wide scope as is contended on behalf of the accused, it would have been framed in the same terms as section 527 which authorises a transfer by the Governor-General in Council on the ground of convenience. The two sections have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place, section 527 contemplates an order for transfer, and recourse may possibly be had thereto if an order made by one High Court under section 185 is disregarded by another High Court. I hold accordingly that the view taken in the cases of *Hrian Kumar Chowdhury v. Mangal Sen* (2) and *Emperor v. Chaichal Singh* (3) gave effect to the true intention of the Legislature, though in the former of these cases, the order was not made in strict conformity with the terms of section 185; and I am constrained to dissent from the decision in *Rajani Benod Chakravarti v. All India Banking and Insurance Company* (1). The second question formulated by me must, like the first, be answered in the negative. In this view, it is unnecessary for me to consider whether even if the narrower construction were adopted, the present case would, in so far as the accused is charged with an offence under section 409, Indian Penal Code, fall within the purview of section 185, by reason of a conflict of judicial opinion regarding the true construction of section 179 and the consequent doubt as to the jurisdiction of the Trial Court.

The question finally arises, whether in the circumstances of the present case an order under section 185 should be made in favour of the accused. Upon a full consideration of the facts which have been reviewed in detail by the learned Chief Justice in the judgment he has just delivered and which I cannot usefully supplement, I see no escape from the conclusion that the

balance of convenience is on the whole in favour of a trial here. In my judgment the Rule should be made absolute and an order made in terms of section 185.

CHAUDHURI, J.—My answers are to be found in the order of reference. I have nothing to add to what I have said. The reasons why I think that the case should be tried in Calcutta are to be found in my separate judgment which is to be considered as part of my judgment in this reference.

NEWBOLD, J.—I wish to add some remarks to the joint judgment of reference to make my individual opinion more clear. Though I hold we have powers to pass orders under section 185, Criminal Procedure Code, on the application of the accused petitioner, I do not think it was intended that the section should be used for this purpose. It seems to me that the Legislature by giving jurisdiction to several Courts in the previous section of Chapter XV intended, as far as possible, to remove doubts as to jurisdiction in cases in which such doubt might otherwise arise. There was no necessity to add section 185 to remove doubts as to jurisdiction. Even if doubts did arise as to the interpretation of these previous sections, they could be dealt with in the same way as doubts as to jurisdiction which frequently occur in connection with other parts of the Code. But when more Courts than one had been given jurisdiction to try the same offence, it became necessary to provide for a possible deadlock which would occur if two Courts either each refused to take action on the ground that the case should be tried by the other Court or both proceeded to try the same case. It seems to me clear that this section was enacted to provide for such a difficulty and the doubt mentioned in the section is not a doubt as to jurisdiction but a doubt as to which Court having jurisdiction should try the case under such circumstances. On such a doubt arising the High Court exercising powers under section 185 would have to decide with reference to the convenience of all concerned. Though it was not intended that this section should enable an accused to apply for a transfer on the ground of his personal convenience, the wording of the section is sufficiently wide to give a High Court power to take action on such an application. I entirely agree with the

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remarks of Mr. Justice Woodroffe as to the danger of an obstruction to administration that could be caused by an improper use of this section. To avoid this danger I think that these powers should seldom be exercised on the application of an accused, and only if he be able to convince the Court that a refusal to exercise these powers is likely to lead to a miscarriage of justice. This, for reasons I have given in my previous judgment, I hold the present petitioner has failed to do so.

I accordingly agree with my Lord the Chief Justice as to the answer to be given to the first two questions referred and adhere to my original opinion that the third question should be answered in the negative and the Rule discharged.

SANDERSON, C. J.—In consequence of the opinion of the majority the Rule is made absolute and the order will be drawn up in terms of section 185 of the Criminal Procedure Code, as indicated in the judgment.

Rule made absolute.

PATNA HIGH COURT.

MISCELLANEOUS CRIMINAL REVISION NO. 17
OF 1916.

June 14, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

AMRIT MONDAL AND OTHERS—
PETITIONERS

versus

EMPEROR THROUGH MAHARAJ

MONDAL—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 526—
Transfer of criminal case, grounds for—Opinion of
Judge on evidence in prior counter-case.*

It is not a sufficient ground for the transfer of a criminal case that the Judge, in a former proceeding arising out of a counter-case, expressed certain views upon the evidence as to which of two versions was correct. Judges must be presumed to be upright men, who will approach a case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. [p. 160, col. 1.]

Application against an order of the first class Magistrate, Purnea, dated the 1st March 1916.

Messrs. Wasi Ahmad and Lalit Mohan Ghose, for the Petitioners.

Mr. S. Ahmad (Deputy Government Advocate), for the Crown.

JUDGMENT.—This is an application for the transfer of a trial pending in the Sessions Court at Purnea to the Sessions Court at Bhagalpur, on the ground that the accused has a reasonable apprehension that he will not receive a full consideration of his case in the former Court.

The facts of the case are, that the accused were complainants in a case in which they alleged that there had been a riot on the 4th November 1915. The complainants in that case were put on their trial before Mr. P. K. Gupta and were acquitted, on the ground that it was not shown that there had been a riot on the 4th November at all. The Public Prosecutor in the former trial opened his case with a statement that there had been two occurrences, one on the 2nd November, and the other on the 4th November, and whether the complainants in the case which he was opening (accused in the case now before us) were or were not guilty with regard to the occurrence on the 2nd November, he strongly urged that the other side should be convicted for the occurrence on the 4th November. The learned Judge on hearing the evidence decided that there had been one occurrence only, on the 2nd November, not on the 4th November. The witnesses who gave evidence in that case, who will now be the accused in the present case, stated on oath that there was no occurrence on the 2nd November. This story the learned Judge has disbelieved. The position is this. The Judge has not heard any of the eye-witnesses to the occurrence of the 2nd November. He has no idea as to who was responsible for the disturbance of the 2nd November or for the various injuries caused to the other side on that date, but he has not believed the statements on oath, made to prove that there was no occurrence on the 2nd November, by persons who will afterwards make statements before him as accused persons. Upon this learned Counsel for the petitioners urge that we should give them a chance before another Court of proving that there was no occurrence on the 2nd November.

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The basis of all such applications must be that the accused must have a reasonable apprehension that he will not receive a fair trial. The leading case upon the subject is that of *Asimaddi v. Govinda Baidya* (1). The learned Deputy Government Advocate in shewing cause is extremely anxious that the precedent in that case should not be destroyed by the first pronouncement made on the subject in this Court. The case has been followed in *Crown v. Kamil* (2), *Rajani Kanta Dutta v. Emperor* (3) and referred to and not dissented from in *Pandurang v. Emperor* (4) and *Emperor v. Hargobind* (5). We should be extremely sorry to depart in this Court from a principle which has been maintained throughout India. That principle is that the accused has no reasonable ground for apprehension that he will not have a fair trial, merely because the Judge in the former proceeding, arising out of a counter-case to the one now coming before him, has expressed certain views upon the evidence in the former case as to which of the two versions is correct. The basis of that ruling is that Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by any thing that has gone before that case. This view we are as anxious as the learned Deputy Government Advocate to uphold. We will not believe that our Judges are so easily prejudiced that, because one incidental part of the case before them has been decided in a previous case, they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial. We must refuse in the circumstances of this case to depart from the established practice of the Courts of India. The Rule is discharged.

With regard to the application for bail in this case, it seems to us that the only serious injury inflicted was one upon the head of a boy with a *lathi* blow which has resulted in

his death. Bail should be allowed to the satisfaction of the District Magistrate; such bail not to exceed Rs. 1,000 in each case.

Rule discharged.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 210B OF 1916.

July 6, 1916,

Present:—Mr. Justice Twomey.

ITALA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code Act V of 1898, s. 350—*Magistrates, Bench of, case tried by—Decision after hearing part of evidence, legality of.*

Section 350, Criminal Procedure Code, does not apply to cases tried by Benches of Magistrates.

Damri Thakur v. Bhowani Sahoo, 23 C. 194; 12 Ind. Dec. (N. S.) 129; *Hardwar Singh v. Khaga Ojha*, 20 C. 870; 10 Ind. Dec. (N. S.) 585, referred to.

There is no provision of law which provides for a change in the constitution of Benches of Magistrates, and, therefore, only those Magistrates who have heard the whole of the evidence in a case can decide the case.

JUDGMENT.—In this case the prosecution evidence was heard by two Honorary Magistrates who took no further part in it. The defence evidence was heard by two other Honorary Magistrates of the same Bench and the accused was sentenced and convicted by these two Magistrates. The procedure was illegal. Section 350 of the Criminal Procedure Code does not apply to cases tried by Benches of Magistrates, as pointed out in *Damri Thakur v. Bhowani Sahoo* (1) and *Hardwar Singh v. Khaga Ojha* (2). There is no provision of law which provides for a change in the constitution of Benches of Magistrates, and in the absence of any such provision it must be held that only those Magistrates who have heard the whole of the evidence can decide the case. The conviction and sentence are set aside.

Revision allowed;

Conviction set aside.

(1) 23 C. 194; 12 Ind. Dec. (N. S.) 129.

(2) 20 C. 870; 10 Ind. Dec. (N. S.) 585.

(1) 1 C. W. N. 426.

(2) 1 S. L. R. 37; 8 Cr. L. J. 159; 9 Cr. L. J. 275.

(3) 3 Ind. Cas. 88; 36 C. 904; 10 Cr. L. J. 244.

(4) 15 C. P. L. R. 192.

(5) 12 Ind. Cas. 652; 33 A. 583; 12 Cr. L. J. 564.

JANAKI AMMAL v. NARAYANASAMI AIYAR.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

July 10, 1916.

Present:—Lord Shaw, Lord Parmoor and
Mr. Ameer Ali.JANAKI AMMAL—DEFENDANT—APPELLANT
versus
NARAYANASAMI AIYAR—PLAINTIFF—
RESPONDENT.

Hindu Law—Widow's estate, nature of—Reversionary heirs, position of—Suit to restrain waste—Waste not proved—Specific Relief Act (I of 1877), s. 42—Declaration of reversioner's right—Form of decree—Decree awarding declaration while dismissing substantial claim, futility of—Civil Procedure Code (Act V of 1908), O. VII, r. 7—Further relief

A Hindu widow's right with respect to the estate of her deceased husband is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited but so long as she is alive no one has any vested interest in the succession. [p. 162, col. 1.]

A reversionary heir, although only having a contingent interest, is recognised by the Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life; but such heir thus appealing to the Court does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. [p. 162, col. 2.]

A Court should not entertain a suit for a mere declaration that plaintiff is the reversioner of a Hindu widow, as such a declaration would be premature and be subject to being rendered valueless by the development of events. [p. 163, col. 1.]

In a suit by a reversioner for an injunction to restrain waste and for appointment of a receiver, it is not competent to the Court, after dismissing the claim for these reliefs to make a declaration that plaintiff is the nearest reversioner to defendant, even to prevent future litigation between the parties. It is not legitimate to give a plaintiff, under cover of a request for 'further relief,' after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims. [p. 163, col. 2.]

Appeal from a judgment and decree of the High Court, Madras, dated the 23rd August 1912, reported as 17 Ind. Cas. 261, modifying those of the Subordinate Judge, Mayavaram, dated the 28th October 1907.

FACTS.—Respondent, claiming to be the reversionary heir to the property of one Ramasami Iyer, after the death of the appellant (the widow) and her husband's mother, instituted a suit against appellant on allegations of waste, and prayed for (a) an injunction, (b) for appointment of a receiver, (c) further relief, and (d) costs.

Appellant in her written statement pleaded *inter alia* that respondent was not the next reversionary heir.

The Trial Court and the High Court both found that the allegations of waste were unfounded, but they gave the plaintiff a declaration that he was the nearest reversioner to the deceased after the lifetime of the widow and her husband's mother. The Trial Court made no order as to costs and the High Court directed that the parties should bear their own costs. The learned Judges of the High Court (Miller and Abdur Rahim, JJ.) observed that "though the declaration asked for in the plaint" (it was not asked for) "was not essential, yet the peculiar circumstances of this class of suits seem to make it not undesirable that it should remain to prevent further litigation on the question between the plaintiff and the first defendant (appellant), should the former find it necessary to attack again the latter's management of the estate."

Hence this appeal.

Mr. *Kenworthy Brown*, for the Appellant, contended that the respondent was not entitled to a decree and the suit ought to have been dismissed. His rights came into existence only on the extinction of existing or future life-estates.

[LORD PARMOOR.—You dispute the right of the Court to make the declaration.]

He could get no declaration as to being the next reversionary heir.

[MR. AMEER ALI.—It is a right which comes into existence at the time one dies—and your contention is that he may not be so at that time.]

[LORD PARMOOR.—He had no vested right, but his right would arise on the happening of certain events.]

[LORD SHAW.—The decree is wholly wrong because it declares that he is the next reversionary heir.]

[LORD PARMOOR.—Such declaration cannot be made. The Court ought not to have made any declaration.]

Reference was made to *Strimathoo Moothoo Vija Ragoonadah Rane, Kolandapayree Natchiar v. Dorasinga Tevar* (1), *Venkatanarayana*

(1) 2 I. A. 169; 23 W. R. 314; 15 B. L. R. 83; 3 Sar. P. O. J. 456.

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Pillay v. Subbammal (2), *Davis v. Angil* (3), *Dysart (Earle) v. Hammerton* (4), *Hammerton v. Dysart (Earle)* (5), Mayne's Hindu Law, 8th Edition, paragraphs 605, 624 and 647.

Mr. Raikes, for the Respondent, contended that he had the right for declaration in respect of his property in the estate under section 42 of the Specific Relief Act. The next reversioner had a right to protect and bring a suit to prevent one enjoying a life-estate from committing waste. The Board had reversed the decision in *Jaipal Kunwar v. Indar Bahadur Singh* (6).

Mr. Brown was not called upon to reply.

JUDGMENT.

LORD SHAW. — This is an appeal from a decree of the High Court of Judicature at Madras of the 23rd August 1912,* modifying the decree of the Subordinate Judge of Mayavaram, dated the 28th October 1907.

The suit was brought with reference to the estate of one Ramasami Iyer, of Konerirajapuram, who died intestate on the 24th June 1906. It is not disputed that the widow holds the property under the Hindu Law as "a widow's estate." The mother of the late owner is the person entitled to succeed should she survive this widow. On the expiry of these lives the estate will descend to the next reversionary heir of the deceased.

The rule of the Hindu Law with regard to the nature of the widow's estate may have been subject to various forms of expression but in substance it is not doubtful. Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but, to use the familiar language of Mayne's "Hindu Law," paragraph 625, page 870, "so long as she is alive no one has any

vested interest in the succession." These propositions were not disputed.

The law as to the situation of the reversionary heirs is also in substance quite clear; there is, as stated, no vesting as at the date of the husband's death, and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives; that is to say, in the present case at the death of the survivor of the appellant and her late husband's mother. Even where the Courts have proceeded, prior to the opening of the succession, to give any declaration, this has been done for special reasons only, as in the case of *Jaipal Kunwar v. Indar Bahadur Singh* (6) and — to use the language of Sir Arthur Wilson (page 70) — it is made clear that "whenever the succession opens by the death of the widow the present decision will have settled nothing as to who should succeed."

It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir of the deceased proprietor. If a Court of Law proceeded to make any declaration of right upon that subject, such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of reversionary heir. *A priori*, accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility.

It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on

(2) 29 Ind. Cas. 298; 42 I. A. 125; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555; 19 O. W. N. 641; 28 M. L. J. 535; 17 M. L. T. 435; 21 O. L. J. 515; 17 Bom. L. R. 468.

(3) (1862) 4 De Gex F. & J. 524 at p. 529; 45 E. R. 1287; 31 Beav. 223; 31 L. J. Ch. 613; 8 Jur. (N. S.) 1024; 6 L. T. 850; 10 W. R. 722.

(4) (1914) 1 Ch. 822 at p. 834; 83 L. J. Ch. 530; 110 L. T. 879; 78 J. P. 297; 12 L. G. R. 653; 58 S. J. 378; 30 T. L. R. 379.

(5) (1916) A. C. 57; 85 L. J. Ch. 33.

(6) 31 I. A. 67; 7 O. C. 239; 26 A. 238; 8 C. W. N. 465; 14 M. L. J. 149; 6 Bom. L. R. 495; 8 Sar. P. C. J. 625.

*See 17 Ind. Cas. 261—Ed.

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this subject was recently expounded in the judgment of this Board delivered by Mr. Ameer Ali in *Venkatanarayana Pillay v. Subbammal* (2).

This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life-estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go.

The suit in the present case was brought by the plaintiff against the defendant and appellant, making charges of a serious character against the conduct and management of the estate by the deceased's widow. Collusion, concealment, maladministration, malice, and fraud were charged, and the statement was made that heavy loss would be incurred if the properties were left in her possession—subject to waste by her. The appointment of a receiver upon the estate was prayed for, and an injunction was asked restraining the widow from doing any act injurious to the plaintiff's reversionary interest. The third prayer of the plaint was for "granting such further relief as to the Court may seem fit and proper."

It may be at once said that, of the serious charges made, none were held to be well founded in fact: and no reason was found by the Courts below either for the appointment of a receiver or the granting of an injunction. By the decree of the Subordinate Judge, however, of date the 28th October 1907, the following order was made, namely, "that plaintiff is declared to be the next reversionary heir of the deceased Ramaiyar after the life-time of defendants Nos. 1 and 2" (his widow and mother). This was done under the third prayer just referred to. For the reasons above set forth it is plain that such a declaration is unavailing as well as premature. It appears to have arisen on account of a dispute as to whether the plaintiff's relationship to the deceased had

been made out, and the Courts below may have been misled by the circumstance of that dispute into permitting the question of a declaration to enter the decree. The form of the declaration was that the plaintiff was "the next reversionary heir."

In their Lordships' opinion the plaintiff-respondent was not entitled to such a declaration. Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the suit should be dismissed, and that the respondent do pay the costs before the Board and in the Courts below.

Appeal allowed.

Solicitor for the Appellant: Mr. Douglas Grant.

Solicitors for the Respondent: Messrs. Chapman, Walker and Shephard.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO 7 OF 1914.

July 19, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

Babu RAM SAHAY—DEFENDANT NO. 1—
APPELLANT

versus

JAGDAMBA SINGH—PLAINTIFF,
JIT BAHADUR SINGH AND ANOTHER—
DEFENDANTS—RESPONDENTS

Oudh Laws Act (XVIII of 1873), s. 10—Pre-emption—Mortgage—Foreclosure—Decree for pre-emption obtained by one co-sharer without impleading others

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equally entitled, effect of—Transfer of pre-empted property by decree-holder during pendency of appeal, effect of—Bona fides—Suit carried on by money supplied by third person, whether liable to dismissal.

A suit for pre-emption is not liable to dismissal merely because it is carried on with money supplied by a third person, it being open to the pre-emptor to sell his interest in the property obtained by pre-emption and pay the money to the vendee. [p. 166, col. 1.]

Bindeshuri Singh v. Pandit Balraj Sahai, 10 O. C. 49; *Ram Sahai v. Gaya*, 7 A. 107; A. W. N. (1884) 224; 4 Ind. Dec. (N. S.) 305, referred to. *Maharani v. Ram Adhar*, 13 Ind. Cas. 508, distinguished.

After a decree for pre-emption has been passed and payment made in pursuance of it, the right to pre-emption fructifies into a title to the property forming the subject of the claim, though that title may be subject to the result of an appeal which may be filed in the case by an unsuccessful party. [p. 166, col. 1.]

Onkar Singh v. Bhagwan Dat Singh, 25 Ind. Cas. 694; 17 O. C. 242; *Amir Husan v. Musammatt Sardar Begum*, 3 Ind. Cas. 546; 12 O. C. 229, referred to.

On foreclosure of certain property, one of several persons equally entitled to pre-empt the property obtained a decree for pre-emption in a suit to which others who were also equally entitled to pre-empt were not made parties. Subsequently one of these others brought a suit for pre-emption against the person who had obtained the previous decree for pre-emption without impleading the person who had obtained the original decree for foreclosure. His claim for pre-emption was decreed, but the unsuccessful party filed an appeal against it and during the pendency of the appeal the decree-holder transferred the property acquired by pre-emption to a third person, who was joined as a respondent:

Held, that the first decree for pre-emption furnished a cause of action to persons equally entitled along with the decree-holder, inasmuch as the latter obtained the property by pre-emption to the exclusion of others who had an equal right to pre-empt the same. [p. 165, col. 1.]

Held, further, that the omission to implead the person who had obtained the decree for foreclosure, in the subsequent suit for pre-emption, was not a fatal defect. [p. 165, col. 1.]

Ram Sarup v. Sital Prasad, 26 A. 549; 1 A. L. J. 278; *Bindeshuri* 278; *Singh v. Pandit Balraj Sahai*, 10 O. C. 49, referred to.

Appeal against the decree of the Sub-Judge, Unao, dated the 16th December 1913.

Mr. *Mumtaz Husain*, for the Appellant.

Mr. *Haider Husain*, for Respondent No. 1.

Pandit Gokaran Nath Miera and *Syed Zahur Ahmad*, for Respondent No. 3.

JUDGMENT.—This appeal arises out of a suit for pre-emption in respect of property obtained by Janki Pershad by virtue of a decree for foreclosure. It appears that Girdhari Lal and Sital Singh owned a share in a certain *mahal*, which they mortgaged in favour of Janki Pershad. Janki Pershad obtained a formal decree for foreclosure in

respect of that share on the 13th July 1907, and got possession of the property comprised in the decree. No notice was given by him to the plaintiff or to the other members of the village community entitled to pre-emption under section 10 of Act XVIII of 1876. Ram Sahay was the first person to sue for pre-emption. He succeeded in obtaining a decree against Janki Pershad and obtained possession of the pre-empted property on depositing the mortgage money. Thereupon the present plaintiff Ujagar Singh turned up and filed a suit for pre-emption, impleading Ram Sahay as the sole defendant to his suit. Another person, who filed a similar suit for pre-emption in respect of the same property, was subsequently added as a co-defendant.

It is not disputed that Ram Sahay, as well as the present plaintiff and the other person who filed a rival suit for pre-emption, have an equal right of pre-emption. They are, in common with the mortgagors, members of the same village community.

The learned Subordinate Judge accordingly directed lots to be drawn between them, with the result that Ujagar Singh has succeeded in getting the decree. The propriety of that decree is impugned by Ram Sahay.

—Before the learned Officiating Judicial Commissioner who referred this case to a Bench, it seems to have been contended that the cause of action for a suit for pre-emption arising out of a decree final for foreclosure is exhausted after a decree for pre-emption is obtained by any one of the persons entitled to pre-empt the property which is the subject of that decree, but that point is not now pressed.

What is urged on behalf of the defendant-appellant is that the latter by enforcing his right of pre-emption has not given any cause of action to the plaintiff, that the person whose decree for foreclosure gave rise to the plaintiff's right of pre-emption was a necessary party to the suit, and that the plaintiff has lost his pre-emptive right by reason of his having sold the property, which gave him that right, subsequent to the passing of the decree in his favour by the Court of first instance. It is also contended on the strength of a mortgage made by Ujagar Singh in favour of Ambika Pratap, son of Dwarka Pershad, since the passing of that decree, that Ujagar

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Singh had not sued to enforce the pre-emptive right in his own interest for his own benefit.

The omission of the plaintiff to implead Janki Pershad as a co-defendant to the suit cannot, however, prejudice his right to seek redress as against the person who is now holding the property, which forms the subject of his claim. By reason of the decree for pre-emption obtained by Ram Sahay, Janki Pershad has no longer any subsisting interest in that property, and, though the cause of action for pre-emption arose out of the decree for foreclosure obtained by Janki Pershad, there is no relief which can now be granted against him. Order I, rule 3, of the Code of Civil Procedure declares that all persons can be joined as defendants against whom any right to relief in respect of or arising out of the cause of action is alleged to exist; and Order VII, rule 5, of the same Code requires that the plaint should show that the defendant is or claims to be interested in the subject-matter and is liable to be called upon to answer the plaintiff's demand. In *Ram Sarup v. Sital Prasad* (1), which was followed by this Court in *Bindeshuri Singh v. Pandit Balraj Sahai* (2), it was accordingly held that the vendor was not an essential party to a suit for pre-emption. If no relief could have been claimed as against Janki Pershad, his joinder would have served no useful purpose. The cause of action as against Ram Sahay consists in his having obtained the property by pre-emption to the exclusion of the plaintiff who had an equal right to pre-empt the same; and the mere fact that Janki Pershad has not been impleaded is not fatal to his suit. Order I, rule 9, of the Code of Civil Procedure, moreover, lays down that the non-joinder of necessary parties is not one of the grounds on which a suit can be defeated, and the Court should decide the suit, dealing with the matter in controversy, so far as it concerns the rights and interest of the parties actually before it.

Ujagar Singh died after obtaining the decree under appeal, and was succeeded by his son Jagdamba Bakhsh Singh who admits

that he sold the property, by virtue of which his father claimed to be a member of the village community, to Ram Sahay on the 11th November 1915. He also admits that his father mortgaged the property obtained by pre-emption in favour of Ambika Partab in lieu of Rs. 6,000 on the 31st December 1913 and paid out of the consideration money the sum of Rs. 5,599, which was required to satisfy the decree for pre-emption. The mortgagee has been brought on the record during the pendency of this appeal. From the application made by Jagdamba Bakhsh Singh asking for permission to withdraw from the prosecution of his claim for pre-emption during the pendency of this appeal and the subsequent applications made by him, at one time retracting and at another time confirming the same, it is evident that he has been playing into the hands of one party or another, and it may well be doubted how far he has been influenced by considerations of good faith in the various transactions into which he is stated to have entered since his father's death. The right of property which Ujagar Singh acquired by virtue of his decree for pre-emption, though subject to the result of an appeal which the unsuccessful party had a right to file, cannot, however, be prejudiced by any act of Ujagar Singh himself, or his son and heir, after the property was mortgaged by Ujagar Singh in favour of a third person, who has been brought on the record; and the Court cannot in such a case go outside the facts and circumstances, as they stood on the date on which the decree for pre-emption was passed, to ascertain whether the plaintiff's right to sue for pre-emption subsisted on the date of that decree. On behalf of the defendant reliance is placed on the decision in *Onkar Singh v. Bhagwan Dat Singh* (3), but in that case the vendee was found to have held certain property to which he had a defeasible right on the date on which the suit for pre-emption was filed, but to which his right had become absolute owing to the failure of the party interested to impugn it with success by the time the claim for pre-emption came up for hearing before this Court on appeal. The right so perfected could be referred back in that case to a date anterior

(1) 26 A. 549; 1 A. L. J. 278.

(2) 10 O. C. 49.

(3) 25 Ind. Cns. 634; 17 O. C. 242.

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to the suit so as to defeat a claim for pre-emption. As pointed out in *Amir Hasan v. Musammatt Sardar Begam* (4), the plaintiff pre-emptor is bound to show a valid title not only on the date of the suit but also on the date on which a decree is passed in his favour. When such a decree is passed and payment is made in pursuance of it, the right to pre-emption fructifies into a title to the property, forming the subject of the claim, though that title may be subject to the result of any appeal which may be filed in the case by the unsuccessful party. The decision in *Onkar Singh v. Bhagwan Dat Singh* (3) cannot be taken to lay down that a person who has obtained a title by virtue of a decree for pre-emption can by his own subsequent act prejudice the position of one to whom he may have, wholly or in part, made a transfer based upon that title. The sale effected by Jagdamba Bakhsh Singh in favour of Ram Sahay of the property which gave Ujagar Singh a right to pre-emption, after Ujagar Singh had obtained his decree for pre-emption cannot, therefore, affect the propriety of that decree, even if such a sale be a *bona fide* one.

There are no circumstances in this case to indicate that Ujagar Singh did not sue for pre-emption in his own interest. The property in dispute has been found by the learned Subordinate Judge to be worth Rs. 8,000. Ujagar Singh sought to pre-empt that property on payment of a much smaller sum; and from the fact that he raised that amount after obtaining the decree by making a mortgage in favour of Ambika Partab, there can be no necessary inference that he acted throughout to benefit the would-be-mortgagee. In *Bindeshuri Singh v. Pandit Balraj Sahai* (2) it was held that a suit for pre-emption was not liable to dismissal merely because it was carried on with money supplied by a third person; and in *Ram Sahai v. Gaya* (5) it was laid down that it was open to the pre-emptor to sell his interest in the property obtained by pre-emption and pay the money to the vendee. The decision in *Maharani v. Ram Adhar* (6) does not apply, because the

circumstances of that case were entirely different. There the pre-emptor was found to have parted with her own interest and to have had no possible personal object in pre-empting the share which was sold by her husband's nephew. Here Ujagar Singh was acting in his own interest, and the mere fact that since his death his son has parted with some of the property left by him does not affect the *bona fides* of his suit.

We see no reason, therefore, to interfere with the decree passed by the Court below and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 591 OF 1912.

May 11, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

Lala HUKAM CHAND—DEFENDANT—

APPELLANT

versus

KADAR BUKSH AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Mortgage—Charge, deed of, construction of—Redemption.

A mortgagor borrowed a certain sum of money by way of further advance from his mortgagee and gave a bond for the loan in the following terms:

"The above debt will be a charge against the property above mortgaged.....If I fail to pay the whole or a part of the above debt, I will have to pay it at the time of redeeming the above mortgage." In a suit for redemption by the mortgagor:

Held, that the deed constituted a mortgage of or at least a charge on the property and that the plaintiff could not redeem it without payment of the amount secured by the deed. [p. 168, col. 1.]

Madho Misser v. Sidh Finaik Upadhya, 14 C. 687; 7 Ind. Dec. (N. S.) 456, distinguished.

Balasubramania Nadar v. Sivaguru Asari, 11 Ind. Cas. 629; 21 M. L. J. 562, referred to.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 7th March 1912, varying that of the Subordinate Judge, 2nd class, Amritsar, dated the 15th November 1910, decreeing the claim on payment of Rs. 1,179-4-0.

FACTS appear from the following extract from the order of the learned Divisional Judge:—

(4) 3 Ind. Cas. 546; 12 O. C. 229.

(5) 7 A. 107; A. W. N. (1884) 224; 4 Ind. Dec. (N. S.) 305.

(6) 13 Ind. Cas. 508.

HUKAM CHAND v. KADAR BUKSH.

"The plaintiff claimed to redeem certain land which he mortgaged to defendant for Rs. 597 on 24th August 1886. The profits of the land were to be held against the interest on the mortgage. Plaintiff, therefore, prayed to redeem on payment of Rs. 597 only.

The defendant claims that on 18th May, 1888, the plaintiff executed a further mortgage-deed for Rs. 99 with interest at Rs. 2-2-0 per cent per mensem. And another for Rs. 30-2-0 on 25th July 1891. He also claims Rs. 100 for improvements, or in all Rs. 1,279-14-3.

The lower Court has allowed the claim of defendant for all but Rs. 100 improvements, and given plaintiff a decree for redemption on payment of Rs. 1,179-4-0. The plaintiff has died and his sons now prosecute this appeal.

Three points are urged in appeal:—

1. That the bargain was harsh and unconscionable and the interest should be reduced if the second and third deeds are not disallowed.

2. That repayment was made.

3. That the second and third deeds were not mortgages at all but simple money bonds. That they cannot be considered as mortgages at all, and they are now barred by time.

It will be convenient to take the last point first. * * * * * The deed for Rs. 99, dated 18th May 1888, is worded as follows, so far as its material part goes: 'Whereas I owe Bhola Nath Rs. 99 (and then follows detail of the consideration) and whereas my land and house are already mortgaged to Bhola Nath (details are then given). The above debt will be a charge against the property above mortgaged. Interest has been agreed to be paid for the above at Rs. 2-2-0 per cent. per mensem. I agree to pay the above debt with interest in *Jeth Sambat* 1946 (1890). If I fail to pay the whole or a part of the above debt I will have to pay it with interest at the time of redeeming the above mortgages. If I were to ask for the redemption of the property mortgaged by the above mortgage-deeds on payment of the money due on them only, the mortgagee will be entitled to refuse redemption till he is paid this debt with

interest and then also the debt due on the mortgage-deeds. Any repayments will be endorsed hereon or they will not be recognised. I, therefore, execute this bond so that it may serve as an authority. Interest will continue to be charged at the above rate till the debt is paid up.'

It will be noted that the expression bond is expressly used.

There was a very similar case reported as *Madho Misser v. Sidh Binaik Upadhya* (1). And it was there held that such a contingent charge on property was not a mortgage-deed within the purview of section 100 of the Transfer of Property Act. And I am of opinion that that decision must govern the present case. Payment was to be made in *Jeth Sambat* 1946 otherwise it would have to be made on redemption. Meaning the property could not be redeemed until payment was made. I, therefore, hold that this deed of 18th May 1888 was a bond and not a mortgage-deed. The deed of 25th July 1891 is described as a mortgage-deed and is not seriously contested."

The Hon'ble *Pandit Shiv Narain*, R. B., and Messrs. *Nihal Chand Mekra* and *Sewa Ram Singh*, for the Appellant.

JUDGMENT.—Plaintiff mortgagor sued to redeem the land in suit by payment of Rs. 597 to the mortgagee in possession. The latter produced two other mortgage-deeds besides that recited by the mortgagor and the first Court decided that in order to redeem plaintiff had to pay

	Rs.	a.	p.
A	597	0	0
B	552	12	0
V	30	2	0

Total ... 1,179 14 0

The Divisional Judge in appeal held that the document B was not a mortgage but a mere bond. For this view he quoted *Madho Misser v. Sidh Binaik Upadhya* (1) and reduced the mortgage debt by Rs. 552-12-0.

The mortgagee comes here in second appeal, which clearly must succeed.

(1) 14 O. 687; 7 Ind. Deg. (N. S.) 456.

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The principle on which *Malho Misser v. Sidh Binaik Upadhya* (1) was decided has been disapproved in *Balasubramania Nadar v. Sivaguru Asuri* (2); further, that case and this are far from being parallel.

In this case plaintiff is the mortgagor and even if the mortgagee had been unable to recover on document B, it does not follow that the mortgagor can recover possession without discharging the debt secured by that document.

As a fact, the document appears to be a mortgage or at least a charge, for it states in so many words that this debt shall be secured on the land, and that the earlier mortgage shall be irredeemable except upon discharge of the debt secured by the document.

Plaintiff, therefore, cannot redeem except on payment of this charge also.

We are not addressed on the points of repayment and unconscionability of the bargain, nor are we impressed by them.

We accept the appeal and restore the decree of the first Court with costs throughout to defendant.

Appeal accepted.

(2) 11 Ind. Cas. 629; 21 M. L. J. 562.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 290 OF 1914.

July 17, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

KOTA BALABHADRA PATRO—DEFENDANT NO. 2—APPELLANT

versus

KHETRA DOSS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienee from co-parcener, whether entitled to joint possession—His position and rights—Transfer of Property Act (IV of 1882), s. 44, if applicable to cases under Hindu Law.

The alienee from a co-parcener in a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by partition the share to which his alienor was entitled. [p. 169, col. 1.]

Maharaja of Bobbili v. Venkataramanjulu Naidu, 25 Ind. Cas. 585; 39 M. 265; 10 M. L. T. 18; 27 M. L. J. 409 and *Nanjaya Mudali v. Shanmuga Mudali*, 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576, followed.

Suraj Bansi Koer v. Sheo Persad Singh, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.)

705 and *Hardi Narain Sahu v. Ruder Perakash Misser* 10 C. 626; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510; 5 Ind. Dec. (N. S.) 420, referred to.

Section 44 of the Transfer of Property Act does not override the Hindu Law in a case governed by that law. [p. 169, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Napier, reported as 25 Ind. Cas. 401, in Second Appeal No. 2213 of 1912, preferred against the decree of the District Court of Ganjam, in Appeal Suit No. 3 of 1911 (Original Suit No. 906 of 1909 on the file of the Court of the District Munsif, Aska).

FACTS of the case appear from the judgment.

Mr. T. Prakasam, for the Appellant.—The only question is whether the alienee from a Hindu co-parcener can have joint possession with the other co-parceners. The authorities are uniform that he cannot. See *Suraj Bansi Koer v. Sheo Persad Singh* (1), *Hardi Narain Sahu v. Ruder Perakash Misser* (2), *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (3), *Iburamsa Rowthan v. Thirumalai Muthuveera Thiruvengkatasami Naick* (4) and *Nanjaya Mudali v. Shanmuga Mudali* (5).

Mr. P. Nagabhushanam, for the Respondents.—This Court has held in a series of decisions that an alienee of an undivided co-parcener is a tenant-in-common with the other co-parceners. See *Subba Row v. Anathanarayana Iyar* (6), *Iburamsa Rowthan v. Thirumalai Muthuveera Thiruvengkatasami Naick* (4) and *Chinnu Pillai v. Kalimuthu Chetti* (7). The decisions in *Nanjaya Mudali v. Shanmuga Mudali* (5) and *Maharaja of Bobbili v. Venkataramanjulu Naidu* (8), no doubt, hold that an alienee has

(1) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

(2) 10 C. 626 at p. 637; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510; 5 Ind. Dec. (N. S.) 420.

(3) 20 Ind. Cas. 954; 40 C. 966; (1913) M. W. N. 661; 15 Bom. L. R. 867; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 25 M. L. J. 512; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

(4) 7 Ind. Cas. 555; 14 M. 269; 8 M. L. T. 269; 20 M. L. J. 743 (1901) M. W. N. 380.

(5) 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(6) 14 Ind. Cas. 524; 23 M. L. J. 64 at p. 67; 11 M. L. T. 395.

(7) 9 Ind. Cas. 596; 15 M. 47 (F. B.); 21 M. L. J. 246; (1911) 1 M. W. N. 234; 9 M. L. T. 369.

(8) 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 409.

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no interest in property but has only a right to partition and that he is not a tenant-in-common, but they are opposed to earlier Full Bench rulings of this Court. See *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (9) and *Chinnu Pillai v. Kalimuthu Chetti* (7) which have all held that the alienee is entitled to a definite vested interest in the property alienated.

Such a right to joint possession has been recognised in Bombay. See *Patil Hari Premji v. Hakam Chand* (10).

Mr. *Prakasam* was not called upon to reply.

JUDGMENT.—The question in this appeal is, whether an alienee of a co-parcener in a joint Hindu family is entitled to possession of the alienor's share as a tenant-in-common. There can be no doubt that, so far at least as this Presidency is concerned, he has no such right. It has been ruled in a series of decisions that his only right is to obtain, by a suit for partition, the share to which his alienor was entitled. He is allowed to stand in the shoes of the co-parcener whose rights he has acquired and thus the equities are worked out between the parties. The point is covered by recent decisions of this Court. In *Maharaja of Bobbili v. Venkatramanjulu Naidu* (8) it was ruled by Wallis, C. J., and Kumaraswami Sastri, J., that a purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant-in-common with the other members. *Sankaran Nair and Bakewell, JJ. in Nanjaya Mudali v. Shanmuga Mudali* (5) also laid down the law to the same effect after careful review of the Privy Council decisions bearing on the subject. The Judicial Committee's rulings in *Suraj Bansi Koer v. Sheo Persad Singh* (1) and *Hardi Narain Sahu v. Ruder Perakash Misser* (2) clearly bear out this view of the Hindu Law. The learned Vakil for the respondents has referred to some rulings of the Bombay High Court, but it is not necessary to consider them here, as there has been a uniform course of decisions in this Presidency laying down that an alienee from a Hindu co-parcener does not

thereby acquire the rights of a tenant-in-common, such as to possession and to mesne profits. Reliance was also placed on section 44 of the Transfer of Property Act, but the rule enunciated there does not override the Hindu Law in a case governed by that law.

The result will be the decree of the District Judge will be set aside and there will be a decree declaring that the plaintiffs have a valid mortgage right to the extent of the share of the third defendant and that they are entitled to enforce the same by a suit for partition. The respondents will pay the costs in this Court as well as in the District Court.

Appeal allowed; Decree modified.

V. R. P.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 92 of 1916.

August 8, 1916.

Present:—Mr. Stuart, J. C.

RAMPHAL—PLAINTIFF—APPLICANT
versus

MUTHERA AND OTHERS—DEFENDANTS—
OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887)
—Jurisdiction—Suit by successful objector as regards property attached and then released but not restored—costs.

Where a successful objector to the attachment of crops placed in charge of a person sues for damages on the ground that the crops have not been restored to him, the suit does not lie on the small causes, but on the regular, side. [p. 170, col. 1.]

Lishanbar Nath v. Gaddar, 9 Ind. Cas. 317, 8 A. L. J. 92; 33 A. 306, followed.

Where, on a regular Court returning the plaint for presentation to the Small Cause Court, the plaint is so presented, but the latter Court dismisses the suit on the ground that it is not cognizable by it, it ought not to order the plaintiff to pay costs. [p. 170, col. 1.]

Application against the order of the Subordinate Judge, Gonda, exercising Small Cause Court powers, dated 7th June 1916.

Babu Surendra Nath Roy, for the Applicant.

Mr. Har Narain Das, for the Opposite Party.

(9) 25 M. 690.

(10) 10 B. 363 at p. 366; 5 Ind. Dec. (N. S.) 630.

RAJ BAHADUR SINGH v. CHANDRAPAL.

JUDGMENT.—Muthra held a decree against *Musammatt Koela*. In execution of that decree he attached certain crops. Ramphal and Bhagwat objected that the crops belonged to them. The crops were placed in charge of Ramraj. The Court allowed the objection of Ramphal and Bhagwat and directed that Ramraj should restore the crops. Ramraj is alleged not to have restored the crops. Ramphal then sued Muthra and Ramraj for damages, alleging that the two latter were in collusion. He joined Bhagwat as a defendant as Bhagwat refused to join as a plaintiff. The question is whether his suit is or is not triable by a Small Cause Court under the provisions of Act IX of 1887. I find an almost exactly similar case which was decided by a Bench of the Allahabad High Court in *Bishambar Nath v. Gaddar* (1). There certain crops were attached. The plaintiff filed an objection against the attachment. The objection was allowed and the attachment was removed. While the property was under attachment the attached crops disappeared. It was subsequently found that the *shahna* had stolen them. Here the *shahna* has refused to give them up and they seem to have disappeared. The Allahabad High Court held that such a suit was not cognizable by the Court of Small Causes under the provisions of Article 35 (j) of the Second Schedule, Act IX of 1887, as amended by Act VI of 1914. With that view I agree. I, therefore, uphold the order of the Subordinate Judge.

I have, however, to note that, in my opinion, the plaintiff should not have been made to pay costs. He first instituted the suit as a regular suit. The Munsif returned the plaint to him holding that the suit was triable by a Small Cause Court. He went to the Small Cause Court, which dismissed his suit on the ground that it was not cognizable by the Small Cause Court. The error appears to have been not his error but the error of the Munsif. In these circumstances I modify the order to this extent that the parties bear their own costs throughout.

Application rejected.

(1) 9 Ind. Cas. 317; 8 A. L. J. 92; 33 A. 306.

OUDEH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 194 OF 1914.

March 24, 1916.

Present:—Mr. Lindsay, J. C., and

Mr. Stuart, A. J. C.

RAJ BAHADUR SINGH—PLAINTIFF—

APPELLANT

versus

CHANDRAPAL AND OTHERS—DEFENDANTS—

RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption in Oudh—Pre-emptors, rival, rights of, determination of.

The general principles laid down by the Allahabad High Court regarding the law of pre-emption, which prevails in the province of Agra, cannot be applied so as to affect the scope of the Oudh Laws Act which regulates the law of pre-emption in Oudh. [p. 171, col. 2; p. 172, col. 1.]

Where rival pre-emptors, having the right to pre-empt, claim the same property in exercise of such right, the right to acquire the property must, under section 9 of the Oudh Laws Act, be decided by lot. [p. 171, col. 2.]

Sheo Charan Singh v. Bhikai, 11 Ind. Cas. 532; 14 O. C. 156, dissented from.

Wali-ul-Hak v. Mohammad Ghani-ul-Hak, 3 O. C. 330; *Mahabir Prasad v. Ram Jiwan Lal*, 8 Ind. Cas. 272; 13 O. C. 260; *Sheoratan Singh v. Ujagar Singh*, 16 Ind. Cas. 800; 15 O. C. 389, referred to.

Appeal against the decree of the District Judge, Fyzabad, dated the 28th February 1914, upholding that of the Munsif, Fyzabad, dated the 8th September 1913.

ORDER OF REFERENCE.

LINDSAY, J. C.—(November 22, 1915.)—This is a second appeal in a pre-emption suit the facts of which are somewhat peculiar. The plaintiff is Raj Bahadur Singh and the second defendant Chhedi Singh is his cousin. Each of these parties owned an 8-anna share in the village in which the property in dispute is situated. On the 7th of January 1913, Chhedi Singh sold a 4-anna out of his 8-anna share to the first defendant Udit Misra, who is admittedly a stranger to the village. On the first of March 1913, Udit Misra re-conveyed this property by a sale-deed to Chhedi Singh. The present suit was brought on the 26th of May 1913 by Raj Bahadur Singh to enforce pre-emption in respect not of the first but of the second sale. The Courts below found that Raj Bahadur Singh was not entitled to claim pre-emption, the reasoning being that as the property has now reverted to Chhedi Singh who is admittedly a co-sharer in the village, the plaintiff has really no cause of

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action for a suit to pre-empt. The Courts have relied mainly upon a decision of Mr. Piggott reported as *Sheo Charan Singh v. Bhikai* (1). The facts of that case were not in all respects the same as those of the case now before me, for in that case it was pre-emption of the first sale which was sought. However, certain observations in this judgment have been relied upon by the Courts below in support of their opinion that the plaintiff Raj Bahadur Singh cannot claim pre-emption. I am not satisfied that the decision of Mr. Piggott just referred to applies to the present case, and in any event I am unable to reconcile his ruling with what has been laid down in two Bench decisions of this Court reported as *Wali-ul-Hak v. Mohammad Ghani-ul-Hak* (2) and *Mahabir Prasad v. Ram Jiwan Lal* (3) respectively. It appears to me that both of these latter cases lay down the proposition that in a case like the present where the plaintiff has an equal right of pre-emption with the purchaser, a suit will lie in which the plaintiff is entitled to ask that his right to pre-empt should be determined by lot. There can be no doubt that Raj Bahadur, the second defendant, has an equal right of pre-emption and according to the Bench rulings the fact that Chhedi Singh had actually bought the property does not affect the right of the plaintiff to ask for pre-emption. In view of what I consider the divergence of opinion in the rulings which I have just mentioned, I think it proper to refer this case for decision to a Bench. I order accordingly.

JUDGMENT.—The facts of this case are set out in the order by which the appeal has been referred to a Bench for disposal, but they may be recapitulated shortly in order to make this judgment complete.

One Chhedi Singh owned an eight anna share in the village in which the property in dispute is situated. His cousin Raj Bahadur Singh owns a similar share in the same village. On the 7th January 1913, Chhedi Singh sold one-half of his share to Udit Misra, a stranger to the village. The latter re-conveyed the half share to Chhedi Singh on the 1st of March 1913. Raj Bahadur has now sued to pre-empt this

latter sale and the question is whether he can maintain the suit.

Both Courts below have decided that he cannot and have relied upon certain observations of Mr. Piggott's in a judgment reported as *Sheo Charan Singh v. Bhikai* (1).

The particular passages referred to by the learned District Judge are the following:—

"The object of the law of pre-emption is to prevent the introduction of strangers into the co-parcenary body: that object is equally attained when transfers are prevented by the fear of a claim for pre-emption as when such claim is successfully enforced after a completed transfer [*Sheo Charan Singh v. Bhikai* (1)].

"It (i. e., the right of pre-emption) is not a right to acquire property, but a right in certain particular cases to acquire immovable property in preference to other persons." (Cf. page 158*). And so it has been held in the case we are now considering that because Chhedi Singh is as much a co-sharer in the village as the plaintiff Raj Bahadur Singh, the latter has no case for pre-emption because his right to acquire is no higher than that of Chhedi Singh's. As has been pointed out in the order of reference, Mr. Piggott's view of the law is not in harmony with what has been laid down in various decisions of this Court. It was held in *Wali-ul-Hak v. Mohammad Ghani-ul-Hak* (2) by a Bench of this Court that where two or more persons have an equal right of pre-emption and property is sold to one of them, the other or others could ask the Court to have the question as to who is entitled to buy the property decided by lot. The same view was taken in another Bench ruling reported as *Mahabir Prasad v. Ram Jiwan Lal* (3) and again in a later ruling of a Bench reported as *Sheoratan Singh v. Ujagar Singh* (4). In this latter case the Court was asked to overrule the decision in *Wali-ul-Hak v. Mohammad Ghani-ul-Hak* (2) and refused to do so.

We are unable to agree with Mr. Piggott that any general principles laid down by the Allahabad High Court regarding the law of pre-emption which obtains in the

(1) 11 Ind. Cas. 532; 14 O. C. 156 at p. 157.

(2) 3 O. C. 330.

(3) 8 Ind. Cas. 272; 13 O. C. 260

(4) 16 Ind. Cas. 800; 15 O. C. 389.

* Page of 14 O. C.—Ed.

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Province of Agra, can be applied so as to affect the scope of the Statute which regulates the law of pre-emption in Oudh (Chapter II of the Oudh Laws Act): and whatever the object of the law of pre-emption generally may be conceived to be, we have to take the language of the Statute as we find it and to give full effect to it.

According to the interpretation which has been accepted in the Bench rulings quoted above, the plaintiff-appellant in the present case has a right to come to Court and to ask that as between him and the respondent Chhedi Singh the right to acquire the property conveyed by the sale-deed of the 1st March 1913 should be decided by lot.

We order, therefore, that the case be sent back to the lower Appellate Court with a direction that Raj Bahadur Singh and Chhedi Singh be summoned and ordered to draw lots in the presence of the Court. The result of the drawing will be reported as soon as possible to this Court so as to enable us to pronounce the final order in the case.

Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 437 OF 1910.

April 6, 1911.

Present:—Mr. Chamier, J. C.

CHHATARPAL SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

KUSHAR SINGH—PLAINTIFF—

RESPONDENT.

Pre-emption, suit for, on basis of being co-sharer—Possession—Proof—Re-purchase by vendor, whether defeats third person's right of pre-emption.

Possession may be sufficient title as against a trespasser, but something more than possession recently acquired must be shown as a basis for a claim to pre-empt as a co-sharer.

A person who sells property in respect of which another has a right of pre-emption, cannot defeat that other's claim to pre-empt by re-purchasing the property before the suit for pre-emption is brought.

Appeal against the decree of the Sub-Judge, Unao, dated the 12th July 1910, confirming that of the Munsif, South Unao, dated the 11th May 1910.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought by the respondent against the appellants and six persons not parties to this appeal, who foreclosed a mortgage made in their

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favour by the grandfather of the appellants. The decree absolute for foreclosure is dated December 15th, 1903. The suit was resisted by the appellants on various grounds of which one only need now be mentioned, namely, that the appellant's father re-purchased part of the property in June 1907, i. e., 2½ years before this suit was brought and that as to that part, at all events, the suit should be dismissed. It is now conceded that under the rulings of this Court the respondent as the owner of a plot of grove land was a co-sharer of the persons against whom the decree for foreclosure was passed. An attempt was made to show that at the date of the re-purchase of June 1907 the appellant's father also was a co-sharer, but all that was proved was that he had obtained mutation of names in 1905 in respect of 2 *bighas* 7 *biswas* 10 *biswansis* in the village. Possession may be sufficient title as against a trespasser, but something more than possession recently acquired must be shown as a basis for a claim to pre-empt as a co-sharer. It must be taken then that Badri was not a co-sharer at the date of the repurchase, and the only question is whether a person who sells property in respect of which another has a right of pre-emption can defeat that other's claim to pre-empt by re-purchasing the property before the suit for pre-emption is brought. On principle it would seem that he cannot do so, and it has been so held in the Punjab in the case mentioned by the lower Appellate Court. I agree with the view expressed in that case. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 45 OF 1916.

June 23, 1916.

Present:—Mr. Justice Walsh and

Mr. Justice Sundar Lal.

MANSA PURI, MINOR, THROUGH BHOPAL

—APPELLANT—APPLICANT

versus

HARBHAGAT PURI *alias* SHANKAR

PURI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5 (e)—Application for leave to sue as pauper—Discretion of Court—"Agreement" and "proposed suit," meaning of.

SHAMBHU DAT v. JAGANNATH.

An application for leave to sue as a pauper is within the discretion of the Court to grant or reject.

An agreement, in order to bar an application under Order XXXIII, rule 5 (e), must be one with reference to the subject-matter of the proposed suit, and the word "proposed" indicates that it must have reference to the suit which has been instituted and that the agreement referred to must be a champertous agreement.

Civil revision against the order of the Subordinate Judge, Agra, dated the 2nd February 1916.

FACTS material for the purpose of this report are as follows:—

One Harbhagat Puri presented an application to sue as a pauper for the possession of certain property on 26th June 1915. He was opposed by Mansa Puri the defendant, on the ground that the applicant having executed a simple mortgage-deed hypothecating the property in suit on 25th March 1906 in favour of one Panna Lal was debarred from suing as a pauper under the provisions of Order XXXIII, rule 5 (e), of the Civil Procedure Code. The Subordinate Judge of Agra decided against this contention of the defendant and allowed the plaintiff to sue as a pauper. The defendant came to the High Court in revision.

Mr. Narayan Parshad Asthana, for the Applicant.—The wording of the rule is clear and if there is any agreement with reference to the subject-matter of the suit the Court shall reject the application.

[WALSH, J.—You forget the importance of the word *proposed*. It means any champertous agreement.]

Mr. Iqbal Ahmad for Mr. S. K. Dur, for the Respondent.—The mortgage-deed is dated 25th March 1906. The suit has been brought nearly ten years after.

Mr. Narayan Parshad read the mortgage-deed and submitted that the deed was executed to file a suit regarding this property then in possession of the Police and the property had now come to applicant. That suit had been dismissed and now this suit was brought.

Mr. Iqbal Ahmad for Mr. S. K. Dur, not called upon.

JUDGMENT.—This is an application for revision of an order passed by the Court below granting leave to the plaintiff to sue as a pauper. The ground upon which the application was made is that the respondent had executed an agreement in favour of a

third party giving him an interest in the subject-matter of the suit, and that the application, therefore, should not have been granted. It appears that in 1908 the applicant mortgaged his property for the purpose of instituting a suit. We are informed that a suit was filed but it was dismissed. There is no ground for revision of this order. The Court below had discretion to grant the application or not, and it is not possible to say that the Court below acted illegally and with material irregularity in granting the application. It has been suggested that the said mortgage precluded the plaintiff from maintaining his application. Under the law it is an agreement with reference to the subject-matter of the proposed suit that bars the application. The word "proposed" indicates that it must have reference to the suit which has now been instituted and that the agreement referred to is a champertous agreement. The decision of the Court below upon this point is correct. We dismiss the application with costs.

Application dismissed.

SECOND CIVIL APPEAL No. 55 OF 1915.

April 28, 1916.

Present:—Mr. Stuart, A. J. C.

SHAMBHU DAT—DEFENDANT No. 1—
APPELLANT

versus

JAGANNATH—PLAINTIFF, UMRao AND
OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Price of property, decision as to—Market value—Income of property—Court, position of—Presumption—Bad faith.

A Court has a perfect right to decide on the facts whether property has been genuinely sold for a fancy price which has been paid to and enjoyed by the vendor, or whether the sale-price has been fixed fictitiously in order to defeat claims for pre-emption and has not been actually enjoyed by the vendor. [p. 174, col. 1.]

A Court has a right under the provisions of section 13, Act XVIII of 1876, to decide that the price was not fixed in good faith and to determine the amount to be paid in the suit for pre-emption upon the market value. [p. 174 col. 1.]

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But in the absence of actual evidence to show that the price was fixed in bad faith, no legal presumption to that effect can arise from the fact that the price paid by the vendee, as well as even that offered by the pre-emptor, are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer. [p. 175, col. 1.]

Sheo Din v. Bajrang Bakhsh, Select Cases 203 and *Mukta Pershad v. Sheo Mangal*, 1 O. C. 227, referred to.

Appeal from the decree of the District Judge, Gonda, dated the 9th November 1914, upholding the order of the Sub-ordinate Judge, Gonda, dated the 29th July 1914.

Babu Aditya Prasad, for the Appellant.

Babu Ram Chandra, for the Respondents.

JUDGMENT.—The property in question was sold for a consideration of Rs. 2,500, of which Rs. 1,700 were paid in the presence of the Sub-Registrar and Rs. 800 were left with the vendee for payment to the prior mortgagee. The Courts below have found on the evidence of the *patwari* and the evidence afforded by the entries in certain sale-deeds that the market-value of the property was considerably less. The *patwari* has asserted that the profits of the property amount only to Rs. 20-9-4 a year. A Court has a perfect right to decide on the facts, whether property has been genuinely sold for a fancy price which has been paid to and enjoyed by the vendor, or whether the sale price has been fixed fictitiously in order to defeat claims for pre-emption and has not been actually enjoyed by the vendor. In the first case the principles enunciated in *Sheo Din v. Bajrang Bakhsh* (1) have application. In the latter case the principles enunciated in *Mukta Pershad v. Sheo Mangal* (2) have application, and the Court has a right under the provisions of section 13, Act XVIII of 1876, to decide that the price was not fixed in good faith and to determine the amount to be paid in the suit for pre-emption upon the market value. If the decision of the Courts below is a decision based upon actual evidence this appeal must fail, for if the Courts below on evidence had decided that the

price was fixed in bad faith there would be nothing more to be said. I find, however, that the Courts below have not arrived at this decision upon anything in the nature of evidence. There is no evidence to show that the price was fixed in bad faith. The evidence afforded by the entries in the sale-deeds is worth nothing. There is nothing to show the circumstances in which those transfers were made and the mere recitals are of no value whatever. There remains the fact that the profits of property transferred are only Rs. 20-9-4. Thus it would appear that the vendee is purchasing the property at 125 years' purchase on the recorded income. This on the face of it would appear to show either that the price is a fancy price, or, as is more probable, that the income of the property is grossly undervalued. The latter alternative is supported by the fact that the pre-emptor himself offers Rs. 1,248, that is to say, more than 60 years' purchase on the recorded income. No man actuated by reasonable business principles would offer 60 year's purchase for property, for it stands to reason that he would be much better off if he invested his money in Government securities, and when we find that a man does offer 60 years' purchase or more upon the recorded income, it can only be concluded that the transaction does not mean what it appears to mean on the surface, and either that the property has great possibilities of development or (what is more likely) that the income has been purposely misstated either to obtain a low assessment or for some other reason. Thus we have it that on the one side the purchaser is offering a price which no sensible man actuated by business principles would offer if the income is correctly recorded, and that, on the other hand, the pre-emptor is also offering a price, which though somewhat less than half of what the vendee has offered, is nevertheless a price considerably greater than what would be offered by any man actuated by business principles if the income is correctly recorded. The only conclusion to be drawn is that the profits have been grossly understated, and having drawn that conclusion the next conclusion follows that we do not know what the profits are. It is quite possible that the profits are so great that the price offered

(1) Select Cases 208.

(2) 1 O. C. 227.

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by the vendee is not an unreasonable price at all, and in these circumstances there is no legal ground for assuming that the price has been fixed in bad faith. I need not touch on the other points raised in the appeal as they have been dropped in argument.

In the result I allow the appeal and direct that Jagannath obtain possession of the property if he pays Rs. 2,500 and the costs of all three Courts into Court on or before the 28th June 1916, less the amount which he has already paid into Court. Jagannath will pay his own costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL REFERENCE UNDER SECTION 57 OF THE
STAMP ACT.

June 14, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chaudhuri.

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Stamp Act (II of 1899), Sch I, Art. 5, cl. (c)—Hire-purchase contract—Agreement to hire with option to purchase, stamp duty on.

An agreement to hire machinery with an option on the part of the hirer to purchase is an agreement within the meaning of Article 5, clause (c) of Schedule I to the Stamp Act and is, therefore, liable to a stamp duty of eight-annas only. [p. 181, col. 1.]

Reference, under section 57 of the Indian Stamp Act, by F. J. Monahan, Esq., Member of the Board of Revenue, Bengal, dated 18th April 1916.

REFERENCE.

On the 8th June 1914, Linotype and Machinery, Ltd., of London and Calcutta and the Windsor Press of Calcutta executed an instrument which is described as a hire-purchase agreement, whereby one duplex double-letter linotype machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The principal conditions agreed to are that the hirers shall pay £135 on the

execution of the deed and thereafter £540 by 27 equal monthly instalments, together with interest, and that upon payment of the full sum with the interest in the manner specified in the document, the hired machinery shall become the property of the hirers, but that until such payment is made the machinery shall continue to be on hire.

2. This document was submitted to the Collector of Stamp Revenue, Calcutta, by the Solicitors of Linotype and Machinery, Ltd., for the purpose of having it duly stamped. The Collector of Stamp Revenue, Calcutta, has raised the question whether a hire-purchase agreement is to be stamped as an agreement or as a conveyance. The applicants proposed to stamp it as an agreement and urged that in England such a document is chargeable as an agreement under section 7 of the Finance Act, 1907. They contend that even if the agreement is taken to be a conditional sale, it comes under clause (a) of the exemptions mentioned in Article 5, Schedule I, of the Indian Stamp Act, 1899. They point out that there is no obligation that the machine should be purchased, and state that, in a number of cases, the machine is returned to the owners after it has been hired for a certain period. The Collector points out that the provisions of section 7 of the English Act cannot be followed here, and that it is necessary to consider how such an instrument should be dealt with under the Indian Stamp Act, as there is no special provision for the stamping of a "hire-purchase" instrument in Schedule I thereof. He holds that the instrument comes within the term "conveyance", as defined in section 2 (10) of the Indian Stamp Act, and is liable to be stamped as such.

3. The Legal Remembrancer, who was consulted, considers that there are good grounds for holding that the instrument under consideration comes within the definition of conveyance and should be stamped in the manner suggested by the Collector. The Board concurs with the opinion of the Legal Remembrancer, but considers that the question how a hire-purchase agreement should be stamped is of such importance as to render it necessary that

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a reference should be made to the Hon'ble High Court for an authoritative decision under section 57 of the Act.

4. Printed copies of the document in question, of the Collector's letter of the 28th January 1916 and of the Solicitor's letter of the 6th January 1916, are submitted herewith:

No. 6 R. S., dated Calcutta, the 28th January 1916.

From—Rai J. M. Das Bahadur, Collector of Calcutta.

To—The Commissioner of the Presidency Division.

Under the provisions of section 56 (2) of the Indian Stamp Act II of 1899, I have the honour to submit the accompanying instrument with a view to obtain a decision of the Chief Controlling Revenue Authority as to the correct amount of stamp duty which the same attracts.

2. The document, on which no stamp duty was paid at the time of execution, was produced for validation under the Stamp Act on payment of annas 8 which was suggested by the applicants, Messrs. Watkins and Co., as the proper duty leviable thereon. The instrument, which is described as a hire-purchase contract, was entered into on the 8th June 1914, between the Linotype and Machinery, Limited, of London and Calcutta, called the "Company" of the one part and the "Windsor Press," of Calcutta, called the "Hirers" of the other part. The parties agree to let and to hire a machine for a term of 27 months, upon terms and conditions set forth in the document and for the purpose of the agreement the hired machinery is valued at £.75 or Rs. 10,125. It is agreed that the hirers shall pay the Company as hire the sum of £675 and interest by 27 equal monthly instalments and that upon payment of the full sum the said hiring shall cease and determine and the hired machine shall thenceforth be the property of the hirers.

3. In their letter dated the 6th January 1916, the applicants have given their reasons for holding that a duty of annas 8 only is payable on the instrument. They say that in England a hire-purchase agreement is

chargeable as an agreement with a stamp duty of 6d. under section 7 of the Finance Act of 1907. They state that the agreement is not a conditional sale and they contend that if it is taken to be a conditional sale, it must be held that it comes under clause (a) of the exemptions mentioned in Article 5 of Schedule I to the Stamp Act. The principal question for consideration, they say, is whether the ownership of the machine is transferred from one party to another. They express the opinion that the instrument in question falls short even of an agreement to convey, one party giving the other only an option to purchase the machinery at a certain price. It is said that there is no obligation on the other party to purchase the machine and that in a number of cases the machine is returned to the owner after the same has been hired for a certain period.

4. The contention that under section 7 of the English Finance Act of 1907 such an instrument is chargeable as an agreement with a stamp duty of the only 6d. does not seem to be correct. An extract of section 7 is given below:

"Paragraph 7. Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal (or in Scotland with a clause of registration), as a deed, as the case requires, and the exemption numbered (3) under the heading 'Agreement or any Memorandum of an Agreement' in the First Schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument."

It will be seen that a hire-purchase agreement is chargeable as an agreement if under hand only and as a deed if under seal. The instrument in question is a document under seal and as such is liable to be charged as a deed. The distinction between an instrument under seal and an instrument under hand only is not recognized by the Indian Stamp Act. This is clear from the different definitions of the terms

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"Executed" and "Execution" in the two Acts which are given in parallel columns below:—

Definition in the Indian Stamp Act.
"Executed" and "Execution" used with reference to instruments mean "Signed" and "Signature."

Definition in the English Stamp Act.
The expression "Executed" and "Execution" with reference to instruments *not under seal* mean "Signed" and "Signature."

A deed under seal being not distinguished in the Indian Stamp Act from a deed under hand only, the provisions of section 7 of the English Act cannot be followed here. It is necessary, therefore, to consider how such an instrument should be dealt with under the Indian Stamp Act. The nature of such an instrument is very clearly described in section 7 of the Finance Act quoted above. It is an "agreement for or relating to the supply of goods on hire whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied." There is clearly a transfer in such a transaction within the meaning of section 5 of the Transfer of Property Act. The interest acquired by the transferee is of the nature of a contingent interest as defined in section 21 of the Transfer of Property Act. It seems that an instrument creating such a right comes within the scope of the term "conveyance" which, as defined in section 2 (10) of the Indian Stamp Act, includes not only a conveyance on sale, but every instrument by which property, whether moveable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for in Schedule I. A "hire-purchase" agreement is not specifically provided for in Schedule I. A hiring agreement is so provided for, but a "hire-purchase" agreement is something more than a mere hiring agreement. It would seem, therefore, that the instrument in question is chargeable as a conveyance under the Indian Stamp Act.

5. As regards the contention that if the instrument be treated as a conveyance, it should be exempted from stamp duty altogether under clause (a) of the exemptions under Article 5 of Schedule I to the Stamp Act, I beg to state that section 7 of the

English Finance Act specifically provides that the exemption is not applicable to a "hire-purchase" agreement. It does not appear that there is anything in the Indian Stamp Act favouring a contrary conclusion.

6. It will be seen from the letter of the applicants referred to above that hire-purchase agreements are executed in large numbers in this country. The question as to the proper stamp duty payable on such documents is, therefore, one of considerable importance. In England it has been necessary to make special provision for such documents. It is desirable, therefore, that there should be an authoritative ruling on the point here.

* * * * *

Dated Calcutta, the 6th January 1916.

Demi-official from—Messrs. Watkins and Co., Solicitors.

To—The Superintendent of Stamps, Calcutta Collectorate.

Re: *hire-purchase agreement.*

Your letter of the 4th instant. The agreement in question is in a form in common use in Calcutta and India and great numbers of these agreements, to our knowledge, are used by the vendors of machinery, motor cars, typewriters and other engineering goods. During the past 15 years all such agreements that have passed through our hands, totalling some hundreds, have been stamped annas 8 each, and no question has ever been raised before as to the sufficiency of the stamp. In England, a hire-purchase agreement is chargeable with stamp duty as an agreement (*i. e.*) 6d. (see section 7 of the Finance Act, 1907).

The agreement is specially drawn so as to prevent any title in the goods passing and we fail to understand the Controller's contention that the agreement is a conditional sale. Even were his contention correct, it appears to us that the agreement would then fall under exemption (a) to Article 5 of the Stamp Act, as being "an agreement for or relating to the sale of goods of merchandise exclusively" in which case it is not liable to duty at all.

The whole question really is as to whether the ownership of the machine is transferred from one party to the other. The deed itself clearly says that the property

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is hired and there is an option to the hirer to buy the property at a fixed price should he so desire. The matter is one of great importance to the mercantile community, as one of the main objects of a hire-purchase agreement is to prevent the machinery vesting in the Official Assignee in the event of the hirer becoming insolvent.

Lord Fisher has clearly laid down that the duty on a conveyance only attaches when the parties proceed to that conveyance and an agreement to convey is not in itself a conveyance [see *Commissioners of Inland Revenue v. Angus* (1)].

In our opinion the present instrument falls short even of an agreement to convey as, as already pointed out, one party gives the other an option to purchase the machinery at a certain price. There is no obligation whatever on the other party to purchase and in a number of cases they do not do so and the machine is returned to the owners after the same has been hired for a certain period.

—
Agreement for the hire of machinery
(document).

H.P.C. (India.)

An agreement made the eighth day of June 1914 between Linotype and Machinery Limited of 188 and 189 Fleet Street in the City of London and of Calcutta (hereinafter called "the Company") of the one part and the Windsor Press of 11 British Indian Street, Calcutta (hereinafter called "the Hirers"), of the other part.

Whereby it is agreed as follows:—

1. The Company hereby agree to let to the Hirers and the Hirers hereby agree to hire for the purpose of carrying on the Hirers' business of printing one duplex double letter Linotype Machine (hereinafter referred to as "the hired machinery") for the term of 27 months from the date of delivery of the machinery upon the terms and conditions herein contained and for the purposes of this agreement the hired machinery is hereby admitted and agreed to be of the value of £675 or Rs. 10,125 f.o.b. English port.

2. The hired machinery shall be erected by the Company upon the premises of the

Hirers at 11, British Indian Street, Calcutta, as soon as the Company are reasonably able to deliver the same but the Hirers shall not have any right or power to cancel or rescind this agreement in case of any delay in delivery of the hired machinery or any part thereof arising through strikes, combinations of workmen, lockout of workmen, or any other cause whatever beyond the control of the Company nor shall the Company under any circumstances be under any liability to the Hirers for any damage or loss directly or indirectly caused by or attributable to delay in delivery of the hired machinery or any part thereof arising from any cause whatever. The Company will supply free of charge the services of a skilled mechanic for the erection of the hired machinery, any other labour employed in erecting the hired machinery shall be at the cost of the Hirers.

3. The Hirers shall pay the Company as hire the sum of £675 or Rs. 10,125 and interest as follows: £135 or Rs. 2,025 to be paid on the execution of this agreement and the sum of £540 or Rs. 8,100 by 27 equal monthly instalments of £20 or Rs. 300 each, the first of such monthly instalments to be paid one month after erection of the machinery and the remaining instalments on the corresponding day of every first calendar month thereafter and also together with each such monthly instalment interest for that month upon that instalment and all the remaining future instalments at the rate of six per cent. per annum, such interest in the case of the first of such monthly instalments being calculated from the date of erection of the hired machinery. All charges for packing, freight, marine insurance, landing, clearing, etc., shall be paid by the Hirers to the Company on delivery of the machinery. If the Hirers shall fail to pay any such instalment and interest or any part thereof on the due date thereof the amount so in arrear shall bear interest until payment at the rate of seven and one-half per cent. per annum. The Hirers shall on the execution of this agreement hand to the Company customary trade bills for the respective amounts of the said instalments of hire and interest payable under this agreement and such bills shall respectively be made payable on the dates on which such

(1) (1889) 23 Q. B. D. 579 at pp. 594, 596; 61 L. T. 832; 38 W. R. 3.

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instalments and interest are respectively payable under this agreement and shall bear interest at the rate of seven and one-half per cent. per annum after due date. The said bills shall be a collateral security for the payment of the said instalments and interest and the giving thereof shall not suspend or affect any of the remedies of the Company hereunder.

4. The Hirers shall not during the continuance of this agreement in any way sell, assign, sub-let or otherwise part with the possession of the hired machinery or any part or parts thereof or assume the ownership thereof or remove from the said premises or from one building to another the hired machinery or any part or parts thereof or attempt so to do or part with possession of their interest in the said premises where the hired machinery is kept without first informing the Secretary of the Company of such intended removal and receiving his consent in writing to do so. The hired machinery shall at all times be at the risk of the Hirers who shall bear any loss arising from the destruction or loss thereof or damage thereto, however caused, and shall take all reasonable care thereof during the hiring period and shall permit the Company or its Agents at all reasonable times to inspect the same and if at any such inspection any part or parts of the hired machinery shall be found broken, damaged or destroyed the Hirers shall forthwith at their own expense and to the satisfaction of the Engineer of the Company replace and repair the parts so broken, damaged or destroyed. The Hirers shall not at any time during the hiring purchase any parts or matrices as may be required to be used with or in connection with the hired machinery except from the Company who shall from time to time supply the same at their ordinary prices current in India at the respective dates when such parts or matrices are ordered.

5. The Hirers shall punctually pay all rent, rates and taxes payable in respect of the premises where the hired machinery or any part thereof is kept and shall upon demand produce to the Company or its Agents the current receipts for the said rent, rates and taxes, and in the event of the same being in arrear the Company is hereby empowered to pay the same and

any expenses attendant thereon and the Hirers shall on demand repay to the Company any sum so paid.

6. The Hirers shall at all times during the hiring keep affixed in a conspicuous position or positions on the hired machinery such plate or plates as the Company may provide for denoting that the hired machinery is the property of the Company and the Hirers shall not at any time during the hiring remove or obliterate any of such plates or allow the same to be removed or obliterated.

7. The Company shall insure the hired machinery against fire in a recognized Tariff Fire Insurance Office in the sum of £690 or Rs. 10,350 and the Hirers shall on demand repay to the Company the premiums paid. The Company shall if requested produce to the Hirers the policy of insurance and the receipts for the current premiums payable for such insurance.

8. If any of the said instalments of hire or any part thereof shall be in arrear and unpaid for one calendar month after the same shall have become due or if the Hirers shall at any time fail or neglect to perform or observe any of the agreements or provisions herein contained and on their part to be performed and observed or if a distress or execution shall be levied or issued upon or against any of the chattels or property of the Hirers or if an order shall be made or an effective resolution passed for the winding up of the Hirers or if a Receiver shall be appointed of the undertaking of the Hirers or any of their assets, then and in any such case the Company may without notice to the Hirers terminate the hiring and may by its servants or Agents without any previous notice to the Hirers enter upon and into any premises or buildings where the hired machinery or any part or parts thereof may be and seize, re-take possession of and remove the same to such place as the Company may think fit notwithstanding any payments previously made by the Hirers.

9. If the hiring shall be determined under clause 8 hereof no person shall have any claim or demand against the Company in respect of any payments previously made by the Hirers, all of which shall in every such case as aforesaid be absolutely

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forfeited and the Company shall be entitled to recover from the Hirers or their estate all instalments of hire then in arrear (if any) with interest thereon as aforesaid and a proportionate part of the current instalment and interest up to the date of the determination of the hiring and in addition such sum (if any) as shall be required with the money so to be paid for hire (exclusive of interest) and the sum previously paid for hire (exclusive of interest) to make up a sum equal to 60 per cent. of the amount of £675 or Rs. 10,125 payable as hire under clause 3 hereof and the Company shall also be entitled to recover from the Hirers or their estate all costs and expenses including levy incurred in or about the entry, seizure and removal under this agreement and the Hirers shall not nor shall any person claiming through them commence or maintain any action, counter-claim or proceeding against the Company, its servants or Agents by reason of the Company taking possession of the hired machinery or by reason of the temporary possession by the Company of the premises where the hired machinery or any part thereof may be for such time as may be reasonably occupied in its removal.

10. The Hirers may determine the hiring on any of the monthly days hereinbefore appointed for payment upon giving to the Company three calendar months' previous notice in writing of their intention so to do specifying the date on which the hiring is to terminate and upon delivering up the hired machinery to the Company on or before that date carriage paid and in good repair as provided by clause 4 hereof at such place in India as the Company may appoint and at the same time paying to the Company all moneys payable hereunder up to that date and in addition such sum (if any) as with the sums then and previously paid for hire (exclusive of interest) shall be required to make up a sum equal to 60 per cent. of the total amount of £675 or Rs. 10,125 payable as hire under clause 3 hereof.

11. If the hiring hereby constituted shall be determined under clause 8 or clause 10 the Company shall upon payment of all sums payable under clause 9 or clause 10 hereof as the case may be return to the Hirers duly cancelled such of the bills mentioned in

clause 3 hereof as shall not at the time of such payment have fallen due.

12. Upon payment by the Hirers to the Company of the full sum of £675 or Rs. 10,125 and interest payable hereunder before or on the days and in manner aforesaid the hiring shall cease and determine and the hired machinery shall thenceforth be the property of the Hirers but until such full payment the hired machinery shall remain the sole and absolute property of the Company, and is only let on hire to the Hirers.

In witness whereof the Hirers have caused their common seal to be hereunto affixed the day and year first above written.

The common seal of the Windsor Press was hereunto affixed—

G. F. BRIDGE, *Proprietor*.

In the presence of { H. ROWLAND,
Manager.
A. N. WARDLEY,
Assistant Manager,
Linotype Machinery,
Limited.

[The Company's representatives are not authorized to consent to any alteration of this Agreement.]

MEMORANDUM FOR LANDLORD

TO LINOTYPE AND MACHINERY, LIMITED.

In consideration of your supplying to the withinnamed Hirers the within mentioned machinery upon the terms of the within agreement I, the undersigned.....of.....being the landlord of the premises within mentioned at which the said machinery is to be placed hereby agree with you that I will not at any time hereafter during the continuance of the said agreement distrain or take the said machinery or any part thereof for rent in arrear or otherwise, and that I will at any time or times allow the same to be removed by you or the said Hirers from the said premises without notice and without any charge whatever.

Signature.....
Name of witness.....
Address of witness.....
Occupation of witness.....

Sir S. P. Sinha, (Advocate-General)
(with him Mr. A. P. Sinha), for the Board
of Revenue.

MANNA SINGH v. BIHARI SINGH.

Mr. B. L. Buckland, for the Company.

JUDGMENT.

SANDERSON, C. J.—In this case, I am of opinion that the document in question is an agreement and not a conveyance.

The document in question has been somewhat loosely described in the reference to us as a hire-purchase agreement. In order to ascertain what the real effect of the document is, we must, of course, look at the terms of the document; and, I am bound to say that when I heard the document read by the learned Advocate-General the thought that came to my mind was that the point was not arguable. Therefore, I was not at all surprised to hear the learned Advocate-General say, as one would expect him to say under such circumstances, that in his opinion the point was not arguable. Even apart from the decisions in *Helby v. Mathew*; (2), which has been cited to us, it is obvious upon the face of the document in question that it is an agreement and nothing more than an agreement. Further than that, it is not even an agreement to purchase but simply an agreement to hire the machinery in question, with an option on the part of the Hirer to purchase.

Under those circumstances, in my judgment, the answer which must be given to this reference is that the document in question is an agreement within the meaning of Article 5, clause (c), of Schedule I to the Indian Stamp Act, and is, therefore, liable to a stamp duty of eight annas.

MOOKERJEE, J.—I agree.

CHAUDHURI, J.—I agree.

(2) (1895) App. Cas. 471; 64 L. J. Q. B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 28 OF 1916.

June 30, 1916.

Present:—Mr. Stuart, J. C.

MANNA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

BIHARI SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Pre-emption—Mortgage—Foreclosure—Decree absolute—Relinquishment by mortgagee in favour of mortgagor, effect of—Cause of action, extinguishment of, by subsequent acts of defendant.

Once a right of pre-emption has accrued it cannot be defeated by a re-sale to the vendor. [p. 183, col. 2.]
Sheo Charan Singh v. Bhikai, 11 Ind. Cas. 532; 14 O. C. 156, dissented from.

Raj Bahadur Singh v. Chandrapal 37 Ind. Cas. 170; 19 O. C. 185n.; *Wali-ul-Haq v. Mohammad Ghani-ul-Haq*, 3 O. C. 30, referred to.

A mortgagee obtained a decree absolute for foreclosure, which gave rise to a right of pre-emption in favour of the plaintiff, but before the institution of a suit for pre-emption the mortgagee executed a deed of relinquishment of the property in favour of the ex-mortgagors:

Held, that the relinquishment could not extinguish the right of pre-emption which had already accrued to the plaintiff. [p. 183, col. 2.]

Second appeal against the decree of the Additional Judge, Lucknow, dated the 3rd December 1915, reversing that of the Sub-Judge, Unao, dated the 30th June 1915.

Pandit Gokaran Nath Misra, for the Appellants.

Babu Bisheshwar Nath and Mr. S. P. Kain, for the Respondents.

JUDGMENT.—Dwarka Singh, Mohan Singh and Ram Nath Singh executed a deed of usufructuary mortgage on 28th July 1882 in favour of certain of their relatives Behari Singh, Kalu Singh, Surajbali Singh and Banke Singh, under which the latter obtained possession of the mortgaged property. This deed contained a clause permitting foreclosure in certain circumstances. On 7th November 1910 the mortgagees, taking advantage of the provision of that clause, sued for and obtained a decree for foreclosure on the foot of the deed of 28th July 1882. On 18th May 1912 this decree was made absolute. On 18th May 1912, the date when the decree became absolute, a right of pre-emption accrued in favour of the present appellants under the provisions of Chapter

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II, Act XVIII of 1876. On 28th May 1914 Dwarka Singh and the remaining decree-holders executed a deed of relinquishment of the property in favour of the judgment-debtors, the ex-mortgagors, and on the same date the ex-mortgagors executed a fresh deed of mortgage of the whole property with the exception of a few *bighas* in favour of the decree-holders. Assuming for the sake of argument that the execution of the deed of relinquishment and of the new deed of mortgage on 26th May 1914 conferred title on Bihari Singh, Kallu Singh, Surajbali Singh and Banke Singh as owners of the property, does this circumstance extinguish the right of pre-emption that accrued in favour of the appellants on 18th May 1914? This is the main point for decision in the present appeal.

According to the decision of Mr. Piggott in *Sheo Charan Singh v. Bhikai* (1) the re-transfer is sufficient to defeat the claim for pre-emption. Mr. Piggott, sitting alone, held in that appeal, following certain decisions of the Allahabad High Court, that the right of pre-emption is in itself a weak right, and that a plaintiff claiming on the strength of it must be in a position to show a valid and subsisting right to pre-emption at the time when he brings his suit into Court, if not indeed up to the time when the decree of the first Court is passed. He considered that the general principles laid down by the Allahabad High Court were applicable to Oudh, because the object of the law of pre-emption was to prevent the introduction of strangers into the co-parcenary body and that object was equally attained when transfers are prevented by the fear of a claim for pre-emption as when such claim is successfully enforced after a completed transfer. He held that the provisions of the Oudh Laws Act on the subject of pre-emption could not be regarded as exhaustive or as covering the entire law of pre-emption in Oudh, that they could not be treated as if they formed part of a penal Statute for punishing transfers to strangers in contravention of the right of pre-emption, but that they merely

provided a remedy for the wrong done to the co-parcenary body of the village community generally by such transfers. This decision is followed by the learned District Judge and it undoubtedly, if it be considered authoritative, is sufficient to support his view. But that decision of Mr. Piggott can no longer be held to be authoritative. The learned District Judge was not in a position to know this, as (by what appears to me an omission) the decision of a Bench, which, in my opinion, has completely overruled and dissented from the view taken by Mr. Piggott, has not yet been published. I refer to the unreported decision in (Second Civil Appeal No. 194 of 1914), *Raj Bahadur Singh v. Chandrapal* (2). This second civil appeal came originally before Mr. Lindsay, who referred its decision to a Bench on 22nd November 1915, on the ground that the decision of Mr. Piggott in *Sheo Charan Singh v. Bhikai* (1) appeared to conflict with previous decisions of this Court in *Wali-ul-Hak v. Mohammad Ghani-ul-Hak* (3), *Mahabir Prasad v. Ram Jiwan Lal* (4). The appeal in question was decided on 24th March 1916 by a Bench consisting of Mr. Lindsay and myself. I direct that a copy of the decision of the Bench be appended to this judgment.

It is to be noted that the decision of the Bench was not exactly on the same facts as the case before Mr. Piggott, or as the present case. But the principles adopted by the Bench overrule the view taken by Mr. Piggott. It will be seen from the decision of the Bench that the Bench was concerned with a case in which a right of pre-emption created by the first transfer was not set up but in which a right of pre-emption created by the re-transfer was set up. Here, of course, the right set up is alleged to have been created by the original transfer. The views taken by the Bench were, however, such that it follows from them as a necessary consequence that the views taken by Mr. Piggott must be considered to be overruled. The Bench held that the general principles laid down by the Allahabad High Court

[1] 11 Ind. Cas. 532; 14 O. C. 156.

(2) 37 Ind. Cas. 170; 19 O. C. 185n.

(3) 3 O. C. 330.

(4) 8 Ind. Cas. 272; 13 O. C. 260.

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regarding the law of pre-emption which prevails in the Province of Agra, cannot be applied so as to affect the scope of the Statute which regulates the law of pre-emption in Oudh and, whatever the object of the law of pre-emption generally in Agra may be conceived to be, this Court has to take the language of the Statute as it finds it and give full effect to it. In other words, we are not concerned with what may have been the intentions of the Legislature when it enacted Chapter II, Act XVIII of 1876, except in so far as those intentions are disclosed in the words of the Statute. Now there is nothing in the words of the Statute that affords any ground for the supposition that, provided a stranger has kept out of the village community, no right of pre-emption exists. In fact it is clear law in Oudh that a right of pre-emption can frequently be exercised when a stranger is not admitted into the co-parcenary body of the community. As the law stands, if a member of the co-parcenary community makes a transfer in favour of another member, a third member possessing right of pre-emption equal to that possessed by the transferee has a right to demand that lots should be drawn to decide whether the transfer should be made in favour of himself or the original transferee. That is clear law in Oudh and hundreds of cases have been decided on that principle. It may well be asked whether anything is gained by such a provision of the law in the interests of the village community as a body? But it is not for this Court to answer that question, but to apply the law as it finds it to be. Mr. Piggott, in laying down a principle that a re-transfer in favour of the original transferor extinguished a right of pre-emption possessed by a third party, was guided solely (as I read his decision) by a consideration that the law of pre-emption in Oudh was enacted in order to protect the interests of the proprietary body and that, where the interests of the proprietary body with regard to the admission of strangers into their midst were adequately safeguarded in any other manner than by the exercise of a right of pre-emption, a right of pre-emption ceased to exist. If that principle

is not accepted Mr. Piggott's decision is of no avail to assist the original proprietors in this connection. That principle is clearly dissented from in the decision of the Bench to which I referred. As I have already stated, I was myself a member of that Bench and I consider that the view which we took, although the facts were not exactly the same, clearly dissented from and overruled the decision of Mr. Piggott sitting as a single Judge. In these circumstances I do not think it necessary to refer the decision of this appeal to another Bench and I arrive at the conclusion that Mr. Piggott's decision affords no authority in support of the view taken by the learned District Judge. I have to decide whether once a right of pre-emption has accrued it can be defeated by anything that happens afterwards. The case in favour of the respondents is, putting aside the question of previous authority and taking the matter as *res integra*, that although a cause of action had accrued on the 18th May 1914 that cause of action had disappeared on the 26th of the same month owing to the re-transfer. The learned Counsel, who has argued the case for the respondents very ably, sets up that the transfer created by the foreclosure was no longer in existence when the suit was brought, and, therefore, he urges that there was no cause of action. His argument, however, ignores an important distinction. When the plaintiff sues on a cause of action that existed on a prior date and he himself has caused this cause of action to disappear before the date when he brings his suit, the argument of the learned Counsel for the respondents might have weight. But the fact that the third party has introduced new elements into the case after the cause of action has accrued cannot possibly affect the plaintiff's right. I consider that the re-transfer of 26th May 1914 (assuming that it was a good re-transfer) could not possibly extinguish the right of pre-emption that accrued on 18th May and I am supported in this view by an unreported decision of Mr. Chamier (Second Civil Appeal No. 437 of 1910), *Ohhatarpal Singh v. Kushar Singh* (5), dated the 6th April (5) 37 Ind. Cas. 172; 19 Q. C. 190n.

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1911. I direct that a copy of this decision also be appended to the judgment.

It will be seen from this judgment that Mr. Chamier decided this very point in the manner in which I proposed to decide it.

As a result I decree this appeal. I restore the decree of the learned Subordinate Judge and set aside the decree of the learned District Judge. As it is agreed that the pre-emptors have paid the amount directed by the learned Subordinate Judge within two months of the date of his decree, no further order fixing a date is necessary. I am given to understand that the sum is still in deposit. The plaintiffs Nos. 1 to 8 will be allowed to deduct their costs from the amount deposited and to obtain possession of the property. The contesting respondents will pay their own costs and those of the appellants in the Court of the District Judge and in this Court.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1413 OF 1915.

July 14, 1916.

Present:—Mr. Justice Roe and

Mr. Justice Jwala Prasad.

JOWALA PRASAD—DEFENDANT No. 3—

APPELLANT

versus

Maharaja PROTAP UDAI NATH

SAHI DEO—PLAINTIFF AND

Musammat LALIN LALIT KOERI—

DEFENDANT—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Charge by one member, whether survives him—Limitation against surety where claim against principal debtor is barred.

One member of a Mitakshara joint family cannot deal with his share in the property of the joint family so as to create a charge which will survive him. On his death the charge created by him is extinguished and every member of the joint family, whether born before or after the creation of the charge, is entitled to plead that no charge subsists upon the joint family estate. [p. 185, col. 2; p. 186, col. 1.]

Sadabarat Prasad Sahu v. Foolbash Koer, 3 B. L. R. 31 (F. B.); 12 W. R. 1; *Deendyal Lal v. Judgeep Narain Singh*, 3 C. 198; 1 C. L. R. 49. 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 463; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715; *Suraj Bansi Koer v. Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R.

242; 2 Ind. Dec. (N. S.) 703; *Luchman Das v. Giridhar Chowdhry*, 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143; 2 Ind. Dec. (N. S.) 152; *Madho Parshad v. Mehrban Singh*, 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 586; *Rafique and Jackson's P. C. No. 121*; 9 Ind. Dec. (N. S.) 105; *Bilya Prasad Singh v. Bhupnarain Singh*, 29 I. d. Cas. 629; 19 C. W. N. 819; 21 C. L. J. 543; 42 C. 1063, referred to.

Quare.—Whether the liability of the surety is kept alive by reason of a charge upon his property for the satisfaction of the debt of the principal debtor where the latter's liability has been extinguished by limitation. [p. 185, col. 1.]

Sheo Kumar v. Narain Das, 24 A. 591; A. W. N. (1902) 139; *Hajaramal v. Krishnarav*, 5 B. 647; 6 Ind. Jur. 139; 3 Ind. Dec. (N. S.) 426; *Gopal Daji Sathe v. Gopal*, 28 B. 248; 5 Bom. L. R. 1020; *Krishto Kishori Chowdhrair v. Radha Ramun Munshi*, 12 C. 330; 6 Ind. Dec. (N. S.) 225; *Subramania Aiyar v. Gopala Aiyar*, 7 Ind. Cas. 898; 33 M. 308; 20 M. L. J. 632; 8 M. L. T. 321, referred to.

Second appeal against the decree of the Judicial Commissioner, Ranchi, dated the 26th April 1951.

Rai Guru Saran Prasad, for the Appellant.

Rai Tribhuban Nath Sahai and Babu Sakshi Kanta Bhattacharji, for the Respondents.

JUDGMENT.

ROE, J.—The plaintiff in this case is a landlord under whom one Musammat Lalit Kueri had a tenancy, upon which, on the 4th of October 1904, Rs. 2,300, was due as rent. The plaintiff agreed that he would forego interest upon this sum if the lady would execute an instalment bond with one substantial security. That substantial security was found in one Kanhaiya Lal. He pledged property belonging to a joint family of which he was the head to secure the instalments which Lalit Kueri had undertaken to pay.

In course of time the lady began to fall into arrears with her instalments. From the 30th of *Asarh Sambat* 1962 she has paid nothing. The plaintiff, therefore, sues to enforce his mortgage security against the sons of Kanhaiya Lal, who is now deceased. One of these sons Gopi Lal was alive at the time of the execution of the surety bond. The other Jowala Prasad was born later.

It is admitted that if the period of limitation in a suit, such as this, is six years then the sums falling due in *Sambat* 1962 and *Sambat* 1963 are barred by limitation.

The lower Courts have concurred in holding that limitation as against Gopi Lal must be six years as there is no charge upon his interest in the property, and against this decision there is no appeal. They have also

JOWALA PRASAD v. PRATAP UDAI NATH SAHI DEO.

concurring in holding that Jowala Prasad took his share in the property subject to the undertakings already entered into by the father Kanhaiya Lal, and that, therefore, he cannot avoid the charge created by the indemnity bond and that while that charge subsists limitation must be held to run under Article 132.

Against this decision Jowala Prasad appeals.

The questions for decision are:—

(1) A Mitakshara father has purported to create for a purpose, not connected with the family, a charge upon the property of a joint family of which he was the head. Can that charge be enforced after the death of the father against a son born into the joint family subsequently to the transaction?

(2) Where a principal debtor's liability has been extinguished by limitation, can the liability of his surety be kept alive by reason of a charge upon the surety's property for the satisfaction of the debt of the principal?

Were it necessary to consider the *second* question I should ask that the appeal be heard by a Full Bench. The conflicting rulings on the point are *Sheo Kumar v. Narain Das* (1) on one side and *Hojarimal v. Krishnarav* (2), *Gopal Daji Sathe v. Gopal* (3), *Krishto Kishori Chowdhrao v. Radha Romun Munshi* (4) and *Subramania Aiyar v. Gopala Aiyar* (5) on the other. It would seem that many sections of the Contract Act indicate that the Allahabad view is the correct view.

I am satisfied that the *first* question must be answered in the negative.

In *Sadabart Prasad Sahu v. Foolbask Koer* (6) the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that according to the Mitakshara Law, as received in the Presidency of Fort William, one co-parcener had not authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family.

- (1) 24 A. 501; A. W. N. (1902) 139.
 (2) 5 B. 647; 6 Ind. Jur. 139; 3 Ind. Dec. (n. s.) 426.
 (3) 28 B. 248; 5 Bom. L. R. 1020.
 (4) 12 C. 330; 6 Ind. Dec. (n. s.) 225.
 (5) 7 Ind. Cas. 898; 33 M. 308; 8 M. L. T. 321; 20 M. L. J. 633.
 (6) 3 B. L. R. 31 (F. B.); 12 W. R. 1,

In *Deendyal Lal v. Jugdeep Narain Singh* (7) it was held that the purchaser of undivided property at an execution sale during the life of the judgment-debtor for his separate debt does acquire his share in such property with the power of ascertaining and realising it by a partition. But in *Suraj Bunsu Koer v. Sheo Persad Singh* (8) it was held to be clear that if no proceedings had been taken to enforce the debt in their father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands.

In *Luchmun Dass v. Giridhar Chowdhry* (9) it was held that even during the lifetime of the father the mortgagee would be entitled only to a decree directing the debt to be raised out of the whole ancestral estate including the mortgaged property.

In *Madho Parshad v. Mehrban Singh* (10) it was clearly laid down that any one of several members of a joint family is entitled to require partition of ancestral property, but so long as his interest is indefinite he is not in a position to dispose of it at his own hand, and for his own purpose.

In a recent Full Bench decision of the Calcutta Court, *Bidya Prosad Singh v. Bhupnarain Singh* (11), it was stated that where property, mortgaged by a father for purposes not connected with the joint family, devolves upon the sons by survivorship, there is no charge on it enforceable against the sons.

It seems to me immaterial that the joint family consisted of only one son at the time of the mortgage, and of two sons at the date of the father's death. It is sufficient to say that there was at the time of the attempt to create a charge upon the property a joint family in existence and that upon the cases I have quoted it is clear that one member of a joint family cannot deal with

- (7) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 463; 1 Ind. Jur. 674; 1 Ind. Dec. (n. s.) 715.
 (8) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 559; 4 C. L. R. 226; 2 Shome L. R. 243; 2 Ind. Dec. (n. s.) 703.
 (9) 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143; 2 Ind. Dec. (n. s.) 1152.
 (10) 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 536; Refique and Jackson's P. C. No. 121; 9 Ind. Dec. (n. s.) 105.
 (11) 29 Ind. Cas. 629; 19 C. W. N. 849; 21 C. L. J. 543; 42 C. 1068.

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his share in the property of the joint family so as to create a charge which will survive him.

On the death of Kanhaiya Lal the charge created by him was extinguished, and every member of the joint family is entitled to plead that no charge subsists upon the joint family estate.

In this view limitation must be governed by Article 120, not by Article 132. The *kists* which fell due in 1962 and 1963 are barred both as against Jowala Prasad and against Gopi Lal.

The appeal is to this extent decreed..

In view of the attempt made by the appellant to avoid liability for the whole debt we direct that each side pay his own costs throughout the litigation.

JWALA PRASAD, J.—I agree with the order proposed.

Appeal accepted in part.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 50 OF 1915.

February 28, 1916.

Present:—Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Heaton.

Sayad AMIN SAHEB AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Sheikh MASLEUDIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bombay Court of Wards Act (Bom. Act I of 1905), ss. 31, 32, applicability of—Civil Procedure Code (Act V of 1908), s. 92—Suit against minor—Guardian not named, effect of.

A suit under section 92 of the Civil Procedure Code, 1908, properly instituted in relation to a public charitable or religious trust against a Government ward is not one directly affecting, at all events, the property of the ward and, therefore, is not bad on the ground that the statutory notice provided for by section 31 of the Bombay Court of Wards Act has not been given, nor is it bad under section 32 on the ground that the Court of Wards was not named as guardian from the commencement of the suit. [p. 187, col. 1.]

Where an omission to name the guardian of a ward in no way affects the merits of the case, it should be treated as a mere defect or irregularity in procedure. [p. 188, col. 2.]

Sharifa v. Mune Khan, 25 B. 574 3 Bom. L. R. 167; *Rup Chand v. Dasodha*, 30 A. 55; 3 M. L. T. 53; A. W. N. (1907) 290, referred to,

First appeal from the decision of the District Judge, Ahmedabad, in Suit No. 54 of 1910.

Mr. G. N. Thakor, for the Appellants.

Mr. N. K. Mehta, for Respondent No. 1.

Mr. G. K. Parekh, for Respondent No. 2.

JUDGMENT.—The plaintiffs, who are the present appellants, instituted a suit under section 92 of the Code of Civil Procedure for the administration and management of certain religious *wakf* property. The learned District Judge after an investigation found certain of the trustees liable for certain sums. The 4th trustee was found liable only in respect of certain costs, but he was not found to be a defaulting trustee. In providing for the appointment of new trustees, the learned District Judge has included the 4th defendant as one of the trustees. That is substantially the ground of the plaintiffs' appeal to this Court, but it does not appear to us that there is any such blame attaching to the 4th defendant upon the finding of the lower Court as should induce us to hold that he is not a fit and proper person to be a trustee under the new scheme. The appeal, therefore, must be dismissed.

That, however, is not the only question which we have to determine now, for it appears upon certain information brought to our notice by Mr. Mehta, who appears under instructions from the *Talukdari* Settlement Officer as the Court of Wards in charge of the superintendence of the property of the 1st defendant, that that defendant has now, and since 1909, been a Government ward under the Court of Wards and was so at the date of the institution of this suit on the 20th of December 1910, and although there was a full hearing of charges against the 1st defendant as a defaulting trustee in the Court of the District Judge, the Government Officer acting as the Court of Wards wishes to establish that by reason of defects in procedure provided by the Court of Wards Act (I of 1905), the whole proceedings so far as the 1st defendant is concerned are a nullity, including the decree for restoration of Rs. 6,000 found to be in his possession as a trustee liable to refund. The point has been brought to the notice of the Court in the form of cross-objections, as the Court of Wards was

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added as a party respondent by *ex parte* order.* It has been contended on behalf of the appellants that the cross-objections are not properly stamped. We think that this contentious argument is well founded.

They must be stamped upon that footing as on an appeal relating to the sum of Rs. 6,000 decreed against the 1st defendant. We have no information as to the manner in which the 1st defendant became a Government ward under the Court of Wards Act; whether he is a person declared by the District Court after application and inquiry to be incapable of managing, or unfitted to manage, his own property on account of physical or mental defect or infirmity, or such habits as cause, or are likely to cause, injury to his property or to the well-being of inferior holders under section 5 of the Act; or whether he is a landholder who has applied in writing to the Governor in Council, under section 9 of the Act, to have the property placed under the superintendence of the Court of Wards. In the absence of any evidence of a declaration by the District Court under section 5, it would probably be safe to assume that he has made the application under section 9. The point, however, is not very material. The 1st defendant was sued with the other trustees of a Mahomedan religious institution, and has been found to have been in possession of the trust funds for a long series of years. Being found to be responsible for a sum of upwards of Rs. 6,000 which has come to his hands, a decree has been passed against him. That decree was passed in a suit under section 92 of the Civil Procedure Code properly instituted in relation to a public charitable or religious trust.

It is argued, however, on behalf of the Court of Wards that the suit is, within the meaning of section 31 of the Court of Wards Act, a suit "relating to the person or property of a Government ward," and, therefore, is one which cannot be brought in any Civil Court until the expiration of two months after the statutory notice in writing prescribed by the section, which notice has not been given.

Now this suit as instituted is merely a suit relating to the property of a religious institution, and not to the property of the 1st defendant, and the argument of the Court of Wards could only be sustainable, if it is

permissible to regard the possible consequences of a suit in deciding the nature of the suit. The consequence of any suit against any defendant may be that there will be a decree against him, if not for money, at all events for costs, and as a consequence of such a decree, an application may be made for the arrest of the defendant in execution, and, therefore, it may in that manner affect his person. Similarly an application may be made to satisfy the decretal costs by issuing execution against his property, and in that manner any decree may affect his property. But the words of the section are not "affecting the person or property of the Government ward," but "relating to the person or property." Those words appear to us to bring within the scope of that section a designedly limited class of suits. It would have been easier for the Legislature, if the contention of the Court of Wards was correct, to say "no suit shall be brought." That, however, is not the expression adopted. It must be not even any suit which may affect the person or property of the ward, but a suit relating to the person or property of the ward, and *prima facie* it must be a suit of which the nature is apparent as soon as the suit is framed, a suit to be judged by its intention and not by its possible consequences. It is easy to satisfy the words of the section without holding that they embrace any suit of any kind whatever. A suit relating to the person of a Government ward might be a suit, such as is referred to in *Sharifa v. Mune Khan* (1), for the custody of the person of the ward, or a suit relating to the marriage of the ward, or even a suit relating to the adoption of the ward. Similarly a suit relating to the property of the ward may reasonably be held to be a suit relating to property which is really the property of the ward, and not the property of some other institution.

Not only is this suit, however, a suit relating to the property of an institution in which the ward is concerned only as a trustee, but the decree itself when properly regarded is a decree for restoration of the property of that institution to the persons responsible for its management under the

(1) 25 B. 574; 3 Bom. L. R. 167.

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new scheme. The defaulting trustee is assumed to have the property which was placed in his charge still in his possession. It is on that footing that he is held liable for it. It is not, therefore, a decree directly affecting at all events the property of the ward. For these reasons we think that the suit is not bad on the ground that the statutory notice provided for by section 31 has not been given.

Then it is argued that it is bad at all events under section 32, which provides that subject to the second paragraph of section 440 of the Civil Procedure Code, which is not material for this judgment, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Wards having the superintendence of the Government ward's property shall be named as the next friend or guardian for the suit, as the case may be. But the section does not say that if the Court of Wards is not named as guardian from the commencement of a suit, the suit is bad. If it is not in every case a fatal objection to a suit against a minor that a guardian has not been named as provided by Statute, then it is obvious that in certain circumstances the omission to name such a guardian during some part of the proceedings may be only a defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of the Court such as is contemplated by section 152 of the Civil Procedure Code. In that case there would be no reason to reverse or substantially vary the decree or remand the case. In our judgment the omission in the present case in no way affects the merits of the case, and it is not suggested that the Court of Wards has any objection on the merits to the decree which has been passed. The conclusion that the omission, such as we have in this case, may be treated as a mere defect or irregularity in procedure is supported by a reference to the judgments in two cases mentioned in argument, one *Rup Chand v. Dasodha* (2) and the other *Walian v. Banka Behari Pershad Singh* (3), a de-

cision of the Privy Council. In both those cases the provisions of section 443 of the Civil Procedure Code had not been complied with, as they should have been, but under the circumstances it was held that the non-compliance did not vitiate the proceedings. Every case, therefore, may be judged upon its own facts to see whether the omission has affected the merits or not. In the present case we think that the provisions of the section will be sufficiently complied with for the purposes of justice if notice is given to the Court of Wards that it will be added to the record as guardian *ad litem* of the 1st defendant as from the date of this judgment, and the proceedings will be amended accordingly. Any further notices which have to be given will be given in the first instance to the Court of Wards as the guardian of the 1st defendant. We do not think that the plaintiffs should be punished in this case by an award against them of costs, and under the circumstances we will allow them their costs. Respondents Nos. 1 and 2 must pay their own costs, and respondent No. 1 must pay full Court-fee on the ground that he is seeking to set aside the decree for Rs. 6,000.

Ordered accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 5 OF 1914.

February 25, 1916.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

LALTA SINGH AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

CHHATTAR SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (IV of 1912), ss. 3 (3), 55—"Proprietor," interpretation of—Ward, disability of, extent of—Joint Hindu family property managed by Court of Wards—Member of joint family, which to be considered as ward—Oudh Laws Act (XVIII of 1876), s. 9—Co-sharer—Pre-emption suit—Plaintiff, one, debarred from instituting suit—Co-plaintiff, position of.

(2) 30 A. 55; 3 M. L. T. 58; A. W. N. (1907) 290.
(3) 30 I. A. 182; 5 Bom. L. R. 822; 7 C. W. N. 77; 30 C. 1021; 8 Sar. P. C. J. 512 (P. C.).

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The disability of a ward, as mentioned in section 55 of the U. P. Court of Wards Act, is not limited to such of his property as is managed on his behalf by the Court of Wards, but extends to every possible cause of action cognizable by a Civil Court. [p. 190, col. 1.]

The word "proprietor", as used in the latter portion of section 3 (3) of the U. P. Court of Wards Act, means the proprietor who has actually made an application under section 10 of the Act. [p. 191, col. 1.]

Therefore, a member of a joint Hindu family governed by the Mitakshara Law, who has neither been declared a disqualified proprietor nor has joined in the application made by the other members of the family under section 10 of the U. P. Court of Wards Act, is not a "ward" under the Act, so that the disability arising out of the provisions of section 55 of the Act does not affect him, and he can institute a pre-emption suit in his personal capacity, in spite of the fact that his interests in the joint family property are managed by the Court of Wards. [p. 190, col. 2; p. 191, col. 2.]

Gulab Singh v. Raja Sesh Gokuldas, 19 Ind. Cas. 521; 40 C. 784 (P. C.); 17 C. L. J. 619; 15 Bom. L. R. 612; 17 C. W. N. 918; (1913) M. W. N. 542; 14 M. L. T. 55; 25 M. L. J. 179; 9 N. L. R. 117; 40 I. A. 117, distinguished from.

A member of a joint Hindu family holding a share in the joint family property is a co-sharer of the subdivision in which the property is situate within the meaning of section 9 of the Oudh Laws Act, even though his name does not appear in the *khevat*. [p. 191, col. 2.]

Hazari Singh v. Joot Singh, 1 O. C. 252, referred to.

Where a father and his son, constituting a joint Hindu family, join in bringing a pre-emption suit, and it is found that the father cannot sue in his personal capacity by reason of the prohibition contained in section 55 of the U. P. Court of Wards Act, this fact does not stand in the way of the son's obtaining relief. [p. 191, col. 2.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 20th October 1913.

Mirza Sami Ullah Beg, for the Appellants.

Babu Hari Kishen Dhaon holding brief of Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—Jai Singh and his brother Lalta Singh applied under section 9, Local Act III of 1899, to have their property placed under the superintendence of the Court of Wards. Their application was granted and on 14th April 1903 their property was placed under the Court of Wards by a Notification No. ¹³³³_{X-875 c} of 1903, dated the 14th April 1903, published at page 675, Part II, of the Government Gazette of 18th April 1903. The notification took effect from the 30th March 1903. This notification, which was made under

section 14, Local Act III of 1899, holds good under the new Act, Local Act IV of 1912, according to the provisions of section 2 of the latter Act. Jai Singh died on 21st March 1913. Drigbijai Singh is the son of Lalta Singh. Certain property was sold over which Lalta Singh and Drigbijai Singh would ordinarily have been able to obtain possession by enforcement of a right of pre-emption. An application was made on behalf of Lalta Singh before the death of Jai Singh to the Court of Wards to institute a suit to obtain this relief. The Court of Wards refused to institute the suit. Lalta Singh agreed that the suit should not be instituted. But subsequently a suit was brought by Lalta Singh and Drigbijai Singh on 28th March 1913. This suit was dismissed by the Subordinate Judge, on the ground that under the provisions of section 55, Local Act IV of 1912, Lalta Singh and Drigbijai Singh both being wards could not sue otherwise than by and in the name of the Collector in charge of their property or such other person as the Court of Wards might appoint on their behalf. They appeal against this decision.

It has been brought to our notice by the learned Counsel for the appellants that the estate was released by the Court of Wards on 2nd May 1915 under Notification No. 410 N/X-26 (4) of 1915, dated the 9th June 1915, published at page 1130, Part II, of the Government Gazette of 12th June 1915.

We agree with the learned Subordinate Judge that Lalta Singh's claim must be dismissed under the provisions of section 55. At the time that the claim was brought he was clearly a ward and subject to the disabilities of section 55. An argument has been advanced before us to the effect that section 55 merely prohibits a ward suing or being sued with respect to such property of his as is under the management of the Court of Wards. But this contention does not find favour with us. It is clear from reading the words of the section that the disabilities of a ward are considerably greater than the disabilities suggested by the learned Counsel for the appellants. The words are: "No ward shall sue or be sued, nor shall any proceedings be taken, in the Civil Court, otherwise

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than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf." If the interpretation suggested by the learned Counsel were adopted we should in effect be inserting the words, "in respect of property of the ward managed on his behalf by the Court of Wards" between the words "Civil Court" and "otherwise." There is no justification for adding a gloss of this nature. The meaning of the section is perfectly plain. The ward is under a disability in suing and with regard to other proceedings in respect of every possible cause of action cognizable by a Civil Court; the law lays down clearly that he is not to take any action on his own motion in such matters, and that no action can be taken against him in his personal capacity, but that his guardian is to take proceedings on his behalf in respect of every matter, and that a person wishing to take proceedings against a ward shall take proceedings against the guardian of the ward and not against the ward himself. The plain words of the section cannot be affected by consideration of the position of the ward with regard to property acquired by him otherwise than by inheritance subsequent to the date of such assumption or declaration. The Court of Wards may in its discretion assume or refrain from assuming the superintendence of such property under the provisions of section 16, clause 4. But that circumstance in no way affects the position of the ward under section 55. We refer to this point simply because it has been pressed before us.

The position of Drigbijai Singh is, however, essentially different from the position of his father. A strong attempt was made by the learned Counsel for the vendee respondent to establish that Drigbijai Singh was a ward of Court although his name does not appear in the notification. He points out that, at the time that the notification was made, Drigbijai Singh was a minor, that he was a member of a joint Hindu family governed by the Mitakshara Law consisting of his father Lalta Singh, his uncle Jai Singh and himself, and that since the death of Jai Singh, Lalta Singh and Drigbijai Singh are the sole members of the family. He points out that the joint family property was managed entirely by the Court of Wards,

that the interests of Drigbijai Singh in such property were made over to the Court of Wards, and that although he attained majority before the institution of the present suit he did not have any control of the management of his co-parcenary share in the joint family property until the property was released in 1915. These circumstances do not, however, in our opinion, afford any justification for holding that Drigbijai Singh was a ward within the meaning of section 55. The word "ward" as used in section 55 is defined by section 3, clause 3, which states: "'ward' means a disqualified proprietor whose person or property or any part of whose property is under the superintendence of the Court of Wards." This portion of the section clearly cannot refer to Drigbijai Singh. Neither Jai Singh or Lalta Singh were disqualified proprietors nor was Drigbijai Singh himself a disqualified proprietor. The Court of Wards might, had it chosen, have applied to have Drigbijai Singh declared a disqualified proprietor (as he was then a minor) under the provisions of Act III of 1899. But the Court of Wards took no such action with regard to him. We now come to the latter part of the section which states: "or a proprietor in regard to whose property a declaration has been made under section 10." Section 9 of Act III. of 1899 and section 10 of Act IV. of 1912 are in agreement with regard to the word "proprietor". Section 9 reads: "A proprietor may make application to the Local Government to have his property placed under the superintendence of the Court of Wards, and the Local Government may, on being satisfied that it is expedient in the public interests that such property should be managed by the Court of Wards, make a declaration to that effect." Section 10 reads: "A proprietor may apply to the Collector to have his property placed under the superintendence of the Court of Wards, and the Court of Wards may, on being satisfied that it is expedient to undertake the management of such property, make a declaration to this effect." Section 10 of the new Act provides that the application should be made to the Collector instead of to the Local Government and provides that the Court of Wards and not the Local Government shall decide whether the estate shall or shall not be taken under the management of the Court of Wards. But

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there is no difference with regard to the person who can make the application. In each case that person is the proprietor. Section 3, clause 5, of Act III of 1899 has not been altered with regard to these points by section 3, clause 3, of Act IV of 1912, in each case the wording of the portion having bearing on the point being "or a proprietor in regard to whose property a declaration has been made" under section 9 of the old Act or section 10 of the new Act. It is clear that this word "proprietor" means the proprietor who made the application. In the present case Jai Singh and Lalta Singh only made the application and Drigbijai Singh did not make an application. Thus Jai Singh and Lalta Singh became "wards" within the meaning of the Act and Drigbijai Singh did not become a "ward." The learned Counsel for the vendee-respondent has drawn our attention to a recent decision of their Lordships of the Privy Council in *Gulab Singh v. Raja Seth Gokuldas* (1). This was a case which was heard on appeal from the Court of the Judicial Commissioner, Central Provinces. There two managing members of a Hindu joint family applied under the provisions of section 7 (4) of Act XVII of 1885, the Central Provinces Government Wards Act, to the Deputy Commissioner as Court of Wards for the district to assume superintendence of the joint family estate with a view to liquidate their debts. Their Lordships held that in making the application they acted within their power and authority as managing members and in the interest of all the members of the joint family, and that, inasmuch as no member had in the property any definite undivided share, what was taken over by the Court of Wards on assuming superintendence of the estate was the property of all the members of the joint family. They held that the Chief Commissioner had power to sanction the assumption by the Court of Wards of the whole of the joint family property, whether the application was made by the managing members only or by all the members of the family, and that the acts of the Court of

Wards in dealing with the property after charge of it was assumed bound the interests of all the members. This decision does not, however, lay down that a member of such a joint Hindu family who has not joined in the application becomes a ward with regard to such disabilities as are contemplated by section 55 of Act IV of 1912. It lays down that the functions and the powers of the managing members of the joint family who have made such an application are taken over by the Court of Wards. The Court of Wards after such an application has been made takes the place of the managing members. Act XVII of 1885 does not create any such disabilities as are created by section 55 of the Local Act IV of 1912. These disabilities are of a peculiar kind. They apply only to the actual wards, that is to say, in the present instance to the persons who of their own accord placed themselves under the Court of Wards, and they do not apply to other members of the family whose interests in the joint family property are managed by the Court of Wards. Thus the provisions of section 55 do not prevent Drigbijai Singh from bringing the present suit to enforce a right of pre-emption. It is established law in Oudh that a member of a joint Hindu family holding a share in the joint family property is a co-sharer of the sub-division within the meaning of section 9, Act XVIII of 1876, even although his name does not appear on the *khewat*. This proposition was laid down in *Hazari Singh v. Joot Singh* (2) and has invariably been followed in subsequent cases. Drigbijai Singh had, therefore, the right to bring the suit apart from the right possessed by his father. It is not the case that his father had no right of pre-emption. It is the case that he had a right of pre-emption but that under the provisions of section 55 he was not permitted to use it except with the consent of the Court of Wards. But the fact that he was not so permitted to use it does not stand in the way of the son obtaining relief when he has sued as a co-plaintiff with his father. We, therefore, decide that Drigbijai Singh's claim must be allowed although the claim of Lalta Singh must be dismissed.

(1) 19 Ind. Cas. 521; 40 C. 784 (P. C.); 17 C. L. J. 619; 15 Bom. L. R. 613; 17 C. W. N. 918; (1913) M. W. N. 542; 14 M. L. T. 55; 25 M. L. J. 179; 9 N. L. R. 117; 40 I. A. 117.

(2) 1 O. C. 252.

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We now come to the question as to the amount to be paid by Drigbijai Singh as a condition precedent to his enforcing his right. The learned Counsel for the appellants accepts the greater part of the consideration as found by the learned Subordinate Judge. He objects, however, to the amount of Rs. 1,805-9-4 in item No. 1. He admits the validity of Rs. 8,961-6-8 out of the total of Rs. 10,767, but argues that under the terms of the deed payment of which is secured by the deed of sale the remainder should be disallowed. His objection is based on an interpretation of one portion of the deed. He would calculate the interest not as compound interest proper but as interest on the amount of simple interest. The words of the deed might possibly bear the interpretation that he would put on them, but they certainly bear the interpretation that the learned Subordinate Judge placed upon them, and, in view of the fact that that was the interpretation of the deed accepted by the parties of their own free will and accord, we see no reason to make a more favourable interpretation in the interests of the pre-emptor when the original debtor was content to accept this manner of calculation. There is nothing of a fictitious or a fraudulent nature about this portion of the transaction. The learned Subordinate Judge at o. p. 203 of his judgment has given good reasons for adding the amount of Rs. 146 to the amount calculated under the terms of the deed. We find against the appellant Drigbijai Singh on this point.

The second point to which he takes exception is with regard to the allowance of the item referred to at o. p. 213. His case is that the deed therein referred to, the satisfaction of which is made a portion of the sale consideration, never existed. But we are satisfied the learned Subordinate Judge arrived at a correct conclusion on the evidence when he found that this deed did exist and that the amount due for its satisfaction has been correctly calculated. We have only to refer to some slight inaccuracies in calculation to which reference is made at o. pp. 209 and 210 of the judgment. These inaccuracies, which have caused the vendors to receive Rs. 89-14-0 too little, are clearly owing to

bona fide mistakes of calculation. They do not show any collusion or anything fictitious. The conclusion at which we arrive is that the amount settled in the deed of sale was settled genuinely and honestly between the parties, that there were no fictitious entries, that there was no collusion although there was a slight error in calculation, and that if Drigbijai Singh wishes to obtain possession of the property by exercise of a right of pre-emption he can only do so by the payment of Rs. 32,000 to Jhau Lal vendee, of which Jhau Lal must make good Rs. 89-14-0 to the vendors.

We, therefore, allow this appeal in part. The appeal of Lalta Singh is dismissed. The appeal of Drigbijai Singh is allowed to this extent that if he pays Rs. 32,000 into the Court of the Subordinate Judge of Hardoi on or before the 1st September 1916 he shall obtain possession of the property transferred.

There were certain cross-objections filed by the vendee-respondent. These are based upon an alleged miscalculation of the Pleader's fee. These objections have no weight. The Pleader's fee was calculated correctly according to the rules at the time that the decree was passed. It is true that subsequent to the passing of the decree the rule affecting the question has been changed, but that circumstance cannot help the objector.

The order as to costs will be as follows:—The vendee will pay his own costs and those of Drigbijai Singh in both Courts including the costs of the cross-objections. Lalta Singh will pay his own costs throughout. If Drigbijai Singh does not pay Rs. 32,000 into the Court of the Subordinate Judge of Hardoi on or before 1st September 1916 his suit shall stand dismissed and he shall pay the costs of defendant-vendee in all Courts.

Appeal partly allowed.

HAIDAR v. FATTEH KHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1598 OF 1915.

July 18, 1916.

Present:—Mr. Justice Broadway.

HAIDAR—PLAINTIFF—APPELLANT
versusFATTEH KHAN—DEFENDANT—
RESPONDENT.*Punjab Alienation of Land Act (XIII of 1900), s. 6—Mortgage to pay off old debt owing to non-agriculturists, whether contravenes provisions of Act—Consideration.*

It is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power and if such a person can induce an agriculturist to pay off a debt due to him and to take a mortgage of land from his debtor as security, for himself, there is nothing in this Act to prohibit such a course. It is immaterial whether the mortgagee pays in cash or gives his bond, nor has he anything to do with the correctness of the account or real amount due beyond what the debtor himself admits and asks the mortgagee to pay for him. [p. 194, col. 2; p. 195, col. 1.]

Jahan Khan v. Dalla Ram, 142 P. R. 1907; 86 P. W. R. 1907; 48 P. L. R. 1903, followed.

Allah Ditta v. Nazar Din, 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916, followed.

Second appeal from the decree of the District Judge, Attock, at Campbellpur, dated the 4th March 1915, affirming that of the Munsif, 1st class, Pindi Gheb, dated the 16th June 1914, dismissing the claim.

Dr. Nand Lal, for the Appellant.

Mr. L. M. Datta, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—Fatteh Khan, the defendant-respondent, owed some money to Chet Ram and Sahib Ditta, the amount, it was alleged, being Rs. 1,000. Fatteh Khan entered into an agreement with Haidar plaintiff-appellant by which Haidar undertook to pay this sum of Rs. 1,000 to Chet Ram and Sahib Ditta on behalf of Fatteh Khan, and Fatteh Khan agreed to mortgage 337 *kanals* and 14 *marlas* of land to Haidar for that amount. Accordingly on the 27th May 1913, Fatteh Khan appeared before the *patwari* and made a statement, in which he clearly said (1) that he owed Chet Ram and Sahib Ditta the sum of Rs. 1,000; (2) that Haidar had undertaken to pay this Rs. 1,000 to Chet Ram and Sahib Ditta; (3) that Chet Ram and Sahib Ditta had agreed to this arrangement and had released him (Fatteh Khan)

from all further liability; (4) that he had accordingly orally mortgaged the said land to Haidar and given him possession of the same and (5) that the said oral mortgage should be entered in the mutation register.

On the 28th May 1913, Fatteh Khan filed an application to the Tahsildar which was to the same effect, and was examined on oath by the Tahsildar when Fatteh Khan repeated his former statement and supported his application. It will thus be seen that on the 27th and 28th May 1913, Fatteh Khan made an unequivocal and clear statement acknowledging that the sum he had owed to Chet Ram and Sahib Ditta was Rs. 1,000, that Haidar had undertaken to pay this sum, and that in consideration of that undertaking he had mortgaged the said land to Haidar for Rs. 1,000 and had given him possession.

The Revenue Authorities ultimately held that the whole transaction was a colourable one—that the real mortgagees were Chet Ram and Sahib Ditta who had put forward Haidar as a mere dummy or *benamidar*, as they being non-agriculturists were prohibited from taking the land on mortgage by the Alienation of Land Act.

Fatteh Khan had in the subsequent proceedings before the Revenue Authorities made the allegations and had said that he had really only owed to Chet Ram and Sahib Ditta Rs. 600 and they had promised to advance him another Rs. 400 if he agreed to this transaction. He alleged that this further sum of Rs. 400 had not been paid to him and, therefore, he had exposed the true state of affairs.

Haidar on the 19th March 1914 then filed the present suit asking for possession in the terms of the oral mortgage.

The learned Munsif dismissed the suit on the 16th June 1914, holding that Fatteh Khan's assertions were correct and that Chet Ram and Sahib Ditta were the real mortgagees, Haidar being merely their *benamidar*. He also held that Fatteh Khan had not settled accounts with Chet Ram and Sahib Ditta at Rs. 1,000. It was, however, held that, as a matter of fact, the land was mortgaged by Fatteh Khan, but that it was invalid as both Fatteh Khan and Haidar had

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been cheated by Chet Ram and Sahib Ditta. Haidar appealed to the learned District Judge who upheld the decision of the learned Munsif and held, as he had done, that though Fatteh Khan had admitted the mortgage before the Tahsildar, on the 20th January 1914, he had exposed the truth of the transaction. He distinguished *Jahan Khan v. Dalla Ram* (1) from the present case, in that he considered that as the accounts said to have been settled with Chet Ram and Sahib Ditta, when Rs. 1,000 were found due, were obviously fraudulent, the respondent never could have agreed to mortgage his land for that sum, seeing it was to a very great extent made up of interest. He accordingly held that "it cannot be said that the mortgage is legal and binding or one that could be enforced." He confirmed the lower Court's decree. Haidar has now preferred this appeal against that decision and I have heard Dr. Nand Lal on his behalf and Mr. L. M. Datta for respondent.

What has been held by both the Courts below is that although as a matter of fact Fatteh Khan did mortgage the land, it is bad in law inasmuch as the real mortgagee was not Haidar but Chet Ram and Sahib Ditta were the actual mortgagees and they, being non-agriculturists, could not take a valid mortgage.

Now a Full Bench of this Court has recently decided that once a mortgage has been entered into it cannot lightly be set aside, and has applied the principles enunciated in section 58, Transfer of Property Act, to this Province. In the present case Fatteh Khan has admitted that, as a matter of fact, he did mortgage the land in suit to Haidar. He has no doubt endeavoured to avoid the transaction, on the ground that Haidar was only a *benamidar* for persons who were themselves debarred from taking the land on mortgage and also on the ground that he had not received the full consideration.

It seems to me, however, that on an examination of these grounds there is really no force in them and that following the Full Bench decision above referred to which

is reported as *Allah Ditta v. Nazar Din* (2), I must hold that the mortgage was actually entered into and that it is valid unless it can be shown that it is barred by the Alienation of Land Act.

Though not precisely the same, the facts of this case are very similar to those in *Jahan Khan v. Dalla Ram* (1).

In that case it was held that it was not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him by an agriculturist by any legal means in his power, and that if such a person could induce an agriculturist to pay off a debt due to him and to take a mortgage from his debtor as security for himself, there was nothing in this Act to prohibit such a course.

In the present case this is precisely what has occurred. Haidar has paid Chet Ram and Sahib Ditta the money due by Fatteh Khan and has taken a mortgage from the latter as security for himself.

It is not denied that Haidar has executed a bond for Rs. 1,000 in favour of Chet Ram and Sahib Ditta and that he is liable thereunder to pay them that sum.

Mr. Datta admitted that Fatteh Khan had been released from all liability to Chet Ram and Sahib Ditta who now could not in any circumstances recover any money from him, but must look solely to Haidar. That being the case the debt due by Fatteh Khan, whatever be the sum, is now extinct, and that because Haidar now is liable to pay it.

In these circumstances it seems to me that there has been no contravention of the provisions of the Alienation of Land Act.

The only person who can advance any claim under the mortgage is Haidar, and Chet Ram and Sahib Ditta can in no conceivable circumstances ever obtain possession of this land. If they did attempt to get possession they would be met at once by this Act.

I must, therefore, hold that the mortgage is a valid one so far as this Act is concerned.

Turning now to the question of consideration, it seems to me that we are only

(1) 142 P. R. 1907; 86 P. W. R. 1907; 48 P. L. R. 1908.

(2) 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916.

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concerned with the terms of the mortgage which is under consideration. They are clear and undisputed, the consideration comes, and can come, only from Haidar and the consideration is obviously the extinction of the debt once due by Fattah Khan to Chet Ram and Sahib Ditta. It has been admitted that that debt is, as a matter of fact, extinct, therefore, it seems to follow that as far as Haidar, the mortgagee, is concerned there is no failure of consideration.

But it is urged that the sum of Rs. 1,000 is now payable to Haidar under the mortgage whereas the debt due was only Rs. 600. I do not quite see how Haidar is concerned with this question. He was told by the creditors and the debtors that the debt due amounted to Rs. 1,000, that sum he undertook to pay and for that sum he had bound himself to Chet Ram and Sahib Ditta, by the bond he has executed in their favour. He can fairly reply that it has nothing to do with him what the correct amount of the debt may have been. Fattah Khan told him it was Rs. 1,000 and on that assurance he has undertaken liability to that extent. He could scarcely be expected to look minutely into the account and to satisfy himself that the sum of Rs. 1,000 was actually due. Indeed it may be that Fattah Khan is right and that Chet Ram and Sahib Ditta did undertake to make him a further advance of Rs. 400, which they have failed to do. Haidar can still reply that with that he has no concern.

It is also worthy of notice that on the 27th and 28th May 1913, Fattah Khan definitely stated that the debt that Haidar had undertaken to pay amounted to Rs. 1,000. The non-payment to him of Rs. 400 was never hinted till a much later stage of the proceedings, and long after Haidar had executed the bond by which he rendered himself liable to pay the sum of Rs. 1,000. If, as a matter of fact, Fattah Khan's claim is correct and Chet Ram and Sahib Ditta did undertake to lend him the Rs. 400 as he states, he is not wholly without remedy. He can claim that sum from Chet Ram and Sahib Ditta. Without in any way expressing a definite opinion on the point, I do not see why he could have sued these persons for specific performance of their contract to pay him that money,

assuming that this remedy was open to him and he could have on proof of his claim either obtained that sum in cash or attached the money due to them by Haidar to that extent.

As it is, on the decision of the Courts below he is not only freed from a debt to the extent of Rs. 600 at least that he admits was due but also escaped the mortgage. In the circumstances I accept this appeal and give Haidar a decree for possession of the land in suit in the terms of the mortgage with costs throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2790 OF 1915.

July 17, 1916.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

MOHAN LAL AND OTHERS—DEFENDANTS—
APPELLANTS

versus

NEKI AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Minor, guardian ad litem of, confession of judgment by—Gross negligence—Minor, suit by, on attaining majority, to set aside decree.

Gross negligence on the part of the guardian ad litem of a minor in defending a suit gives the latter a cause of action to set aside the decree. [p. 196, col. 2.]

Ghulam Ali Shah v. Shahabul Shah, 3 P. R. 1905, 87 P. L. R. 1905; *Nur Muhammad v. Aimna*, 91 P. R. 1907; 191 P. L. R. 1908; *Har Narain v. Musammat Deoki*, 24 P. R. 1893, distinguished.

Ahmad Ali Shah v. Amir Shah, 35 P. R. 1898, *Mohammad v. Sukha Singh*, 13 Ind. Cas. 20; 36 P. W. R. 1912; 15 P. L. R. 1912, approved.

Second appeal from the decree of the District Judge, Karnal, dated the 24th June 1915, reversing that of the Munsif, 1st class, Sonapat, dated the 13th May 1914, dismissing the claim.

Mr. Abdul Ghani, for the Appellants.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—On 24th April 1913, in the Court of the Subordinate Judge, Rohtak, in a suit by Mohan Lal, Musammat Niadri and many others, a decree was passed against the present plaintiffs (who are minors) on a confession of judgment by the latter's guardian ad litem (their mother

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Musammat Dhapan) and Sita Ram, their *mukhtar*. The plaintiffs were collaterals of two men Kala and Naurang who, some 20 odd years earlier, had sold certain land to the minors' ancestors and the suit impugned the alienation. Pleas were filed, involving questions of limitation, ancestral nature of the land, consideration and "necessity," *locus standi* of the collaterals, and acquiescence of them; but none of those questions was decided, for the guardian and *mukhtar* aforesaid appeared and stated that they had received Rs. 1,340 in cash from the plaintiffs, that being the original sale-price, and had withdrawn their defence, not wishing the minors to be burdened with costs. The Subordinate Judge, without really considering the circumstances of the case, sanctioned the compromise, on the ground, apparently, that the price had been got back and the minors were saved from further risks and demands.

The minors now sue, not for possession of the land, but merely for a declaration that the decree was fraudulent and collusive and was due to gross negligence and want of care on the part of their guardian and *mukhtar* and that it should not take effect against them. I think they probably should have sued for possession of the land, as they are out of possession, and will still have to sue for possession, but inasmuch as the case has been fought out in two Courts as it stands and no objection as to the frame of the suit has been put in before me, I am not inclined to take this matter up. The first Court did hold that suit for declaration did not lie, and on this and on the merits dismissed the claim; but the lower Appellate Court ignored this point and gave plaintiffs the decree prayed for.

Defendants come here on second appeal, and urge—

1. That the lower Appellate Court had no right to decide as it has done, without taking any evidence, that the previous suit was time-barred and that the plaintiffs in it had no *locus standi*, there being no issue on these subjects in the present case;

2 That according to *Ghulam Ali Shah v. Shahabul Shah* (1), there was no sufficient

indication of negligence on the part of the guardian;

3. And that at least the minors should return the price received (Rs. 1,340), *Cf. Nur Muhammad v. Ainna* (2).

It is also argued that mere negligence is not sufficient, *Madhavaya v. Kerala Varma* (3), but that ruling is not in point. There the suit had been actively and earnestly prosecuted by the guardian, and a mere mistake had been made. Then in *Har Narain v. Musammat Deoki* (4) fraud in equity was held not recognisable, and the view was taken that, where the Court, which sanctioned the compromise, had all the facts before it, and proceeded on the same lines as those set forth by the guardian as the excuse for his action, it could not be said that the guardian was negligent. In my opinion, however, the later cases, *viz., Ahmad Ali Shah v. Amir Shah* (5) and *Mohammad v. Sukha Singh* (6), are more in point. In the former it is said that gross negligence on the part of a guardian is sufficient to give the minor a cause of action and neglecting to appeal in a hopeful case was considered to be such negligence. In the latter case (Chevis, J.) the facts are almost precisely as in the case now before me.

I am disposed to reject this appeal, so far as concerns the actual decree passed. In my opinion, however, a good many of the findings of the lower Appellate Court are mere *obiter dicta* and are not based on evidence. I hold that there was *prima facie* a good case for the minors in 1913 on the score of limitation and the opposite party's *locus standi* as being 8th degree collaterals. There was also *prima facie* a good case for the minors on the score of passing of consideration, and existence of necessity. As to these questions all that the lower Appellate Court could properly say, and all that can be said now, is that it was the duty of the guardian to stand by these pleas and on the strength

(2) 91 P. R. 1907; 191 P. L. R. 1908.

(3) 13 M. L. J. 68.

(4) 24 P. R. 1893.

(5) 35 P. R. 1898.

(6) 13 Ind. Cas. 20, 36 P. W. R. 1912; 15 P. L. R. 1912.

(1) 3 P. R. 1905; 87 P. L. R. 1905.

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of them to resist the claim; but these questions cannot properly be decided on this record. Had plaintiffs sued for possession, this could have been done, but now these questions will have to be decided when plaintiffs sue for possession. In short, the present decree under appeal merely clears the decree of 1913 out of the way and leaves the parties face to face as if the litigation of 1913 had never taken place.

It follows also that the matter of refund of Rs. 1,340 must be reserved for decision in the further suit.

Appeal dismissed, but without costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 3288 OF 1915.

July 18, 1916.

Present:—Mr. Justice Scott-Smith.

SHAH NAWAZ AND OTHERS—DEFENDANTS—

APPELLANTS

versus

SHAH NAWAZ AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1898), s. 99—Misjoinder of parties—Second appeal, whether competent.

A second appeal is not competent on the ground of misjoinder of parties if it has not affected the merits of the case or the jurisdiction of the Court.

Second appeal from the decree of the District Judge, Karnal, dated the 26th May 1915, affirming that of the Munsif, 1st class, Karnal, dated the 23rd December 1914, decreeing the claim.

Lala Kishen Chand, for the Appellants.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—On the 24th June 1908, Kima sold some joint land, half of which was his own and the other half that of Shah Nawaz. The latter's land he sold in the capacity of guardian. After Kima's death, Abdul Majid, his minor son, and Shah Nawaz sued for the land sold. The lower Courts have decreed the claim on the ground that necessity and consideration had not been proved. Defendants have filed a second appeal to this Court,

The first ground urged is that there was a misjoinder of plaintiffs. An issue on this point was framed in the first Court, and was decided against the defendants. In appeal to the lower Appellate Court, it was urged that the first Court should have allowed the appellants to produce evidence on this issue. No evidence, however, was necessary on the issue. The objection as to misjoinder was based on the fact that Abdul Majid sued for his share of the land on the ground that there was no necessity for the sale, but that Shah Nawaz sued for his share on the ground that, in accordance with the Muhammadan Law, Kima had no power to sell it and the sale was not effected for his benefit. The question was one of law and it had been decided on the facts as admitted, and it must, therefore, be held that no objection to the first Court's finding on the question of misjoinder was raised in the lower Appellate Court. Even if there was any misjoinder, I should hold, having regard to section 99 of the Civil Procedure Code, that the misjoinder has not affected the merits of the case or the jurisdiction of the Court and, therefore, the decree should not be set aside on that account.

It is next urged that appellants, relying upon this legal issue, did not exert themselves to produce all their evidence to prove necessity and consideration. This was their own lookout, and they have only themselves to thank if the evidence was not considered sufficient. They definitely closed their case on the 21st December 1914, and, in my opinion, they are entitled to no further opportunity for producing additional evidence. Lala Kishen Chand urges that as regards Shah Nawaz there should have been an issue as to whether the sale was effected for his benefit. The issue was whether the sale was for necessity and consideration and the defendants knew perfectly well what they had to prove. I do not consider that they have been prejudiced by the form of the issue. The finding that necessity and consideration had not been proved is one of fact and cannot be contested on second appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

SARUP CHAND v. PANI.

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 14 OF 1915.

September 12, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C., and
Mr. Kendall, A. J. C.

SARUP CHAND—DEFENDANT NO. 1—

APPELLANT

versus

Musammât PANI—PLAINTIFF—

RESPONDENT.

Hindu Law—Mitakshara—Partition—Mother's share—Stridhan, mother in possession of, effect of—"Estoppel against estoppel setteth the matter at large", meaning of—Arbitration and award.

On a partition between her sons and step-sons, a mother is, according to the Mitakshara, entitled to a share equal to that of her son. [p. 199, col. 2.]

Damodardas Maneklal v. Uttamram Maneklal, 17 B. 271; 9 Ind. Dec. (N. S.) 177; *Har Narain v. Bishambhar Nath*, 31 Ind. Cas. 907; 38 A. 83; 13 A. L. J. 1129, referred to

The maxim 'estoppel against estoppel setteth the matter at large' explained. [p. 200, col. 1.]

Plaintiff, acting as guardian of her infant son, agreed with defendant her step-son to partition the family property and an arbitrator was appointed to effect the partition. The plaintiff applied to the arbitrator to allot her a maintenance allowance, which he did in the award. Plaintiff then applied on behalf of her son and of herself to have the award filed in Court. On defendant's objection, however, the award was modified, and plaintiff's maintenance was disallowed as against the defendant. Plaintiff thereupon filed a suit for a partition of her one-third share:

Held, that the plaintiff was entitled to a one-third share in the family property. [p. 199, col. 2.]

(2) that the effect of setting aside of the award in regard to her maintenance was to restore the *status quo ante* and to justify the plaintiff in claiming her share in the family property. [p. 200, col. 1.]

Obiter dictum.—There may be cases where the possession of separate property by a mother might have the effect of reducing *pro tanto* the share which she may be entitled to on partition. [p. 200, col. 2.]

Poorendra Nath Sen v. Hemangini Dasi, 1 Ind. Cas. 523; 12 C. W. N. 1002; 35 C. 75, referred to.

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 9th November 1914.

Babu *Har Dayal*, for the Appellant.

Babu *Bisheshwar Nath*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit, brought by the plaintiff-respondent, for partition of a one-third share out of certain property. The plaintiff is the widow of Bhikhamal, who died in May 1907, leaving by her a son, Harak Chand, who is defendant No. 2. He also left by a predeceas-

ed wife another son, Sarup Chand, who is defendant No. 1. Defendant No. 2 was then a minor and was living with his mother, the plaintiff.

On the 16th December 1912 the plaintiff acting as the guardian of Harak Chand entered into an agreement with Sarup Chand for the partition of the joint family property and appointed Debi Prasad as an arbitrator for the purpose of dividing the same into two equal shares. The agreement recited that Harak Chand and Sarup Chand were entitled to a half share each in the disputed property. During the pendency of the arbitration proceeding, the plaintiff applied to the arbitrator to settle the question of her maintenance. On the 5th May 1913 the arbitrator made an award, dividing the entire moveable property, including the ornaments possessed by the plaintiff and those possessed by the wives of Harak Chand and Sarup Chand, and a portion of the immoveable property possessed by the family, the division of which the parties demanded, into two equal portions, allotting one to Harak Chand and the other to Sarup Chand and he adjusted the difference between the value of the ornaments possessed by the ladies aforesaid by directing the plaintiff to give certain ornaments, which were then valued at Rs. 1,200, to Sarup Chand to equalize his share. In regard to the application made by the plaintiff for her maintenance, his decision was that she should get Rs. 250 per year, out of which Rs. 150 would be payable by Harak Chand and the balance by Sarup Chand. The award states that the parties accepted its terms and signed the same in proof thereof.

On the 11th September 1913 the plaintiff, acting as the next friend of Harak Chand and on her own behalf, made an application to the Subordinate Judge of Partabgarh, asking that the award should be filed and a decree passed in accordance therewith. Sarup Chand objected to the finding of the award on the ground that the arbitrator was not authorized by the agreement, referring the dispute between him and his brother to arbitration, to award the maintenance to the plaintiff, and that he had ignored a certain debt due to Santok Chand on a bond, dated the 24th

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January 1911, executed by Bhikhamal for the payment of which each party was equally liable. The Pleader for the plaintiff and Harak Chand thereupon agreed that that portion of the award which directed the payment of Rs. 100 per mensem to the plaintiff by Sarup Chand as maintenance might be treated as unauthorised and excluded from the decree and that Harak Chand might be declared liable for the amount due to Santok Chand by his father. The learned Subordinate Judge, before whom the above proceeding was pending, passed a decree in accordance with the award with the modification that so far as the award gave Rs. 100 per year as *guzara* to the plaintiff, it would not form part of the decree and also that Harak Chand would be liable to pay the debt due from his father, Bhikhamal, on the bond aforesaid. On the 12th January 1912 the plaintiff sent a notice to Sarup Chand, asserting her right to a maintenance of Rs. 30 per mensem, half of which was payable by him, and on the failure of the latter to comply with that demand, filed the present suit for a partition of her one-third share.

The defence, so far as it is material for the purpose of this appeal, was that the plaintiff was not entitled to claim any share according to the custom prevailing in Marwar, to which the family of the parties originally belonged, that the parties still preserved the customs and usages of their original home, that the plaintiff was in possession of moveable property, including jewellery and ornaments, the price of which exceeded the value of the share which each son was entitled to get, that she omitted to claim any share in the property in dispute at the time of the arbitration and acquiesced in the partition made by the arbitrator, and that a mere partial division of the joint family property did not give the plaintiff a right to sue.

The learned Subordinate Judge found that no custom of the kind set up by the contesting defendant was established, that the plaintiff was entitled as mother to claim a one-third share in the family property on a partition between the sons, that she was not in possession of any property other than that comprised in the award, and that she

was not estopped from claiming her share by reason of the partition made between her son and Sarup Chand, or by her actions in relation thereto.

The learned Counsel, who appears for the defendant, concedes that he is not prepared to sustain the objection that a mother is not entitled to a share on a partition made between her son and step-son.

The rule laid down in the *Mitakshara* on the authority of *Yagnayalkya* (Chapter II, verses 116 and 124) is that "if the father makes allotments equal, his wives, to whom no separate property has been given by her husband or her father-in-law, must be rendered partakers of like portions," and "of heirs dividing after the death of the father, she takes an equal share" (*Mitakshara*, Chapter I, section 2, clauses 8 and 9, and section 7, clause (1). In *Damodardas Maneklal v. Uttamram Maneklal* (1) and *Har Narain v. Bishambhar Nath* (2) it has accordingly been held that on a partition between sons and step-sons, a mother is entitled to a share equal to that of her son. It is contended on behalf of the defendant-appellant that according to the custom prevailing in the Marwar country, a widow gets no share, if she has sons in existence but gets maintenance from her son and not from her step-son. The evidence produced in support of that custom is, however, of a most flimsy character. One of the witnesses adduced on the point is Meghraj, who gives two instances, one of which happened 50 years ago, in which the mother claimed no share, and the other 40 years ago, in which the mother lived with her own son and similarly did not claim any share for herself. Madho Lal, another witness, who describes himself as 50 years old, refers to the first instance stating that it happened 25 years ago, but does not know of any other. Tejpal, the third witness, gives no instances at all. The instances cited, if true, are not conclusive because it is possible that in those cases the mother may have been otherwise well provided for and may not have considered it necessary to claim any share in the family property. The witnesses, moreover, do not agree as to the

(1) 17 B. 271; 9 Ind. Dec. (N. S.) 177.

(2) 31 Ind. Cas. 927; 38 A. S. 3; 13 A. L. J. 1129.

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times when those instances occurred, and if they were but infants then, they could not have had any personal knowledge as to the circumstances in which the family property was divided. No *wajib-ul-arz* or other documentary evidence has been filed in support of the alleged custom, and we agree with the learned Subordinate Judge in finding that the defendant-appellant has failed to establish it.

In regard to the argument that the plaintiff is estopped from claiming a share by assenting to the partition made between her son and step-son and asking only for maintenance for herself, it is sufficient to say the defendant-appellant has himself cleared the way for the plaintiff claiming a share in the family property by objecting to the award and getting it modified, so far as it directed the payment of a maintenance of Rs. 100 per year to her out of his share. It was open to the plaintiff at the time of partition to content herself with maintenance or to claim a share equal to that of her son in the family property. She preferred the former course for the time being and moved the arbitrator to allow to her a cash maintenance. But the effect of the objection urged by the defendant-appellant in the proceeding taken by the plaintiff and her son to enforce the award was that the award so far as it directed defendant to pay maintenance was disturbed, and it is not now open to him to say that she had made her election and had become estopped by her previous conduct from claiming a share. As pointed out by Caspersz, an estoppel against an estoppel setteth the matter at large (Caspersz on Estoppel, 4th Edition, section 426); and the effect of the setting aside of the award in regard to maintenance, therefore, would have been, even if there had been an estoppel, to restore the *status quo ante* and to justify the plaintiff in claiming her share in the family property. It is urged on behalf of the defendant-appellant that the plaintiff is in possession of ornaments worth Rs. 5,000, the value of which should be credited in reducing the share claimed by her in the family property, and reliance is placed in support of that contention on *Poorendra Nath Sen v. Hemangini Dassi* (3).

As pointed out in *Mitakshara* (Chapter I, section 7, clause 2, and Chapter II, section 11, clauses 34 and 35), there might be cases where the possession of separate property by the mother might have the effect of reducing *pro tanto* the share which she may be entitled to on partition. But it is clear from the award and the evidence of the arbitrator that the ornaments held by the plaintiff and by the wives of Harak Chand and Sarup Chand were included in the partition and divided into two equal shares, and the deficiency in the value of those possessed by the wife of Sarup Chand was made good by the transfer of certain specific ornaments valued at Rs. 1,200 from the plaintiff to the defendant-appellant to equalize his share. The ornaments held by the plaintiff thus form a part and parcel of the share of Harak Chand, and they cannot, therefore, be credited in reducing the share to which the plaintiff is entitled. According to the decree (Exhibit 4), the award still holds good so far as it allotted to the plaintiff a maintenance allowance of Rs. 150 per year from her own son, Harak Chand, and she is consequently entitled to claim only a one-sixth share out of the half allotted to Sarup Chand.

In a suit for partition the costs of the suit are generally paid by the parties in proportion to their shares, as the partition is generally for their mutual benefit. The costs incurred by the defendant-appellant should not, however, be charged against the plaintiff, as his defence has been far from straightforward. As the plaintiff has been found entitled to a decree to the extent of a one-sixth share, she will be allowed half of her costs here and below from the defendant-appellant and ought to bear the remainder herself.

The appeal is consequently allowed so far that the decree of the Court below will be confined to the plaintiff's one-sixth share out of the half share allotted to the defendant-appellant under the award. The plaintiff will get half of her costs here and below from the defendant-appellant and bear the remainder of her costs herself.

(3) 1 Ind. Cas. 523; 12 C. W. N. 1002; 36 C. 75.

Appeal allowed; Decree modified.

PARAMANANDA SINGH v. SYJOU SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1241
OF 1914.

May 31, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.PARAMANANDA SINGH—DEFENDANT—
APPELLANT
versusSYJOU SINGH—PLAINTIFF—
RESPONDENT.*Landlord and tenant—Tenant holding over without
landlord's assent, right of—Ejectment—Notice to quit,
necessity of—Landlord and Tenant Procedure Act (VIII
B. C. of 1869), s. 53.*

Under the Bengal Landlord and Tenant Procedure Act a tenant, who is not a cultivator with a right of occupancy, remaining in possession, without the landlord's assent after the expiration of his lease, does not acquire any interest in the land and is liable to be ejected forthwith in the manner prescribed in section 53 of the Act without any previous notice to quit. [p. 201, col. 2.]

Semble.—The position might be different where the provisions of the Bengal Tenancy Act apply. [p. 203, col. 1.]

From the mere fact that the landlord tolerates the continuance in occupation of the tenant after the expiry of the term of his lease, the inference does not follow as a matter of course that he accepts his former tenant as his tenant in future. [p. 202, col. 2.]

On the determination of the lease for a term, the lessee is bound to surrender possession to the lessor; on default he may be ejected without notice to quit, unless he has been allowed to hold over with the landlord's assent, either express or implied; but the mere continuance by a tenant of his possession after the expiration of his lease does not give him the status of a tenant. [p. 201, col. 2; p. 202, col. 1.]

Appeal against the decision of the Subordinate Judge, Sylhet, dated the 10th March 1914, reversing that of the Munsif, Karimgunj, dated the 24th February 1913.

Babu Bhupendra Chandra Guha, for the Appellant.

Babu Birendra Chandra Das, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in an action in ejectment. On the 18th April 1904, the defendant took a lease of the disputed land from the plaintiff for a term of three years, from the 13th April 1904 to the 12th April 1907. The lease provided explicitly that the tenant would give up possession upon the expiry of the term and that, if he desired to continue as tenant, he would take a fresh

lease. The term expired, but the defendant neither took a fresh lease nor made over possession of the land to the plaintiff. The consequence was that on the 8th and 15th October 1910, the plaintiff gave notices to the defendant and asked him to quit the land on the 13th April 1911. This demand was infructuous, and on the 29th June 1911 the plaintiff commenced this action to eject the defendant. The Subordinate Judge has held that the tenancy terminated upon the expiry of the prescribed term of three years and that thereafter, as the landlord did not assent to the continuance of the occupation by the defendant, the latter became a trespasser liable to be ejected without service of notice to quit. On the present appeal, this view has been assailed as erroneous in law.

The disputed land lies in the district of Sylhet, where Act VIII of 1869 B. C. is still in operation. Section 53 lays down that whenever in any suit, brought by any *zemindar* or other person in receipt of the rent of the land, to eject any cultivator not having a right of occupancy or to eject any farmer or other tenant holding only for a limited period, after the determination of the lease or tenancy, the Court shall pass a decree in favour of the plaintiff, no application in the form provided in section 212 of Act VIII of 1859 shall be necessary, but the Court shall forthwith, upon the plaintiff depositing in Court the necessary expenses, make an order for delivery of possession in execution of the decree. In the present case, the Subordinate Judge has found that the defendant is not a cultivator with a right of occupancy. Consequently, on the determination of his lease, he was liable to be ejected forthwith in execution of a decree in the manner prescribed in section 53. But it has been argued that as he has remained in possession after the expiry of the term of the lease, he has acquired an undefined interest in the land and is entitled to continue in occupation till that interest has been determined by notice to quit. This argument is entirely fallacious.

On the determination of a lease for a term, the lessee is bound to surrender possession to the lessor; on default he may be ejected without notice, for though he

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entered into the land with right, he has remained without right, as the tenant cannot be said to hold over unless the landlord assents to the continuance of his possession: *Durgi Nikarini v. Goberdhan Bose* (1). But the appellant has contended that the mere continuance of his possession gives him the status of a tenant, and, in support of this view, has invited our attention to the decision in *Huronath Roy v. Smith* (2). That case is clearly distinguishable. There, under the terms of the lease, the tenant was entitled to retain possession of a part of the premises, even after the expiry of the term, and was bound to execute a fresh settlement in respect of such portion. The question arose, whether the mere fact that such fresh lease had not been executed, affected the position of the tenant; the answer was adverse to the landlord, for it was found that the tenant had expressed his readiness to accept the lease from the landlord, who had refused to execute the document. There is, on the other hand, a long line of authorities in this Court which negative the contention of the appellant. Reference may be made to the judgment of Sir Barnes Peacock, C. J., in *Ram Khelawan Singh v. Musammatt Soondra* (3) where the Chief Justice observed that, according to English Law and according to general principles of justice, if, after the expiration of a lease, a landowner continues to receive rent for a fresh period, he must be deemed to have acquiesced in the tenant's continuing to hold upon the terms of the original lease and cannot turn out the tenant or treat him as a trespasser without giving him reasonable notice to quit. In the earlier decision of *Mackintosh v. Gopee Mohan Mozoomdar* (4) the proposition was formulated that to justify a holding over after expiry of a lease, a direct consent on the part of the landlord is requisite; and that no implication of consent can or should be received, where there has been every opportunity of consent in express terms. Later decisions,

specially those of *Sadhoo Jha v. Bhupwan Oopadhya* (5), *Sofaoll Khan v. Woopean Khan* (6), *Jumaut Ali Shah v. Chutturdharee Sahee* (7) and *Ganapathi Mudali v. Venkatalakshminarasayya* (8), indicate that this rule was too broadly expressed and that the assent of the landlord to the continuance of the occupation of the tenant after expiry of the term may be indicated by acceptance of rent or by conduct which justifies an inference to that effect. But there is no authority, except possibly a dictum of Patteson, J., in *Doe v. Thomas v. Field* (9) mentioned in *Faby v. O'Donnell* (10), which supports the proposition that merely because the landlord tolerates the continuance in occupation of the tenant after the expiry of the term, the inference follows as a matter of course that he accepts his former tenant as his tenant in future. This proposition is, on the other hand, opposed to the decision in *Ratan Lal Gir v. Farshi Bibi* (11). It is also opposed to the decision of Mansfield, C. J., in *Doe v. Godsell v. Inglis* (12), where the contention was that, as the tenant had continued in occupation after the expiry of the term, he was entitled to notice to quit, though there was nothing to indicate that his continuance had been accepted by the landlord. Mansfield, C. J., observed: "You do not show that the holding subsequent to the expiration was with the assent of the lessor." Reliance was there, as here, placed upon the fact that the landlord had served a notice to quit; and it was argued that this circumstance afforded an unfailing indication that the defendant was still a tenant, whose tenancy was required to be terminated by a notice to quit. This contention was overruled in the following terms: "This writing is not in the least like a notice to quit; but it is a mere demand of possession, the defendant's term having sometime since expired. The lessor of the plaintiff need not have given any

(1) 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 595.

(2) 2 W. R. 73.

(3) 7 W. R. 152.

(4) 4 W. R. 24.

(5) 5 W. R. Act X Rulings 17; 1 Ind. Jur. (N. S.) 75.

(6) 9 W. R. 123.

(7) 16 W. R. 185.

(8) 25 Ind. Cas. 109; (1914) M. W. N. 728.

(9) (1831) 2 Dowling P. C. 542.

(10) (1870) 4 Ir. R. C. L. 332 at p. 335.

(11) 34 C. 396; 11 C. W. N. 526.

(12) (1810) 3 Taunt. 54; 128 E. R. 22.

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notice at all; but the circumstance of his having given a notice will not hurt him." In our opinion, it is incontrovertible that the defendant in this case ceased to be tenant upon the expiry of his term and is liable to be ejected in the manner prescribed in section 53 of Act VIII of 1869 B. C. The position might have been different if the provisions of the Bengal Tenancy Act had governed this case; but we need not deal with this aspect of the matter, because that Statute admittedly has no application.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 110 AND 115
OF 1914.

September 11, 1916.

Present:—Mr. Lindsay, J. C., and
Mr. Kendall, A. J. C.

BAQAR MIRZA—DEFENDANT NO. 2—

APPELLANT

versus

Mirza MEHDI HASAN—PLAINTIFF,
WAZIR BEGAM AND ANOTHER—DEFENDANTS
NOS. 1 AND 3—RESPONDENTS.

Muhammadian Law—Shia School—Inheritance—Widow's right of succession to landed property of her deceased husband—"Landed property," meaning of—Marriage—Muta—Nikah, before expiry of period of muta, validity of—Oudh Laws Act (XVIII of 1876), s. 5—Reasonable dower, matters to be considered in determining—Dower, whether can be claimed in suit for share in inheritance.

A childless *Shia* widow is not entitled to any share in the landed property of her deceased husband. [p. 208, col. 2.]

A right to receive a fixed annual sum of money in the nature of a rent charge is not 'landed property' within the meaning of the above rule, so as to exclude the widow from participation therein. [p. 209, col. 1.]

A grant of *muafi* land is a grant of the full proprietary interest in the land free of the revenue, and what the grantee takes under the grant is 'landed property' within the meaning of the above rule. [p. 209, col. 2.]

A marriage by *nikah* with a *muta* wife during

the subsistence of the period of *muta*, but after the surrender of the unexpired period, is valid. [p. 207, col. 1.]

In considering a claim of dower under section 5 of the Oudh Laws Act, the first matter to be regarded is whether the sum actually agreed upon is excessive with reference to the means of the husband. If it is not found to be so, there is no occasion to discuss the status of the wife for the purpose of reducing the amount [p. 207, col. 2.]

In considering whether the amount agreed upon is excessive with reference to the means of the husband in cases where the claim is made by a widow, regard must be had to the value of the husband's estate at the time of his death. The principal matters to be considered in deciding whether a certain sum is excessive or not, are the extent and nature of the claims of the various persons who as heirs are entitled to divide the estate. If it is made to appear that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for, such a sum would be considered excessive. [p. 208, col. 1.]

The claim of a widow for dower is, under the Muhammadan Law, a debt chargeable against the general estate of the deceased husband. [p. 205, col. 2.]

It is a clear principle of the Muhammadan Law, applicable alike to *Shias* and *Sunnis*, that the estate of a deceased Muhammadan is, before its distribution among the persons entitled as heirs, liable for the debts which were owing by the deceased at the time of his death. Therefore, the widow of a deceased Muhammadan is competent to put forward her claim for dower in a suit brought by one of the heirs of the deceased for a share in the estate, to which she is a party. [p. 205, col. 2.]

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 30th April 1914.

Messrs. B. E. O'Connor and Abid Husain, for the Appellant.

Mr. Wazir Hasan and Sheikh Ali Abbas, for the Respondents.

JUDGMENT:—These are the appeals of two defendants who were impleaded in a suit brought for partition in the Court of the Subordinate Judge of Lucknow by one Nawab Mirza Mehdi Hasan Mirza. The suit was instituted for the purpose of effecting a division of the estate of one Nawab Faghfur Mirza, who died on the 6th of December 1911. The two appellants in these appeals Nawab Baqar Mirza and Nawab Khurshed Mirza were arrayed as defendants Nos. 2 and 3 respectively and it is an admitted fact that they along with the plaintiff are brothers of the deceased Faghfur Mirza. The first defendant in the case was a lady named Nawab Wazir Begam, who, according to the statements contained in the plaint

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was the widow of the deceased Faghfur Mirza. In setting out the particulars of his claim to a share in the estate of his deceased brother, the plaintiff admitted that Nawab Wazir Begam was entitled to a share of Faghfur Mirza's property in accordance with the Shia Law which governs the relations of the parties. Nawab Baqar Mirza and Khurshed Mirza, the appellants, who are now before us admitted the right of the plaintiff to a share in the inheritance, but they denied that the first defendant Nawab Wazir Begam was a lawful heir of Nawab Faghfur Mirza. They affirmed in paragraph 10 of the common written statement which they filed that the first defendant was in reality a woman named *Musammât Waziran*, who had been the daughter of a servant once in the employ of Nawab Faghfur Mirza. They alleged that no connection, lawful or unlawful, had ever existed between Wazir Begam and Nawab Faghfur Mirza. In short the case for these defendants-appellants was that Wazir Begam, as she is called in the plaint, was nothing but a domestic servant. We may notice here that there was a fourth defendant in the case one Lala Brijbhukhan Das, who was impleaded on the ground that certain items of moveable property left by the deceased Faghfur Mirza had been pledged with him with the consent of the other parties to secure loans amounting in all to Rs. 4,500. The case which the first defendant Wazir Begam put forward was that she was the lawfully wedded wife of Nawab Faghfur Mirza. In the 10th paragraph of her written statement she asserted that she had come into the household of Nawab Faghfur Mirza at Lucknow some 24 or 25 years before the suit was instituted, being at that time of the age of 5 or 6 years. Her story was that she had been brought to Lucknow by her mother, who had been sent from Calcutta for the purpose of offering condolence to Nawab Faghfur Mirza on the occasion of the death of his first wife Sughra Begam. In paragraph 11 of her written statement she set out that after having resided for some time in Nawab Faghfur Mirza's house she was contracted in marriage to him in the *muta* form for a period of four years. In the twelfth paragraph it was stated that in the month of October 1900 Nawab Faghfur Mirza entered into a *nikah* contract of marriage

with her and that her dower was fixed at a sum of Rs. 50,000. She alleged in this paragraph of the written statement that after this marriage was celebrated, she was acknowledged by the relatives of Nawab Faghfur Mirza as the latter's lawfully wedded wife. On the basis of these allegations Nawab Wazir Begam claimed not only to be an heir of Nawab Faghfur Mirza and entitled to her share of the estate under the Shia law, but she also claimed that before any division of the estate could be made she was entitled to receive out of it the sum of Rs. 50,000 which had been fixed as her dower at the time of the marriage contract in October 1900. There were other pleas taken which it is not necessary for us to refer to here. On the strength of these written pleadings filed by parties and of the further statements which were made to the Court eleven issues were framed by the Subordinate Judge. He came to a finding upon each of these issues and the result was that the plaintiff's claim was decreed in accordance with certain findings of the Subordinate Judge, one of which was to the effect that Nawab Wazir Begam was the lawfully wedded wife of Nawab Faghfur Mirza and was entitled to a share in certain items of his estate. The Subordinate Judge also found that Nawab Wazir Begam was entitled to a sum of Rs. 50,000 dower and directed that this money should be paid out of the estate before distribution to the parties who are entitled as heirs. The defendants Baqar Mirza and Khurshed Mirza have now filed separate appeals against the decree of the Court below. Both appeals have been heard together and as they both proceed on common grounds, one judgment will suffice for the purpose of disposing of them. Leaving out of consideration one or two grounds set out in the memoranda of appeal which were not pressed by the learned Counsel for the appellants, we find that six points are raised for decision. The first point taken is that Nawab Wazir Begam ought to have been driven to a separate suit for the purpose of establishing her status as an heir of Nawab Faghfur Mirza. It is pleaded that as she was not in possession of the property in dispute, she should not

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have been allowed to urge a claim in a suit of this nature. The *next* point taken is that it was not open to Nawab Wazir Begam to put forward any claim for dower in a suit brought by one of the heirs of Nawab Faghfur Mirza for division of the estate. The *third* question for decision is whether or not it is proved that Nawab Wazir Begam was duly married to Nawab Faghfur Mirza, the case for the appellants is that this marriage was not proved. The *fourth* point for decision relates to the amount of dower. The case for the appellants in this connection is that even if the factum of marriage be admitted and it be found that *Musammât* Wazir Begam is entitled to claim her dower in the present suit, the sum of Rs. 50,000 which she has claimed, and which the Subordinate Judge has allowed, was excessive and ought to be reduced. The *fifth* point relates to the question of Nawab Wazir Begam's title to a share in certain landed properties known as the *jaqir* properties. Her claim with respect to these items of property was admitted by the Court below. The case for the appellants is that Nawab Wazir Begam is not entitled to any share in these particular items. *Lastly*, there is a question relating to the order of the Court below in the matter of costs.

We proceed to deal with each of these points in the order just mentioned; and *first* of all we have to consider the plea taken to the effect that Nawab Wazir Begam ought not to have been allowed to set up her rights in the present suit. According to the plea taken in the *first* ground of the memorandum of appeal presented by the appellant Nawab Baqar Mirza, it would seem that the case for the appellant is that because they admitted the claim of the plaintiff Nawab Mirza Mehdi Hasan Mirza, the Subordinate Judge ought to have refused to adjudicate upon the question of Nawab Wazir Begam's right to have a share in this estate and ought to have referred her to a separate suit. We may dispose of this point very shortly. We think there is no force whatever in this ground of appeal. We start with the fact that the plaintiff, who is undoubtedly entitled to a share in the estate of his

deceased brother, has admitted the right of Nawab Wazir Begam to a share, she being a widow of Nawab Faghfur Mirza. It is quite obvious that no proper decision regarding the extent of the shares of the various persons entitled to divide the estate between them could have been arrived at by the Subordinate Judge without his coming to a finding on the issue as to whether or not Nawab Wazir Begam was one of Nawab Faghfur Mirza's heirs, and this being the case it appears to us to be futile to put forward a contention that the claim of Nawab Wazir Begam could not be considered in the present suit. On the contrary we are of opinion that the Court acted very properly in dealing with this issue in order to come to a decision as to the rights and liabilities of all the parties interested.

The *second* question for determination is whether or not Nawab Wazir Begam should have been allowed to put forward her claim for dower in these proceedings. Here again we think we may dispose of this part of the appeal in a very few words.

We take it to be a clear principle of the Muhammadan law, applicable alike to *Shias* and *Sunnis*, that the estate of a deceased Muhammadan is, before its distribution among the persons who are entitled as heirs, liable for the debts which were owing by the deceased at the time of his death. It is also an accepted principle of the Muhammadan Law that the claim of the wife for dower is a debt which is chargeable against the general estate of the deceased husband where the claim is made after his death. We fail to see, therefore, on what ground it can reasonably be contended that if it be proved that Nawab Wazir Begam was the wife and, therefore, an heir of Nawab Faghfur Mirza and as such entitled not only to share in some portions of his estate but also to dower, she was not competent to put forward her claim in the present suit to which she, as an heir, was a necessary party. On the contrary, we think that this was the proper occasion upon which a claim of this sort could be put forward and entertained so as, for the benefit of all the parties entitled to share in the

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estate, to put an end to all further litigation. Various authorities have been cited to us upon this matter by the learned Counsel on either side, but the principle appears to us to be so clear as to render it unnecessary for us to discuss any of the cases which have been put forward for our consideration. We are satisfied that so far as this ground of appeal is concerned neither of the appellants has any case.

We come now to the most important of all the questions which are raised for decision here, and that is the question of Nawab Wazir Begam's marriage with the deceased Faghfur Mirza. We have already referred to the case which the lady herself set up in her written statement and we have adverted to the fact that the plaintiff had in his plaint admitted her right to a share in the inheritance as the widow of Nawab Faghfur Mirza. We have also referred to the pleas taken by the second and third defendants, in which they denied this lady's status as a wife and pleaded that she was nothing more than a menial servant in Nawab Faghfur Mirza's household. On the 2nd of April 1913, the date upon which the issues were framed, a *nikahnama* (Exhibit A-I) was put in on behalf of Nawab Wazir Begam.

According to this document the marriage between Wazir Begam and Nawab Faghfur Mirza was celebrated on the 16th *Jamadi-us-sani* 1318 H., corresponding to the 12th October 1900. In the body of this document it is stated that the marriage was solemnized with the assistance of two persons named Molvi Saiyed Husain Saheb *alias* Allan Saheb, a *mujtahid*, and his son one Saiyed Mohammad *alias* Agha Saheb. The latter is said to have acted as *wakil* on behalf of Nawab Faghfur Mirza whilst Allan Saheb, the *mujtahid*, is said to have performed this office on behalf of the lady who is described in the document as "Nawab Wazir Begam Saheba, the daughter of Mirza Abdullah." The document further recites that the dower had been fixed at a sum of Rs. 50,000. On one margin of the deed there are three impressions of the seal of Nawab Faghfur Mirza, over which is a signature alleged to be the signature of Faghfur Mirza himself. An-

other seal affixed on the margin of the deed purports to be that of Nawab Mirza Mohammad Mirza Bahadur, whose signature is also attached to the document. The third seal is that of Nawab Khurshed Mirza, the third defendant in the case. His signature, too, is also to be found on the deed. The fourth seal and signature on the document is that of Mirza Mehdi Hasan Mirza, the plaintiff in the present case, and after this we find the signature (without a seal) of Saiyed Abujafar, an important witness in the case. At the head of the document on one side of it there is what purports to be the signature of Saiyed Mohammad *alias* Saiyed Agha, the son of the *mujtahid*, whilst on the opposite side we have what purports to be the signature of the *mujtahid* himself, beneath which there is attached the impression of a seal said to have been the seal of Allan Saheb. This is the principal piece of direct documentary evidence put forward for the purpose of establishing the fact that a *nikah* was celebrated between Nawab Wazir Begam and Nawab Faghfur Mirza. The plaintiff Nawab Mirza Mehdi Hasan Mirza admitted the genuineness of this document and supported the case which was put forward upon the strength of it. He admitted that his signature was attached to the margin of the deed and that the deed also bore the impression of his seal. Similar evidence was given by the witness Mohammad Mirza and Abujafar, also a witness in the case, has sworn to his signature on the document. On the other hand Nawab Khurshed Mirza, the third defendant, has denied the genuineness of the attestation which purports to have been made by him. Allan Saheb the *mujtahid* and his son Saiyed Agha are both dead and so, of course, is Nawab Faghfur Mirza, the principal signatory of the deed. The case of Nawab Wazir Begam was sought to be proved in the Court below both by oral and documentary evidence and we think we may profitably refer in the first instance to the direct oral testimony adduced by her for the purpose of proving the marriage.

[The learned Judicial Commissioners, after discussing the evidence, oral and documentary, produced by both the parties in support of this issue, proceeded as follows:—]

The evidence, oral, documentary and circumstantial, is overwhelmingly in favour

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of the case set up by Wazir Begam and we hold her, therefore, to be the widow of Faghfur Mirza and entitled to her lawful share of the estate.

Before parting with this question we may notice briefly two points which were raised in argument by the learned Counsel for the appellants, points which do not appear to have been argued in the Court below. It was contended that the *nikah* said to have been entered into in 1900 could not be a valid union, by reason of the fact that a portion of the period of the earlier *muta* marriage was still unexpired at the time the *nikah* ceremony was celebrated. We have it, however, from Abujafar, whose evidence we are prepared to accept, that Faghfur Mirza surrendered the rest of the *muta* period before the second marriage took place and we regard this as disposing of this criticism of the validity of the *nikah*.

Another point made was with respect to the age of Saiyid Agha, the son of the *mujtahid* at the time of this marriage. The evidence is that he acted as *vakil* on behalf of Faghfur Mirza, and certain evidence, particularly that of Zafar Mehdi, has been referred to for the purpose of showing that Saiyid Agha could not have been more than 7 or 8 years of age in October 1900 and, therefore, incapable in law of representing his principal. We have expressed our opinion of the value of Zafar Mehdi's evidence elsewhere and are not prepared to accept his estimate of his brother's age—a vague estimate as it is. We prefer to rely upon the evidence of another relative, Sakhawat Husain, according to whom Saiyid Agha must have been 17 or 18 years of age at the time the marriage took place. If this be so, Saiyid Agha was of full age according to Muhammadan Law which recognises the age of puberty (15 years) as the age of majority.

It having now been found that Nawab Wazir Begam was the duly married wife of Faghfur Mirza and that there is no legal obstacle to her setting up her claim to dower in the present suit, we have next to consider the amount which should be allowed to her on this account. She claims a sum of Rs. 50,000, which she says was the sum agreed upon at the time the *nikah* ceremony was performed,

and the lower Court has held her to be entitled to the whole of this sum.

The case for the appellants is that this sum is excessive and it may be noted here that the plaintiff also, while admitting the claim of Wazir Begam to dower, contended that the amount claimed by her is unreasonably high. The argument is that the social status of Wazir Begam having been of low degree the claim is extravagant.

The law on the subject is to be found in section 5 of the Oudh Laws Act, which lays down that where the amount of dower stipulated for is excessive with reference to the means of the husband, the entire sum shall not be allowed but only such a sum as the Court may consider reasonable, regard being had to the means of the husband and the status of the wife. The first matter to be considered, therefore, is whether the sum agreed upon is excessive with reference to the means of the husband. If it is not found to be so, it is unnecessary to go any further and there is no occasion to discuss the status of the wife for the purpose of reducing the amount.

The Subordinate Judge has held that the amount claimed was agreed upon at the time of the marriage and that it cannot be deemed excessive in view of the fact that the value of the estate left by Faghfur Mirza is admittedly Rs. 2,86,000.

We are of opinion that the decision of the lower Court on this issue should be maintained.

First with reference to the allegation of Wazir Begam that her husband agreed to pay her Rs. 50,000 for the dower, although for reasons already given we have not been able to hold that the *nikahnama* (Exhibit A-1) is satisfactorily proved, we are satisfied that Wazir Begam's statement is true. It is supported by the evidence of the confidential servant Abujafar, whose testimony in this connection we are prepared to accept. We have already mentioned that there is every reason to suppose that Faghfur Mirza was bent upon contracting this *nikah* marriage with Wazir Begam and, we think, there can be no doubt that it was his devotion to this woman which drove him to divorce Malka Begam in spite of the fact that she was a lady of wealth and of high rank. And we think there can also

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be no doubt that Wazir Begam had a very strong influence over her husband. It is by no means improbable, therefore, that she succeeded in obtaining from him a promise to pay her a large sum for dower—a sum which a person in her station of life might not ordinarily expect to obtain. Abujafar deposes that Wazir Begam was demanding a lakh of rupees for her dower and that Faghfur Mirza would, on account of his infatuation for her, have agreed to pay this sum had it not been for his (Abujafar's) persuasion. Abujafar himself thought that ten or fifteen thousand rupees would have been a handsome provision, but it seems that the lady took full advantage of her influence over Faghfur Mirza and held out for a great deal more, and ultimately there was a compromise for Rs. 50,000. We may add, Abujafar's testimony as to the amount fixed is corroborated by the statements of the other witnesses who were present at the marriage including the plaintiff, who admitted frankly in the witness-box that the sum agreed upon was Rs. 50,000. This is a weighty piece of evidence in favour of the lady's claim.

The question then remains whether this amount is excessive with reference to "the means of the husband"—this latter expression signifying, according to the rulings of this Court, the value of the husband's estate at the time of his death in cases where the claim is made by a widow. We have been referred to a number of decisions given in cases of claims for dower for the purpose of showing on the one hand that the demand in the present case is excessive and on the other hand that it is reasonable: but it is apparent that no hard and fast rule can be formulated so as to enable us to say that any sum in excess of a fixed proportion of the value of the assets is unreasonable. Each case must be decided upon its own merits: and we think the principal matters to be considered are the extent and nature of the claims of the various persons who as heirs are entitled to divide the estate. If it were made to appear that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for, it might reasonably be held that such a sum was excessive.

What do we find in the present case? Faghfur Mirza has left no children whose claims have to be considered. The only heirs besides the widow are his three brothers, whose claims need not be treated too tenderly in view of the fact, established by evidence on the record, that they lived upon Faghfur Mirza for most of the time he was alive. It is admitted that both the plaintiff and Khurshed Mirza had become impoverished through extravagant living. Baqar Mirza also admits that he managed to get rid of most of the property he inherited and though he does not seem to have been so dependent upon Faghfur Mirza as his other brothers, he acknowledges that he was not too proud to accept a small monthly allowance from him. In these circumstances we are satisfied that the three brothers can have no legitimate complaint if the dower-debt, which comes to a little more than one-sixth of the value of the whole estate, is paid in full to Wazir Begam.

The next matter for disposal is the question of the right of the widow to take a share in certain immoveable property left by Faghfur Mirza, which the Subordinate Judge has described by the name of "*jagir* property." We may take it as settled law that a childless *Shia* widow is not entitled to any share in the landed property (*arz*) of her deceased husband. The parties are agreed that we have to deal in this connection with only four items of property which are described in Exhibit A-14, the copy of the statement which the deceased Nawab furnished to the Deputy Commissioner of Lucknow in January 1911. One of these items, called Patti Sairpur, is admittedly ordinary *zemin-dari* property and it is conceded that the widow is not entitled under the *Shia* Law to any portion of this. The other three items consist of shares in three villages Baraun Khurd, Pirnagar and Barai Ramna. It is these items to which the collective expression "*jagir* property" has been applied by the Subordinate Judge: but it is admitted that the rights in these three villages are not identical in nature.

Baraun Khurd and Pirnagar are held in what is called *muafi* tenure, that is to say, these properties were granted free of liability to pay Government revenue. The

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co-sharers are the proprietors of the soil. In the case of Barai Ramna the situation is different. This village is settled with third parties, but the revenue which would ordinarily be payable to the Government has been assigned for the benefit of others—and the deceased Nawab was in virtue of this assignment entitled to receive from the proprietors of Barai Ramna a certain share of the land revenue, 9 annas odd out of 16 annas. So far as this last property is concerned, we are satisfied that it cannot be described as landed property once owned by Faghfur Mirza. The property consists in the right to receive a fixed annual sum of money in the nature of a rent-charge: and the widow is not excluded by the rule of Shia Law from participation in property of this description. We think the Court below was right in allowing Wazir Begam her due share of this item. But we are unable to accept its decision with regard to the widow's rights in the shares held in Baraun Khurd and Pirnagar, which were surely nothing else than the landed property of Faghfur Mirza. The view taken by the Subordinate Judge, which we have been asked to endorse in appeal, is that the property in these two villages is made up of two constituent elements, namely, (1) proprietary rights in the soil granted in the ordinary way with a condition that a portion of the income should be paid to Government in the shape of land revenue, and (2) a right to appropriate this portion of the income to which the Government has waived its claim. The widow, it is said, has no share in the first of these elements; but it is contended she can claim a share of the second, which represents in a way a money income which has been granted by Government. We are unable to accept this view, based as it is upon a fiction that there has been a grant of an annual income equal to amount of the land revenue ordinarily assessable. It is true, of course, that for certain fiscal purposes connected with the payment of rates and cesses there has been an assessment of these villages to land revenue, but the fact remains that the grantees hold the land free from the obligation to pay revenue, which under the law constitutes

the first charge on the soil. It is open to the Government to dispose of the land in whatever way it chooses: ordinarily the grant of the proprietary right is made subject to the charge for land revenue: but if the grant is made free of the charge, we take it that what is granted is the full proprietary interest in the land and what the grantees takes in such circumstances is clearly landed property.

We hold, therefore, that Wazir Begam is not entitled to any share of inheritance in either of these *muafi* villages, Baraun Khurd and Pirnagar.

There now remains for disposal a question relating to the manner in which costs were awarded by the Court below. The Subordinate Judge has directed that the plaintiff's costs be paid to him out of the estate, the costs of the first defendant Wazir Begam being charged to the second and third defendants. In the memorandum of appeal filed by the second defendant Baqar Mirza, the plea is taken that the plaintiff should have been made to bear his own costs. We think not. It was the contumacy of the second and third defendants which made it necessary for the plaintiff to bring this suit, and we are of opinion that in the circumstances the lower Court's order as to costs is a proper one with which we should not interfere, except in one respect to be presently noticed.

In conclusion we have a few observations to make with regard to the manner in which the proceedings on Commission in the lower Court were conducted by the Pleaders engaged for the parties. In cases like the present which occur not infrequently in the city of Lucknow, it is necessary to have on record the evidence of *pardanashin* ladies who cannot be asked to attend personally in Court. Consequently recourse has to be had to the procedure sanctioned by Order XXVI of the Code of Civil Procedure and directions have to issue for taking of the evidence of these ladies by a Commissioner appointed for the purpose. Judging from our experience of other cases which have been before us and from what has happened in the present case, it would seem that certain members of the legal profession entertain some curious notions regarding their duties in the matter of examination and

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cross-examination of witnesses. We regret to have to observe that we have found here as in other instances the unedifying spectacle of female witnesses being badgered and harassed in the witness-box with questions not merely irrelevant and futile but in some cases all but indecent. The proceedings on Commission have been protracted from day to day in the interests of the Pleaders engaged and without the slightest regard for the convenience of the witnesses—the result being not merely delay and expense to the parties but acute discomfort and annoyance to witnesses who are specially entitled to protection against such treatment.

We have on more than one occasion condemned in strong language the behaviour of members of the legal profession who seem to be lost to all sense of what is due from them in the matter of professional behaviour and as previous warnings appear to have been disregarded, it is necessary for us to say here that any future instances of departure from the rules of professional decorum will be dealt with rigorously under the powers conferred by the Legal Practitioners Act. We may refer here to some observations of the Privy Council in their judgment recently delivered in the appeals of *Sadik Husain Khan v. Hashim Ali Khan* (1), in which their Lordships animadvert upon the impropriety of the questions which were put in cross-examination and the gross delay and inconvenience caused by the intervals between one period and another of cross-examination. Meantime we are of opinion that the presiding officers of subordinate Courts should as far as possible endeavour to arrange to take the evidence of such witnesses themselves instead of entrusting the duty to a Pleader who can exercise practically no control over the proceedings. And further with a view to putting an end to the scandalous annoyance and delay caused by futile and perverse cross-examination, we think that the Courts would be well advised when taxing costs between the parties to refuse any costs in respect of the fees paid to Counsel who offend in this respect.

In the present case we propose to mark our sense of the impropriety of the behaviour of the Counsel of all parties in the lower Court by striking out from the schedule of costs all the items relating to Pleaders' fees.

The result is that the appeals before us succeed to the extent that the decree of the Court below is modified by declaring that Nawab Wazir Begam is not entitled as heir to any share in the properties in Baraun Khurd and Pirnager, and by further striking out of the schedule of costs the items relating to Pleaders' fees. In other respects the appeals fail and are dismissed. We direct the appellants to pay the separate costs of this Court of the defendant-respondent Wazir Begam and the plaintiff-respondent Mirza Mehdi Hasan Mirza.

We think it proper also to add the following directions to be carried out by the Court below in distributing the estate and preparing the final decree. The debts will be paid first, namely, the sum due to Nawab Wazir Begam for her dower and the debt owing to Lala Brijbukhan Das, the fourth defendant, with whom, admittedly, the heirs of Faghfur Mirza have pawned certain of the moveable property belonging to the estate.

The sum due to the plaintiff in respect of costs in the Court below (as amended by this Court's decree) will then be deducted and the balance of the estate will then be distributed, subject in the case of the defendants Khurshed Mirza and Baqar Mirza to deduction in equal proportions from their shares, when ascertained, of the amounts due by them to Wazir Begam on account of costs in the Court below as modified by this Court's decree, and of the amounts which they are liable to pay to Wazir Begam and the plaintiff respectively on account of the costs of this Court.

Appeals accepted in part; Decree modified.

(1) 36 Ind. Cas. 104; 19 O. C. 192; 31 M. L. J. 607; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 14 A. L. J. 1248.

KESHO PRASAD SINGH v. HARBANS RAUT, PANDURANG LAXMAN UPHADE v. GOVINDA DADA UPHADE.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 3850 OF 1914.

April 15, 1916.

Present:—Mr. Justice Mullick.

Maharajah KESHO PRASAD SINGH

BAHADUR—PLAINTIFF—APPELLANT

versus

HARBANS RAUT—DEFENDANT—

RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—Appeal, delay in presenting—Sufficient cause—Stamp not procurable—Copies, time spent in obtaining, exclusion of.

Appellant applied for copies of the judgment appealed against on 12th June, and on the same day filed some folios and stamps. On the 13th he was informed that some more folios would be required which were supplied on the 15th. Copies were delivered on the 18th. On the last day of limitation stamps were not procurable and the next day being a holiday the appeal was presented on the next following day on which the Court was open:

Held, (1) that the appellant was entitled to the exclusion of the whole of the time from 12th to 18th June from the computation of the period of limitation under section 12 of the Limitation Act, and

(2) that the delay caused by appellant's inability to get stamps on the last day of limitation should be excused under section 5 of the Limitation Act.

Dulali Bewa v. Saroda Kinkar Paulit, 3 C. W. N. 55, referred to.

Second appeal from a decision of the District Judge of Saran, dated the 17th July 1914, rejecting an appeal from a decision of the Munsif, Chapra, dated the 30th May 1914.

Mr. Krishna Sahai (for Mr. Probash Chandra Mitter with him Mr. Chandra Sekhar Prasad Singh for Mr. Susil Madhab Mullick), for the Appellant.

Mr. Gursaran Prasad, for the Respondent.

JUDGMENT.—The decree was signed on the 6th of June 1914; application for copy was made on the 12th of June 1914 and on that day some folios and stamps were filed. On the 13th of June 1914, information was given to the appellant before the District Judge that more folios were required. On the 15th of June the balance of the folios was supplied. The copies were delivered on the 18th of June; the appeal was filed on the 15th of July. There having been no unreasonable delay on the part of the appellant to supply folios and to follow up his application for copy of the 12th of June, I think the appellant was entitled to the whole of the time from the 12th of June 1914 to

the 18th of June 1914. The appeal would, therefore, have been in time if filed on the 13th of July. Now the appellant filed an affidavit before the District Judge stating that he could not get a stamp on the 13th of July; the 14th of July was a holiday and the appeal was filed on the 15th of July. The appeal was, in my opinion, in time. It would seem that the learned Judge is in error in holding that the appeal would have been barred if presented on the 13th of July and I invite his attention to *Dulali Bewa v. Saroda Kinkar Paulit* (1). The learned District Judge does not say that the affidavit is false and if the affidavit is correct, then the delay of two days from the 13th of July to the 15th of July ought to have been excused under section 5 of the Limitation Act. The appeal is decreed with costs and the District Judge is directed to hear the appeal.

Appeal decreed; Case remanded.

(1) 3 C. W. N. 55.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 337 OF 1915.

April 5, 1916.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

PANDURANG LAXMAN UPHADE—

AUCTION-PURCHASER—APPLICANT

versus

GOVINDA DADA UPHADE—

JUDGMENT-DEBTOR—OPPONENT.

Civil Procedure Code (Act V of 1908), O XXI, r. 89, object of—Auction-sale, application to set aside, by judgment-debtor after transferring property, if maintainable—Transferee of property, right of, to apply to set aside sale

A judgment-debtor who has transferred his interest in the property to a third person after the Court-sale has still a right to make an application to have the sale set aside under Order XXI, rule 89, of the Civil Procedure Code, 1903, being in the eye of the law the person owning the property. [p. 213, cols. 1 & 2.]

Ishar Das v. Asaf Ali Khan, 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19 *Adapa Subbarayadu v. Tippabhotla-akshminarasamma*, 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 93; (1914) M. W. N. 147; 1 L. W. 53, not followed.

PANDURANG LAXMAN UPHADE v. GOVINDA DADA UPHADE.

The object of rule 89 of Order XXI of the Civil Procedure Code, 1908, is not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable property shall not at Court-sales be sold at inadequate prices. [p. 213, cols. 1 & 2.]

Per *Batchelor, J.*—The change brought about by rule 89 of Order XXI of the Civil Procedure Code, 1908, may be understood as embodying the desire of the Legislature to make it clear that a purchaser acquiring title before the auction-sale is competent to apply under this provision of the law. [p. 212, col. 2.]

Srinivasa Ayyangar v. Ayyathorai Pillai, 21 M. 416; 8 M. L. J. 54; 7 Ind. Dec. (N. S.) 651; *Ramchandra Dhondo v. Rakhmabai*, 23 B. 450; 12 Ind. Dec. (N. S.) 298, referred to.

Application against an order passed by the District Judge, Nasik, in Miscellaneous Appeal No. 8 of 1915, reversing that of the Subordinate Judge, Pimpalgaon, in Darkhast No. 23 of 1914.

Mr. W. J. Nimbkar, for the Applicant.

Mr. K. N. Koyajee, for the Opponent.

JUDGMENT.

[*BATCHELOR, J.*—The question raised in this application is one of some difficulty and arises under Order XXI, rule 89, of the present Code. The circumstances under which it arises are these:—In execution of a decree the judgment-debtor's property was sold by auction and was purchased by the present applicant for a sum of Rs. 166. Thereafter, and before the auction-sale was confirmed, the judgment-debtor for a sum of Rs. 500 privately sold the property to one Gangaram, a stranger. Then within thirty days of the auction-sale the judgment-debtor applied under Order XXI, rule 89, to set aside the sale. The Trial Court dismissed his application, but the District Court has allowed it, and from the District Court's order this application is brought by the auction-purchaser.

The question is, whether it is open to the judgment-debtor to make this application under Order XXI, rule 89, after he has by private sale transferred or attempted to transfer the property to a third party, such private sale being made after the sale by auction. Under Order XXI, rule 89, an application such as this can be made by any person either owning the property or holding an interest therein by virtue of a title acquired before the Court sale. It is not pretended that the

judgment-debtor can come in as a person holding an interest acquired before the Court sale, but it is claimed that he can apply as being in the eye of the law the person owning this property. Now the words which I have quoted from rule 89 differ from the words in which in the Code of 1882 the corresponding enactment was phrased. For there under section 310A of the Act, a section which was introduced by the Amending Act (V of 1894), such an application as this could be made by "any person whose immoveable property has been sold under this chapter." No doubt at first sight it would appear that the generality of the words of section 310A has been cut down and restricted by the phraseology of the present rule 89. But it appears to me that the alteration of language effected by the present rule is sufficiently explained by reference to the conflict which there previously was as to the position of a purchaser acquiring title before the auction-sale. In *Srinivasa Ayyangar v. Ayyathorai Pillai* (1), for instance, it was held that such a purchaser could apply, whereas the contrary view was adopted in *Ramchandra Dhondo v. Rakhmabai* (2). I think, therefore, that the change brought about by rule 89 may be understood as embodying the desire of the Legislature to make it clear that a purchaser acquiring title before the auction-sale was competent to apply under this provision of the law.

So far, therefore, there would appear to be no reason for doubting the correctness of the District Judge's view. But the applicant has relied upon the decisions in *Ishar Das v. Asaf Ali Khan* (3) and *Adapa Subbarayadu v. Tippabhotlallakshminarasamma* (4), which are undoubtedly in favour of that construction of rule 89 for which he contends. I need not discuss the Madras decision in detail, because the stronger case in the applicant's favour is admittedly the Allahabad ruling. It is enough to say, with respect, that I am not able to adopt

(1) 21 M. 416; 8 M. L. J. 54; 7 Ind. Dec. (N. S.) 651.

(2) 23 B. 450; 12 Ind. Dec. (N. S.) 298.

(3) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.

(4) 22 Ind. Cas. 193; 28 M. 776; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59.

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the view that it is open to the subsequent purchaser to apply under this rule, for, as it seems to me, he is excluded by the terms of the rule. The decision in the Allahabad High Court followed upon the argument that rule 89 gave judgment-debtors a last chance of saving the property for themselves and that it was no part of the Legislature's intention that the property should be saved for persons to whom it might be privately sold after the auction-sale had taken place. While fully conscious of the weight due to this argument both on its own merits and by reason of its acceptance by the learned Judges of the Allahabad Court, I cannot but think with very sincere respect that there is another aspect of the question which also must be regarded. For, as I understand these provisions of the law, their object is not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable properties shall not at Court-sales be sold at inadequate prices. If that is an important consideration, then it follows that in such a case as this it is no answer to the judgment-debtor to say that even if his application be granted, the immoveable property will still be lost to him. The reply would be that the loss of the immoveable property is now inevitable, but that the Court will be realizing the intentions of the Legislature if it construes these provisions so as to ensure that the monetary loss falling upon the judgment-debtor be as little as possible. For myself I can see no serious difficulty in holding that for the purposes of the rule the judgment-debtor in the position of the present applicant is still the owner of property in the eye of the law, the auction-sale being still unconfirmed. That position must, I think, be held either by him or by the subsequent vendee, and in my view it clearly does not belong to the subsequent vendee, because he has not acquired any title nor can he acquire any title until the auction-sale has been set aside. The case does not, I think, essentially differ from the case where there is nothing between the judgment-debtor and the third party, except an agreement that the third

party will purchase at a higher value if the judgment-debtor can succeed in getting the auction-sale set aside, and in that case it appears to me clear that the judgment-debtor would be entitled to come in under rule 19. I do not think that he is in any materially worse position because there has passed between him and the stranger a conveyance which confessedly is not and cannot be operative, inasmuch as the auction-sale is still subsisting.

On these grounds I am of opinion that the view taken by the District Court is right, and I would discharge the Rule with costs.

SHAH, J.—After hearing the arguments again in this case, I am of opinion that the judgment-debtor has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of rule 89, Order XXI, in spite of the fact that he has transferred his interest in the property after the Court-sale. The transfer by him after the auction-sale is, in my opinion, inoperative so long as the sale subsists, and it could take effect only if the sale is set aside on an application under rule 89.

Having regard to the object and scope of this rule, it seems to me that the judgment-debtor must be deemed to own the property for the purposes of the rule. There is no reason to suppose that the object of the rule is to save the immoveable property only for the benefit of the judgment-debtor. But it seems to me that it is within the scope of the rule to enable the judgment-debtor, if possible, to prevent the sale of his property by the Court for an inadequate price. One of the ways in which the judgment-debtor could secure this result would be that he might procure a purchaser for a higher price and thereby enable himself to deposit the necessary amount as required by the rule. He might either agree to sell or sell the property to a third person subject, of course, to the condition that the Court-sale is set aside. This very case affords an apt illustration of the manner in which the judgment-debtor may be able to take advantage of this rule. The property in question is sold to the auction-purchaser for Rs. 166, whereas the judgment-debtor

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would be able to realize Rs. 500 for the same property by a private sale. Even though the judgment-debtor would not be able to retain the immoveable property if the sale were set aside, it is clear that the setting aside of the sale would be highly beneficial to him under such circumstances. It cannot and ought not to make any difference in the result whether he merely agrees to sell or actually sells the property subject to the auction-sale being set aside.

I do not see any reason to hold that the rule refers to the ownership or interest as existing at the date of the application. It seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the rule, provided he owns it or holds an interest therein at the date of the sale by the Court. The words "at the date of the application" are not to be found in the rule, and I do not see any good reason to read the rule as if the words were inserted therein.

Apart from the decided cases there is no difficulty in accepting the view which has found favour with the lower Appellate Court in this case. The learned Pleader for the applicant here has, however, relied upon *Ishar Das v. Asaf Ali Khan* (3) and *Adapa Subbarayadu v. Tippabhotlakshminarasamma* (4), which undoubtedly support his contention that the judgment-debtor who has transferred his interest in the property to a third person after the Court-sale has no right to make an application to have the sale set aside under rule 89. I have carefully considered these decisions. I regret that I am unable to follow them. These two decisions do not seem to me to be quite consistent with each other; and both of them appear to me to be based either upon too restricted a view as to the object and scope of the rule or upon an interpretation involving the reading of certain words in the rule which do not occur therein.

I, therefore, agree that the Rule should be discharged with costs.

Rule discharged.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 473
OF 1915.

April 17, 1916.

Present:—Mr. Justice Scott, Smith.

SHERA—PLAINTIFF—APPELLANT

versus

GANGA RAM AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 42—Assets, absence of, whether ground for annulling or refusing adjudication.

Absence of available assets is no ground either for refusing an order for adjudication of an insolvent or for annulling an adjudication once made.

Miscellaneous first appeal from the order of the District Judge, Lyallpur, dated the 5th June 1915, annulling the order of adjudication.

Mr. Mukand Lal Puri, for the Appellant.

Lala Kishan Chand, for the Respondents.

JUDGMENT.—This is an appeal from an order of the District Judge of Lyallpur annulling an adjudication of an insolvent under section 41 of Act III of 1907 on the ground that he has no assets. I can find no authority in support of such an order.

The District Judge himself previously held that the absence of available assets was not a sufficient ground for refusing an order of adjudication, and his present order is inconsistent therewith.

What was not a sufficient ground for refusing adjudication is not one for annulment of an adjudication once made. I, therefore, accept the appeal and set aside the order of annulment.

No order as to costs. The order staying execution is confirmed.

Appeal accepted.

ACHRATLAL JEKISENDAS v. CHIMANLAL PARBHUDAS.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 63 OF 1916.

April 14, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

ACHRATLAL JEKISENDAS—

APPELLANT

versus

CHIMANLAL PARBHUDAS—

RESPONDENT.

Guardians and Wards Act (VIII of 1890),—Father not having care or custody of son, remedy of—Suit, maintainability of—District Court, jurisdiction of.

A father who has never had the care or custody of his infant child can file a regular suit for the custody of his son, but cannot successfully call upon a Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over to the father. [p. 215, col. 2; p. 216, col. 1.]

The dictum of the Privy Council in *Mrs. Annie Besant v. Narayaniah*, 24 Ind. Cas. 290; 16 Bom. L. R. 625; 18 C. W. N. 1089; 27 M. L. J. 30; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 12 A. L. J. 1155; 1 L. W. 520; 38 M. 507, to the effect that a suit *inter partes* is not the proper proceeding is not intended to be of such general application as virtually to overrule the decision in *Sharifa v. Mune Khan*, 25 B. 574, 3 Bom. L. R. 167.

The jurisdiction of the District Court in the matter of minors is defined by the Guardians and Wards Act and it has no inherent power to make orders with reference to minors which are not expressly conferred upon it by that Act. [p. 215, col. 2.]

First appeal from the decision of the Joint Judge, Ahmedabad, in Miscellaneous Application No. 41 of 1913.

Mr. G. N. Thakor, for the Appellant.

Mr. Kanga (with him Mr. M. H. Vakil),
for the Respondent.

JUDGMENT.—The question in this appeal is whether the father, who has never had the care or custody of his infant child, can successfully call upon the Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over. The learned Joint Judge holds that the father has two courses only open to him, *viz.*, to file a regular suit for the custody of his boy, or apply to the High Court for an order in the nature of *habeas corpus* under section 491 of the Criminal Procedure Code. In regard to the Criminal Procedure Code, section 491, the learned Judge is in error, for such an application could only be made in a case falling within the limits of the ordinary civil jurisdiction of the High

Court, whereas this is an Ahmedabad case. That a suit can be filed for the custody of the boy may be conceded on the authority of two decisions in this Court, one being *Sharifa v. Mune Khan* (1) and the other being referred to in the report in that case. We are not prepared to hold that the dictum of the Privy Council in *Mrs. Annie Besant v. Narayaniah* (2) to the effect that a suit *inter partes* is not the proper proceeding, was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa v. Mune Khan* (1).

The only question remaining then is whether the learned Judge was right in refusing to make an order on the application under the Guardians and Wards Act. It may be taken on the authority of the Privy Council in *Mrs. Annie Besant v. Narayaniah* (2) that the jurisdiction of the District Court is defined by the Guardians and Wards Act, and that it has no inherent powers to make orders with reference to minors which are not expressly conferred upon it by that Act. The chapter of the Act relating to the appointment and declaration of Guardians is Chapter II. Section 12 provides for the summoning before the Court of the minor for whom an application has been made for the appointment of a guardian, and for the *interim* custody of the minor pending the hearing of the application under section 13. Then section 17 lays down matters to be considered by the Court in appointing a guardian and clause 4 of that section lays down the respective rights of parents claiming guardianship where those parents are European British subjects. In such cases the Court will appoint one or other of them a guardian, and the minor will then be given to such parent as is appointed guardian. But where the parents are not European British subjects, section 19 lays down that nothing in the chapter shall authorize the Court to appoint or declare a guardian of the person of a minor whose father is living, and is not, in the opinion of the Court, unfit to be guardian

(1) 25 B 574; 3 Bom. L. R. 167.

(2) 24 Ind. Cas. 290 (P. C.); 16 Bom. L. R. 625; 18 C. W. N. 1089; 27 M. L. J. 30; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 12 A. L. J. 1155; 1 L. W. 520; 38 M. 507.

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of the person of the minor. Now if a father has had the care and custody of his infant child, he may be within the definition of the Act a 'guardian', and the provisions of sections 24 and 25 may then apply to him. But that is not the case where he has not had the custody of his infant child. Section 25 cannot apply to this case for the ward has never left or been removed from the custody of his guardian; nor again can the provisions of section 24 be invoked, which were held on a liberal interpretation by the Allahabad High Court in *Utma Kuar v. Bhagwanta Kuar* (3) to justify the Court in obtaining and delivering over the custody of a minor to a Mahomedan mother who had been appointed guardian by the Court. It appears to us that on the peculiar facts of this case the learned Joint Judge is right, and the only remedy of the father is to file a suit. We think that under the circumstances of the case we should make no order as to costs.

Order confirmed.

(3) 29 Ind. Cas. 416; 37 A. 515; 13 A. L. J. 742.

CALCUTTA HIGH COURT.

APPLICATION IN THE MATTER OF APPEAL IN SUIT
No. 21 of 1915.

May 8, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.
BEATRICE ALICE DE STE CROIX—

PETITIONER

versus

PHILLIP DE STE CROIX—

OPPOSITE PARTY.

Divorce Act (IV of 1869), s. 43—Divorce, decree nisi for, in suit by husband—Costs of appeal, wife's right to get from husband—Custody of children of marriage on decree for divorce.

In a proper case, on the application of a wife who prefers an appeal against a decree *nisi* for divorce, the Appellate Court may, in its discretion, make an order directing the husband to provide for the costs of the wife's appeal. [p. 219, col. 2; p. 221, col. 2.]

On making a decree for dissolution of marriage it should be the duty of the Court to look to the interests of the children of the marriage and carefully to weigh the comparative advantages and disadvantages of giving the custody of all or any of

them to the one parent or to the other, but no general rule on the subject can be laid down. [p. 217, col. 1; p. 220, col. 1.]

Per Mookerjee, J.—The Court, though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children. [p. 220, col. 1.]

The doctrine that the husband who brings a suit for divorce should provide costs to the wife, to enable her to make her defence and to prosecute her appeal when a decree is passed against her, should be very cautiously scrutinised, as such a doctrine is an encroachment upon the ordinary rule that costs follow the event. [p. 221, col. 1.]

In a suit for divorce brought by a husband for the adultery of his wife, the wife did not deny the charge of adultery but pleaded condonation, connivance and collusion on the part of the husband and the Judge, having decided against the defences, made a decree *nisi* and gave the custody of the children of the marriage, two daughters, aged respectively 10 and 20, to the husband. The wife then preferred an appeal and made an application to the Appellate Court asking that the Court should make an order restraining the husband from sending the two daughters out of the jurisdiction of the Court until the disposal of her appeal and directing him to pay to her Solicitors such sum as might be fixed by the Court for and towards the costs of her appeal:

Held, that under the circumstances of the case it would be wrong to interfere with the discretion which the law vests in the father who is the proper and legitimate guardian of the children, and that the facts of the case were not of such a nature as to justify an order that the husband should make provision for his wife's costs of the appeal. [p. 217, col. 2; p. 219, col. 2; p. 220, col. 1; p. 221, col. 1.]

Application in the matter of an appeal, decided by Mr. Justice Greaves on the 11th April 1916.

Mr. *Avetoom*, for the Petitioner.

Mr. *Pearson*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—(April 17, 1916).—This is an application by Beatrice Alice De Ste Croix, asking that this Court should make an order that the children of the marriage between herself and her husband should remain within the jurisdiction of this Court until her appeal is disposed of. It is a matter of painful nature, as so many applications in divorce cases are, and this case is peculiarly painful, because it is that of a woman who had been married for a number of years and who has been a mother for a considerable time and who is struggling for the right of her continued access to her two daughters,

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The principle upon which an application such as this ought to be considered was laid down in the case of *Symington v. Symington* (1) which was cited to us, the passage to which I desire to refer being at page 420: "It should be the duty of the Court to look to the interest of the children and carefully to weigh the comparative advantages and disadvantages of giving the custody of all or any of them to the one parent or to the other." I am at a loss to conceive how any general rule upon such a subject can be laid down.

Now, in this case the facts are that the applicant was the respondent to a petition for divorce. During the course of the hearing, she through her learned Counsel stated that she was not in a position to deny the fact that adultery had been committed by her. But she set up other defences to the effect that her husband had condoned the adultery she had committed, and that he had also condoned the adultery. A decree *nisi* was made by the learned Judge who heard the case, having decided against the defences set up by the respondent. The daughters in question are respectively twenty and ten years old, and the elder daughter will be twenty-one this year in July, and it is in evidence before us that she is engaged to be married and she is herself desirous of going to England and intends returning to India by December of this year. The husband has sworn an affidavit in which he said that even if this unfortunate matter had not occurred and if he and his wife had been still living together as man and wife, he would have thought it right to send home his other daughter who, as I have said, was ten years old, in order that she might be put to school. What he proposes to do is to send the daughters to Jersey, where he has property and where he has some sisters, and that the younger girl should be put to a school which is called Jersey Ladies' School.

Now, under those circumstances, can this Court possibly say that the course which the husband proposes to take is an unreasonable one. Speaking for myself, I

do not think it is. I think, it is often to the advantage of an English girl, ten years old, that she should leave this country, at all events for sometime, for the sake of health and perhaps also for the sake of education: and, one must remember that the person who proposes so to deal with these girls is the father who has certain well-known rights and duties which were referred to in the case which I have already mentioned, as follows: "The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence and it should not be taken from him without gross misconduct on his own part and danger of injury to the health and morals of the children." Now, in this case, having regard to the finding of the learned Judge, there is nothing to be said against the morals or the conduct of the father: nor is there anything in the course which he proposes to take which is calculated to injure the morals or the health of the children. In my opinion, it would be wrong for us to interfere with the discretion which the law vests in the father, who is the proper and legitimate guardian of the children under the circumstances of this case. Therefore, in my opinion, that part of the application must be refused.

With regard to the other part, as to the costs, we think this is a matter of considerable general importance, and, therefore we think it right to take time to consider our judgment.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree.

JUDGMENT.

SANDERSON, C. J.—In this case the husband brought a suit for divorce, and the learned Judge granted him a decree *nisi*, on the ground of the respondent's adultery: subsequently an application was made by her to this Court applying first of all that her husband should be restrained from sending the children of the marriage out of the jurisdiction of this Court. That matter was disposed of on the hearing of the application. It was further prayed that the petitioner in the divorce

(1) (1875) L. R. 2 H. L. Sc. & D. 415 at p. 420.

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suit should be ordered to make provision for the costs of her appeal to this Court, and we reserved our judgment upon that point.

The principle upon which the husband has been directed to make provision for his wife's costs in these cases has been laid down in *Robertson v. Robertson* (2), and the passage to which I wish to refer is at page 122. I am now reading from the judgment of Sir George Jessel, where he says: "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English Law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance." There is another passage at page 123, where the learned Master of the Rolls says: "I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that that reason ought to be sufficient to all right-minded men." That principle was endorsed by Lord Justice Brett and also by Lord Justice Cotton at pages 124 and 125. In a subsequent case, *Otway v. Otway* (3), there is passage which

is material at page 155, and it is to be noticed that this is a judgment of Lord Justice Cotton who was a party to the decision in *Robertson v. Robertson* (2). He says: "Then as regards the appeal I doubted very much whether we ought to allow any costs of the wife on the appeal, we having decided against her on the ground that she had already been found guilty of adultery before any of the proceedings in the appeal were taken. But I think the case we have been referred to, of *Holt v. Holt* (4), settles that question. If after she had been found guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs; but here she was only defending herself against a proceeding taken by the husband, and that being so, I think that, following what is laid down in *Holt v. Holt* (4), it was reasonable for her to instruct a Solicitor and Counsel to appear. Therefore, although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore, I think we ought to allow her her costs of this appeal, as well as the costs of the proceedings in the Divorce Court." There is one other passage which I think is material to notice, and it is as follows: "There is one point I said I should mention, namely, with reference to the recent legislation as to the position of married women. If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a *feme sole*, retaining all her property and being in a position to sue and be sued." That observation would, of course, affect the principle which was referred to by Sir George Jessel in *Robertson v. Robertson* (2), but it would not affect

(2) (1881) 6 P. D. 119 at p. 122; 51 L. J. P. 5; 45 L. T. 237; 29 W. R. 850.

(3) (1888) 13 P. D. 141 at p. 155; 57 L. J. P. 81; 59 L. T. 153.

(4) (1858) 28 L. J. Mat. 12.

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the second principle to which he refers at page 123 where he says: "but I am not oblivious to the nobler view.....held in House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery."

Now, there are two passages in Halsbury's Laws of England, 16th Volume, to which I think right to refer, because each of them deals with the question of practice. At page 561 and in clause 1139 there is this to be found: "If a woman obtains a decree, and her husband appeals, she is entitled to defend herself, and he must provide her costs of the appeal. The fact that she has committed adultery does not necessarily affect the matter; but if she, being herself found guilty, actively brings the matter before the Court, he need not make such provision." Then after that is cited *Otway v. Otway* (3). But there is a note to be found on the top of the notes at page 562 in which reference is made to an unreported case, *Campbell v. Campbell*, 'in which the House of Lords ordered the sum of £ 150 to be paid to the wife to enable her to carry on the appeal;' and it is also noted that 'a similar result happened in the case of *Yelverton v. Longworth* or *Yelverton* (1864) not reported.' It is not quite clear whether in either case the wife was the appellant, but as I read the words it looks to me as if she was the appellant—we have not had the opportunity of getting further information as to the record in either of the cases, and, therefore, I am entirely depending on the notes.

The other passage is at page 604 (that is, article 1235), and it is this: "Where the wife, having obtained an order in the Court below, is the respondent to an appeal, the practice is to allow her her costs of the appeal even if it is successful, and the husband may be ordered to pay into Court or give security for her costs of the appeal, the hearing being stayed until he does so; but this practice has no application where the wife is the appellant."

As far as I know those are the only authorities or references to which our atten-

tion was drawn during the argument of this case. In my judgment we ought not to make an order that the husband should make provision for the costs of the wife's appeal in this case, having regard to the facts which are set out in the petition of the lady, in the various affidavits which are now before the Court. I need not refer to these facts in detail, but it is sufficient to mention that during the course of the case it was stated by the lady's learned Counsel in effect that she was not in a position to deny the adultery. Her case was based upon an allegation that her husband's conduct conduced to the adultery and that he in fact condoned it. This case has been held to be unfounded by the learned Judge. As I have said before, I do not wish to enter into the details which are set out in the affidavits; but, in my opinion, the facts are not such as to justify us in making an order that the petitioner in the divorce suit should make provision for his wife's costs of the appeal. I wish to make it clear that I do not decide that this Court has no jurisdiction to make an order on the application of the wife who is an appellant to this Court. On the contrary I think this Court has jurisdiction to make such an order in a proper case if the Court thinks right so to do upon the facts of the case, even where the wife has had an order *nisi* made against her in the first Court, and where she herself is the appellant. I desire to confine my decision in this case simply and solely to the facts of this case, and to say that in this case the wife is not entitled to the order for which she asks.

WOODROFFE, J.—The petitioner prays that the respondent may be ordered to pay to the applicant's Solicitors such sum as may be fixed by the Registrar towards the costs of her appeal. The husband filed a suit for divorce alleging adultery; and the usual provision was made for the wife's costs. Though adultery was originally denied, it was and has been before us admitted and a decree was made for the dissolution. The petitioner wishes to appeal on the grounds of condonation, inducement to adultery and collusion which have disentitled plaintiff to the relief notwithstanding the adultery found. On the statement of facts made to us at the hearing there does not appear to be any substance in any of

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these grounds. It is unnecessary to decide the question of our power to make the order asked for. It is sufficient to say that I do not think that this is a case in which we should make such an order. I would, therefore, refuse the application.

MOOKERJEE, J.—This is an application by a wife who has appealed against a decree *nisi* made by Mr. Justice Greaves on the 11th April 1916, in a suit for dissolution of marriage instituted by her husband on the ground of her adultery. The petitioner did not deny the charge of adultery, but pleaded condonation, connivance, and collusion. These pleas were not established to the satisfaction of the Trial Judge. The decree *nisi* was consequently made, and the custody of the children of the marriage, two daughters, was given to the husband. By a consent order made *pendente lite*, the petitioner is entitled to be paid a sum of Rs. 340 monthly by her husband by way of alimony, and also a specified sum towards her costs of the proceeding; the decree further directs the husband to pay her costs of the suit and trial. In the present petition, she prays, *first*, that her husband may be ordered to keep the children within the jurisdiction of the Court until the disposal of her appeal with a view to enable her to have access to them and not to send them away to Jersey as he intends to do, and *secondly*, that her husband may be directed to pay to her Solicitors such sum as may be fixed by the Court for and towards the costs of her appeal.

The Court has already refused her *first* prayer on the ground that the paramount consideration in a matter of this description is the benefit of the children and that in the present case, it was not for their welfare that they should continue to reside here longer: *Symington v. Symington* (1), *D'Alton v. D'Alton* (5), *Philip v. Philip* (6). In fact, the Court, though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children:

(5) (1878) 4 P. D. 87; 47 L. J. P. 59.

(6) (1872) 41 L. J. Mat. 89; 27 L. T. 592.

Handley v. Handley (7), *Kelly v. Kelly* (8)

The Court, however, took time to consider its decision upon the *second* prayer in the application. Reliance has been placed in support of that prayer on the principle that as a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. One reason usually assigned for this rule is that the law assumes that on her marriage all the property of the woman presumably passes to her husband, so that, for her protection, it is necessary that not only should she not be made liable to pay costs but that she should litigate at the expense of her husband: *Wells v. Wells and Hudson* (9), *Clarke v. Clarke* (10), *Miller v. Miller* (11), *Milne v. Milne* (12), *Robertson v. Robertson* (2), *Smith v. Smith* (13), *Otuay v. Otuay* (3), *Earnshaw v. Earnshaw* (14). A second reason was assigned by Pigot, J., in *Young v. Young* (15): "inasmuch as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property and.....that consideration might fairly be used to influence the Court in determining whether in cases such as these, the wife might not be entitled to obtain the necessary costs from the husband, apart from any question of right to her property." A third reason sometimes assigned in justification of the rule is that as a wife can bind her husband for necessities, her costs, incurred in a litigation about her matrimonial status, may be considered a

(7) (1891) P. 124; 63 L. T. 535; 39 W. R. 97; 55 J. P. 293.

(8) 5 B. L. R. 71.

(9) (1864) 3 Sw. & Tr. 542; 33 L. J. M. 151; 10 L. T. 696; 10 Jur. (N. S.) 755.

(10) (1865) 4 Sw. & Tr. 111.

(11) (1869) 2 P. 13; 39 L. J. P. 4; 21 L. T. 471; 18 W. R. 152.

(12) (1871) 2 P. 202; 40 L. J. P. 13.

(13) (1882) 7 P. 84; 51 L. J. P. 31.

(14) (1896) P. 160; 65 L. J. P. 89; 74 L. T. 560; 60 J. P. 377.

(15) 23 C. 916n; 12 Ind. Dec. (N. S.) 608.

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necessity: *Jones v. Jones* (16), *Brown v. Ackroyd* (17). Whatever reasons historical or equitable may be discoverable in support of the rule, it has been generally followed in a long line of cases in this country, though sometimes not without reluctance: *Fowie v. Fowie* (18), *Proby v. Proby* (19), *Georgucopulas v. Georgucopulas* (20), *Thomson v. Thomson* (21), *Boyle v. Boyle* (22), *Mayhew v. Mayhew* (23), *Payne and Co. v. Pirojshah* (24), *Natal v. Natal* (25).

It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event; and speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised. In the case before us, the charge of adultery is not denied by the wife; but she seeks to test, by way of appeal, the correctness of the decision of the Trial Judge on the special grounds she assigned with a view to resist a decree for dissolution of marriage notwithstanding her misconduct. I can discover no reasonable ground on which her claim to be financed by her husband in the prosecution of her appeal in such circumstances can be justified. I can very well understand that if a wife obtains a decree, and her husband appeals, she may be held entitled to defend herself and to require her husband to provide her costs of the appeal: *Holt v. Holt* (4), *Earnshaw v. Earnshaw* (14). The fact that she has committed adultery may not, in those circumstances, necessarily affect the matter. But if she, being herself found guilty, actively brings the matter before the Court, I cannot see how her husband may be justly called upon by her, as a matter of right, to provide for her costs. The view I take is in accord with that adopted by Cotton, L. J., in *Otuay v. Otuay* (3): "if after she had been found (16) (1872) L. R. 2 P. & D. 333; 20 W. R. 320. (17) (1856) 5 El. & Bl. 819; 25 L. J. Q. B. 193; 2 Jur. (N. S.) 203; 4 W. R. 229; 26 L. T. (O. S.) 215; 103 R. R. 762; 119 E. R. 639. (18) 4 C. 260; 3 C. L. R. 484; 2 Shome L. R. 143; 2 Ind. Dec. (N. S.) 166. (19) 5 C. 357; 5 Ind. Jur. 242; 5 C. L. R. 1; 2 Ind. Dec. (N. S.) 838. (20) 29 C. 619. (21) 14 C. 580; 1 Ind. Dec. (N. S.) 384. (22) 7 C. W. N. 565; 30 C. 631. (23) 19 B. 293; 10 Ind. Dec. (N. S.) 198. (24) 12 Ind. Cas. 554; 13 Bom. L. R. 920. (25) 9 M. 12; 3 Ind. Dec. (N. S.) 405.

guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs." See also *Earnshaw v. Earnshaw* (14). I am not unmindful that the House of Lords has sometimes made an order on the husband to pay a round sum to his wife to enable her to carry on her case before the House of Lords: *Robinson v. Robinson* (1859 unreported), *Keats v. Keats* (1859 unreported), *Campbell v. Campbell* (unreported), *Yelcerton v. Yelcerton* (1864 unreported). These cases are mentioned in note (c) to Article 1139 in Volume XVI of the Laws of England edited by Lord Halsbury. The circumstances under which the orders were made are, however, not stated nor are the reasons available. These cases consequently merely show that circumstances are conceivable, in which the Court may, in its discretion, make an order in favour of the wife; but they do not lay down an inflexible rule, and I cannot treat them as authorities which oblige me to hold that the application of the present petitioner should be granted. In my opinion, her second prayer must, like the first, be refused.

Application rejected.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 759 OF 1914.

April 12, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

ARJUN RAMJI MHANKAL—

DEFENDANT—APPELLANT

versus

RAMABAI RAOJI VITHOBA—

PLAINTIFF—RESPONDENT.

Limitation Act (XV of 1877), s. 7—*Limitation Act* (IX of 1908), s. 6—*Minor—Cause of action arising during minority—Death within three years of attaining majority—Personal representative, right of, to sue.*

Where a minor acquired a cause of action to sue for possession of property and died after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representative can, although twelve years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the lifetime of the deceased, [p. 222, col. 1.]

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Mahomed Arsad Chowdhry v. Yakoob Ally, 15 B. L. R. 357; 24 W. R. 181; *Rudra Kant v. Nobo Kishore*, 9 C. 663; 12 C. L. R. 269; 4 Ind. Dec. (N. S.) 1091; *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*, 17 M. 316, at p. 342; 4 M. L. J. 152; 6 Ind. Dec. (N. S.) 219; *Mahadev v. Babi*, 26 B. 730; 4 Bom. L. R. 513, referred to.

Second appeal from the decision of the District Judge of Ratnagiri, in Appeal No. 270 of 1913, reversing the decree passed by the Subordinate Judge, Malvan, in Civil Suit No. 93 of 1912.

Messrs. P. B. Shingne and S. M. Varde, for the Appellant.

Mr. Coyajee (with him Mr. A. G. Desai), for Respondent No 1.

Mr. B. V. Desai, for Respondents Nos. 2 and 3.

JUDGMENT.—The question is whether, where a minor acquired a cause of action to sue for possession of property and died after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representative can, although twelve years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the lifetime of the deceased. In our opinion the personal representative can maintain such a suit. In such a suit the deceased must be included in the term "plaintiff" for the purpose of Article 142, for according to section 3 of the Limitation Act "plaintiff" includes any person from or through whom the plaintiff derives his right to sue.

The title of quondam minor had not been extinguished by twelve years of dispossession, because on attaining majority he was entitled to a further period of three years within which to sue. To use the words of section 28, "the period limited for instituting a suit for possession of the property had not determined."

It is otherwise where a minor with the cause of action more than twelve years in existence dies pending disability. In such a case no extended term has commenced for him; therefore, the cause of action which would survive up to twelve years from its origin would be extinguished on expiry of that period, notwithstanding that the minor had not been able to judge whether or not to sue; for this reason the third clause of

section 7 provided a fresh term for the representative of a person with a cause of action lying under disability.

The express provision for such a case in the third clause of section 7 does not, therefore, impliedly exclude the right of the personal representative to stand in the shoes of the deceased for the purpose of subsisting causes of action, which is expressly recognised to belong to executors and administrators by section 89 of the Probate and Administration Act of 1881.

In *Mahomed Arsad Chowdhry v. Yakoob Ally* (1), Markby, J., observes that "the minor or his representative-in-interest after his death has a special period allotted to him for bringing the suit. There are no words whatsoever in section 7 which would give to any other person in whatever way he might happen to be connected with the minor, any other period for bringing the suit than that specified for ordinary persons". The question was whether the special period was not confined to the minor and his representatives *after death* to the exclusion of representatives *after transfer*, if the term 'representatives' could be appropriately used for transferees.

A Full Bench of the Calcutta High Court came to a similar conclusion as regards transferees in *Rudra Kant v. Nobo Kishore* (2), though there are dicta of the Chief Justice and Mitter, J., which would confine the rights of representatives after death to the special case provided for by the third clause of section 7. Mr. Justice Wilson, who was a member of the Full Bench and of the referring Bench, gave reasons for doubting the correctness of the decisions in both the above Calcutta cases. Their correctness has been doubted also by the Madras High Court in *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai* (3), where it is remarked that "those decisions involve the apparent anomaly that a minor cannot transfer his title to property though at the date of the transfer it is a subsisting interest so far as he is concerned". In this connection also we may refer to section 6 of the Transfer of Property Act, which provides that property of any kind may

(1) 15 B. L. R. 357; 24 W. R. 181.

(2) 9 C. 663; 12 C. L. R. 269; 4 Ind. Dec. (N. S.) 1091.

(3) 17 M. 316; at p. 342; 4 M. L. J. 152; 6 Ind. Dec. (N. S.) 219.

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be transferred subject to certain special exceptions.*

In *Mahadev v. Babi* (4) a Bench of this Court has indicated a preference for the reasoning of Wilson, J., in his judgments in *Rudra Kant's* case (2) and has expressed the opinion that *Mahomed Arsad Chowdhury v. Yakoob-Ally* (1) decided that section 7 limits to the minor and to his representatives after his death the privilege of computing the period, subject to certain conditions, from the date when the disability ceases or from the death of the minor before he can attain majority.

In this view we concur. We are not here concerned with the question decided in *Rudra Kant's* case (2) with reference to representatives by transfer. Shridhar, as whose heiress the plaintiff claims, died on the 5th August 1910 having attained majority on the 21st December 1909—this suit was filed on the 22nd of May 1912 and is, therefore, in time. We affirm the decree and dismiss the appeal with costs of 1st respondent payable by the appellant.

Decree affirmed.

(4) 26 B. 730; 4 Bom. L. R. 513.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 22, 1916.

Present:—Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

Maharaja Sri RAM CHANDRA BHANJ DEO, SINCE DECEASED, NOW REPRESENTED BY Maharaja PURNA CHANDRA BHANJ DEO—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Chowkidari chakran lands—Right of zemindar—Burden of proving that land is chowkidari chakran land—Kabuliyat executed at Permanent Settlement, construction of—Undertaking to continue sardars and paiks in Pergunnah, meaning of—Right to determine employment of paik on service tenure—Resumption of land—Civil Procedure Code (Act V of 1908), O. XLII, O. XLI, r. 25—High Court, power of, to remit case for trial of fresh issue.

Chowkidari chakran lands are lands which at or before the Permanent Settlement had been appropriated or assigned for the maintenance of the Police force

and by reason of such appropriation excluded from the zamindari assessment. The zamindar is precluded by Bengal Regulations I of 1793 and XIII of 1805 from utilising chowkidari chakran lands for remunerating persons who are his personal servants and perform no Police duties, but the onus of proving that the lands in dispute are so appropriated or assigned is on the Government. [p. 226, col. 2; p. 227, col. 1.]

Secretary of State v. Kirtibas Bhupati Harichandan Mahapatra, 28 Ind. Cas. 676; 42 I. A. 30; 19 C. W. N. 65; 17 Bom. L. R. 32; 21 C. L. J. 31; 17 M. L. T. 1; 2 L. W. 11; 28 M. L. J. 457; 42 C. 710, relied on.

Where in January 1801, the zamindar of Pergunnah Nayabasan, which was settled with him in that year, executed a *kabuliyat* in favour of the Government under which he was bound to maintain and keep the same "sardars and paiks" that had all along existed in the Pergunnah, and to carry out whatever orders might be passed by the Magistrate on the paiks:

Held, that the sardars and paiks referred to in the *kabuliyat* were sardars and paiks employed on Police duty; that the document had no reference to paiks who held jagirs within the Pergunnah on tenure services personal to the zamindar himself and having no connection with the local Police; and that the zamindar was entitled to determine the employment of a paik who was in his personal service and held a jagir on service tenure determinable when his employment ceased, and to recover possession of his jagir. [p. 226, cols. 1 & 2.]

Even if it be competent to the High Court in second appeal to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, it ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. [p. 227, col. 1.]

Appeal from a judgment and decree of the High Court, Calcutta, dated April 27, 1910, reversing that of the District Judge, Midnapore, dated July 10, 1907, on an appeal from a judgment and decree of the Subordinate Judge, Midnapore, dated January 21, 1907, and remanding the appeal for re-trial.

FACTS.—The appellant is the zamindar of Pergunnah Nayabasan, and in his zamindari are certain lands held by persons in what is known as service or chakran tenure. A predecessor-in-title of the appellant executed a *kabuliyat* in 1801 in accordance with Regulation I of 1793, which contained the following material clause:—

"I shall maintain and keep on the same sardars and paiks who have all along existed in the said Pergunnah. I shall carry out whatever order may be passed by the Magistrate on the paiks. I have no power to dismiss the sardars and paiks. I shall, year by year, file a list of the names of the individual sardars

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and *paiks* before the Magistrate and one such list before the Collector. I shall depute the *paiks* to keep watch and take care of the boundaries of the said Pergunnah and see that no theft and dacoity and any riot may take place anywhere. I shall carry out any order that may be passed by Government, as best as I can. I shall constantly be engaged for the good of the Government. I shall not neglect in any way to pay the Government revenue and to comply with the several provisions. If I do not pay the above Government revenue according to the instalments or if I act contrary to any order that may be passed at any time in respect of the *paiks* and (torn) as mentioned above, then the Members of the Board and of the Council shall be competent to eject me forthwith from the *zamindari* of the said Pergunnah and resume the *zamindari* of the said Pergunnah and grant the *zamindari* of the said Pergunnah to anybody they like (torn)".

It was the appellant's case that there were and had been from time immemorial two classes of *paiks* holding service lands within the *zamindari*. The first class consisted of Government *paiks* called commonly *chowkidars*, *digars*, and *sardars* and the second class of private *paiks* called commonly *dal paiks*, *dal beharas* and *bhullakes*. The appellant admitted that the provisions of the *kabuliyat* and also those of Regulation XX of 1817, section 21, applied to the first class and did not claim any power to dismiss them; but he contended that the second class were his private servants and that it rested with him to dismiss them at his pleasure.

In 1898 appellant dismissed one Suba Naik whom he alleged to be a private *paik*, and attempted to resume Suba Naik's *jagir* land. Suba Naik obtained an order from the Magistrate the effect of which was to prevent his ejectment without suit. He died and was succeeded in possession by his sons. Appellant instituted this suit against the sons and the Secretary of State claiming the land and a declaration of his right to dismiss the second class of *paiks* without the interference or control of Government.

The sons pleaded that they were in

fact private *paiks* but that they had done nothing for which they could be dismissed. The Secretary of State contended that all *paiks* on the estate came within the terms of the *kabuliyat* and that even if they were of two classes Suba Naik came within the first class.

It was found by the Subordinate Judge and on appeal by the District Judge that there was a class of private *paiks* over whom the *zamindar* had absolute control, and that Suba Naik belonged to that class. They decreed the suit.

The Secretary of State preferred a petition of second appeal to the High Court raising for the first time the contentions—

(1) That the material issue was whether the lands in suit were at the Settlement dealt with as ordinary lands of the estate or as *jagir* lands reserved for remunerating *paiks* for services.

(2) That the only questions in the case were (a) whether Suba Naik's *jagir* existed at the Settlement and (b) what kind of duties Suba Naik had to perform at the Settlement and that this issue and these questions had not been tried.

The High Court (Brett and Sharfuddin, JJ.) remanded the case for re-hearing on the question whether Suba Naik's lands were included in those excepted from revenue because appropriated for the maintenance of the Police and whether, if so, plaintiff could resume them or dismiss Suba Naik even if only employed in *zamindari* duties. Costs to abide the result.

Against this decision, the *zamindar* appealed to His Majesty in Council.

Messrs. De Gruyther, K. O., and Raikes, for the Appellant.—Regulation XX of 1817, section 21 (2) did not provide for registers of Police Officers.

[LORD ATKINSON.—The point was not in respect of land, but in respect of estates].

[SIR JOHN EDGE.—They all paid rents.]

They were *chowkidari chakran* lands and the point was whether they were Government lands (Regulation I of 1793, section 8, paragraph 4).

[MR. AMEER ALI.—If there is revenue assessed for the whole *mahal*, then what is not assessed is outside the *mahal*. They may form part of *mahal* for administrative purposes, but not for revenue.]

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[LORD PARKER.—The *paiks* were super Naiks and were wrongly ejected, but the Courts below held that they were rightly ejected. It was so because they held *chowki-dari* land.]

[LORD ATKINSON.—They say that *prima facie* it is Government land.]

There were concurrent findings of fact and the High Court ought not to have disturbed them, *Secretary of State v. Kirtibas Bhupati Harichandan Mahapatra* (1). There were two points: (1) whether these persons were Police or private individuals and (2) whether they held land for one or for the other. The High Court had no power under section 100 of the Civil Procedure Code to entertain the appeal.

Sir E. Richards, K. C., and Mr. Dunne, for the Respondents:—This was a test case. The Raja wanted a declaration of title to this land.

[MR. AMER ALI.—Is the land within the ambit of what was let out by the *zamindar*?]

This issue was never tried. The Courts below had applied wrong tests in construing the *kabuliyat* and the whole point was whether the lands were exempt from assessment.

[SIR JOHN EDGE.—You said in the lower Court that there was only one class of *paiks* and the Courts below were quite right in saying that there were other classes.]

Many of these *paiks* were engaged in both duties [*Joykishen Mookerjee v. Collector of East Burdwan* (2)].

[MR. AMER ALI.—You say that the question of tenure must be decided.]

[SIR JOHN EDGE.—You cannot ask the Court to try a thing which is not placed before it. You never filed documentary evidence about the tenure.]

It was raised for the first time before the High Court, but the right test is as laid down by the Penal Code.

[LORD PARKER.—You want that point which ought to have been tried in Courts below to be tried here.]

Yes. Section 11 of Act V of 1908, Explanation IV. The matter was raised in the plead-

ings. Section 100 of Act V of 1908 did not apply to construction of documents as was held in *Fate's Chand v. Kishen Kunwar* (3).

The proper test was that laid down in *Joykishen Mookerjee Collector of East Burdwan* (2) and the Courts below ought to have applied the test and, therefore, it was right for the High Court to remit it for re-trial. Section 100 did not apply to the Court of Appeal at all.

[LORD PARKER.—Both Courts held that the *kabuliyat* did not apply to *sardars* and *paiks*. The whole thing depends on the construction as to what *sardars* and *paiks* mean.]

The Privy Council would not interfere with the discretion of the High Court.

The appellant was not called upon to reply.

JUDGMENT.

LORD PARKER OF WADDINGTON.—This was an action in which the appellant, as plaintiff, sought to recover possession from the first and second defendants of a *jagir* containing about 29 *bighas* of land situate within the territorial limits of the Pergunnah Nayabasan in the District of Midnapur, of which the appellant was the proprietor. The Secretary of State, who alone has appeared as a respondent in this appeal, and is hereafter referred to as the respondent, was added as a third defendant because the Government of India disputed the right which the appellant was asserting in the action. The appellant's case was that in 1898 one Suba Naik was in his personal service and held the *jagir* on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naik and given him notice to quit his *jagir*; that Suba Naik had refused to deliver up possession of the *jagir*, and had obtained from the Magistrate an order which precluded the appellant from obtaining possession thereof without civil suit; that Suba Naik had since died, and that the first and second defendants wrongfully claimed to retain possession as his heirs.

(1) 26 Ind. Cas. 676; 42 I. A. 30; 19 C. W. N. 65; 17 Bom. L. R. 32; 21 C. L. J. 31; 17 M. L. T. 1; 2 L. W. 11; 28 M. L. J. 457; 42 C. 710.

(2) 10 M. L. A. 16 at p. 45; 1 W. R. 26 (P. C.); 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 51; 19 B. R. 879.

(3) 16 Ind. Cas. 67; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 735; 14 Bom. L. R. 1090; 34 A. 579; 17 C. L. J. 1; 39 I. A. 247.

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The Pergunnah Nayabasan was settled in 1801 with Rani Sumitra Bhanj (the appellant's predecessor-in-title), who in January of that year executed a *kabuliyat* in favour of the Government. Under this *kabuliyat* the proprietor of the Pergunnah was bound to maintain and keep the same "*sardars* and *paiks*" who had all along existed in the Pergunnah, and to carry out whatever order might be passed by the Magistrate on the *paiks*. He was also precluded from dismissing the *sardars* or *paiks*, and bound to depute the *paiks*, to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere.

The appellant has throughout contended that the *sardars* and *paiks* referred to in this *kabuliyat* are *sardars* and *paiks* employed on Police duty, and that the document has no reference to *paiks* who hold on tenure services personal to himself, and having no connection with the local Police. This contention has been upheld, and in their Lordships' opinion rightly upheld, by all the Courts below. On the other hand, it has been throughout contended by the respondent that the provisions of the *kabuliyat* preclude the appellant not only from dismissing *paiks* whose tenure services include the performance of Police duties, but from resuming their *jagir* lands, even though he might provide for their remuneration in some other way. The appellant having accepted this contention, their Lordships will assume, as was assumed in all the Courts below, that it is correct.

On reference to the written statement of the respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the *kabuliyat*. In order to succeed, he had, therefore, to prove that Suba Naik held by service tenure involving the performance of Police duties. Curiously enough, the first two defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any Police duty, but that the appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform

their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the respondent's case.

The Subordinate Judge found first that there had always been two classes of *paiks* within the Pergunnah (1) *paiks* who hold their *jagirs* in consideration of the performance of Police duties, and (2) *paiks* whose tenure services were personal to the *zamindar*. He also found that Suba Naik belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the respondent failed, and gave judgment in favour of the appellant.

The first and second defendants were content with this decision, but the respondent appealed to the District Judge, who came to the same conclusions both of fact and law as had been come to by the Subordinate Judge, and dismissed the appeal with costs.

The respondent thereupon presented an appeal to the High Court. By section 584 of the Civil Procedure Code then in force, the High Court as Second Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naik belonged to the class of *paiks* having no Police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court, therefore, could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the *kabuliyat*, it is not obvious what other questions of law arose. The respondent, however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the *jagir* in question were *chowkidari chakran* lands, that is, lands which at or before the Settlement had been appropriated or assigned for the maintenance of the Police force, and by reason of such appropriation excluded from the *zamindari* assessment. It is in

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their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings, the question whether Suba Naik was a *paik* with Police duties would have been of little importance if not quite immaterial. The appellant would be precluded by Regulation I of 1793 and XIII of 1805 from utilizing *chowkidari chakran* lands for remunerating persons who were his personal servants and performed no Police duties, but as appears from the case of *Secretary of State v. Kirtibas Bhupati Harichandan Mahapatra* (1), the onus of proving that the lands in question were so appropriated or assigned would lie on the respondent. The *kabuliyat* contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court. Such admission could hardly be avoided. The real question upon the pleadings was whether the appellant could rightly terminate Suba Naik's tenancy. The new issue suggested raises the question, not whether Suba Naik's tenancy could be determined, but whether it ought not to be determined and the *jagir* utilised for maintaining some Police Officer appointed by the Government. Nevertheless the High Court held that this was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for re-hearing. It not only did this, but it ordered all the costs already incurred to abide the result of the re-hearing. In other words, if the appellant failed on a new case set up for the first time on the second appeal, he would have to pay whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordships' opinion, even if it be competent to the High Court to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had discovered fresh facts of which he was unaware when the case was before the lower Courts. The

possibility of the lands in question being *chowkidari chakran* lands, which could not, according to the Regulations, be resumed, must have been present to the minds of his advisers when his statement by way of defence was filed. It had been suggested by the Magistrate whose order necessitated the action. The action of the respondent's advisers in not raising the point must have been deliberate. With knowledge of it, he elected to fight the action on the question whether Suba Naik could rightfully be dispossessed of his *jagir* rather than on the question whether he ought not to be dispossessed and the *jagir* utilised for Police purposes. The record contains little or no evidence pointing to there being any *chowkidari chakran* lands which could not be resumed within the Pergunnah. On the contrary, the *rubokari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The respondent does not suggest that he has any further evidence.

Their Lordships are, therefore, of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

Solicitors for the Respondent: The Solicitor, India Office.

PUNJAB CHIEF COURT.

CIVIL REFERENCE NO. 13 OF 1913.

June 3, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

NIAZ ALI—DEFENDANT—APPELLANT
versus

MUHAMMAD RAMZAN AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 113, O. XLVI, r. 1—Reference to High Court, when competent—Pre-emption suit, decree in, under appeal—Government notification taking away right of pre-emption, effect of.

Section 113, Civil Procedure Code, should be read in conjunction with Order XLVI, rule 1, and only

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those cases should be referred to the High Court under the section which are not open to further appeal.

A Government notification taking away the right of pre-emption in respect of certain property would be fatal to the case of a plaintiff in whose favour no decree had been passed at the date of the notification, but it would not affect the rights of a plaintiff in whose favour a decree had been passed before the date of the notification, merely because that decree was under appeal at that date.

Bishen Singh v. Ganda Singh, 16 Ind. Cas. 959; 10 P. R. 1913; 264 P. W. R. 1912; 5 P. L. R. 1913, distinguished.

Sat Bharai v. Sat Bharai, 18 Ind. Cas. 329; 65 P. R. 1913; 24 P. W. R. 1913; 46 P. L. R. 1913, referred to.

Case referred by the District Judge, Sialkot, with his No. 100-J, dated the 18th August 1916, for the orders of the Chief Court, Punjab.

Bhagat Gcbind Das, for the Appellant.

Malik Muhammad Hucain, for the Respondents.

ORDER.—The plaintiffs in this case sued to pre-empt, and obtained a decree on condition of payment of Rs. 1,000 by a certain date. The vendees appealed to the District Judge. While the appeal was pending in the District Court, the Local Government issued a notification taking away rights of pre-emption with respect to agricultural land within the limits of a Municipality. The learned District Judge has now referred to this Court the question whether *Bishen Singh v. Ganda Singh* (1) covers the case of a pre-emptor, who has already obtained a decree but against whom the vendee-defendant has lodged an appeal prior to the issue of a Government notification taking away the right of pre-emption.

The order of reference quotes section 113 of the Civil Procedure Code, but that section should be read in conjunction with Order XLVI, rule 1, which provides for reference to a High Court only in cases not open to further appeal. But as the question is a simple one, and as both sides have been represented in this Court, we think it better in the interests of all concerned that we should answer the question put to us.

It is clear that all rights to pre-empt with regard to land like the land in suit ceased from the date of the notification. But

before that date the plaintiff in the present case had already obtained a decree and thereby he became more than a mere plaintiff seeking to enforce a claim to pre-empt. He became a decree-holder entitled, immediately he paid in the pre-emption money, to the status of full owner, provided, of course, that the decree of the first Court was not upset on appeal. In the Appellate Court he is a decree-holder, defending the decree which has already been passed in his favour, and unless fault can be found with that decree it should be upheld. If the decree was right on the day it was passed the subsequent Government notification cannot make it wrong, as the notification has no retrospective effect. It is clear then that the case differs from *Bishen Singh v. Ganda Singh* (1), in which the notification was issued before the plaintiff had obtained any decree. In this connection, too, we may refer to *Sat Bharai v. Sat Bharai* (2), a case in which a reversioner sued for a declaration that an alienation should not affect her reversionary rights. Her suit being dismissed by the first Court, she appealed, still seeking a declaratory decree but during the pendency of the appeal the alienor died, and the appeal was then dismissed for the reason that succession having opened out the plaintiff had lost her right to obtain a mere declaration. So, too, in the present case, had the plaintiff's suit been dismissed by the first Court, and had the plaintiff been the appellant in the District Court, we take it that a Government notification issued while the appeal was pending and taking away the right to pre-empt would have been fatal to the plaintiff's chance of success. But as we have already pointed out, the plaintiff is not now seeking to enforce a right to pre-empt, but he is a decree-holder defending his decree, and we hold that the notification is no bar to his defence.

The case is returned to the District Judge, who will dispose of the appeal on its merits. Pleaders' fees in this Court Rs. 16 each side, which will be costs in the cause (*vide* Order XLVI, rule 4).

Case returned.

(1) 16 Ind. Cas. 959; 10 P. R. 1913; 264 P. W. R. 1912; 5 P. L. R. 1913.

(2) 18 Ind. Cas. 320; 65 P. R. 1913; 24 P. W. R. 1913; 46 P. L. R. 1913.

KALI SHETTATHI v. SHAMA RAU.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 44 OF 1915.

CIVIL REVISION PETITION NO. 32 OF 1915.

August 11, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

KALI SHETTATHI AND ANOTHER—

JUDGMENT-DEBTORS—APPELLANTS—PETITIONERS
versus

SHAMA RAU AND OTHERS—DECREE-

HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (w), O. XLVII, r. 7, O. IX, r. 9—Execution application, dismissal of, for default—Restoration—Review of restoration order and its cancellation—Subsequent review of order for dismissal for default, whether lies.

An application for execution of a decree having been dismissed for default, it was, on the application of the decree-holder under Order IX, rule 9, Civil Procedure Code, restored in Execution Petition No. 36 of 1913. In Execution Petition No. 39 of 1913 the judgment-debtors applied for a review of the restoration order on the ground that it was passed without notice to them. The Court granted the review and set aside the order of restoration. The decree-holder then applied in Execution Petition No. 52 of 1913 for review of the original order dismissing the execution petition for default, which was granted:

Held, that Execution Petition No. 52 of 1913 was not in effect for a review of the order in Execution Petition No. 39 of 1913, whose scope could not be enlarged by implication so as to affect the order of dismissal of the original execution petition, which was liable to be reviewed independently. [p. 230, col. 1.]

Appeal against the order of the District Court of South Canara, in Civil Miscellaneous Appeal No. 12 of 1913, preferred against the judgment of the Court of the District Munsif of Udipi, in Revision Execution Application No. 52 of 1913 (in Execution Petition No. 888 of 1910, Original Suit No. 189 of 1893), and petition under section 115 of Act V of 1908 and the Charter Act to revise the order of the Court of the District Munsif of Udipi in Revision Execution Application No. 52 of 1913.

IN C. M. S. A. NO. 44 OF 1915

Mr. K. P. Lakshmana Rao, for the Appellants.

IN C. R. P. NO. 32 OF 1915

Mr. J. L. Rosario (with him Messrs. K. P. Madhava Rao and K. P. Lakshmana Rao), for the Petitioners

Mr. K. Y. Adiga, for the Respondents,

JUDGMENT.—The respondents are decree-holders whose application for execution was originally dismissed for default. They obtained its restoration under Order IX, rule 9, of the Code of Civil Procedure, by presenting Execution Application No 36 of 1913.

The appellants, the judgment-debtors, then applied to the District Munsif in Execution Application No. 39 of 1913 to review his order of restoration, on the ground that it had been passed without notice to them. He granted a review and set aside his order of restoration.

Respondents then in Execution Application No. 52 of 1913 applied for a review of the original order dismissing the execution petition for default. The District Munsif granted a review and set aside the dismissal in the order, which is the subject of the present proceedings. The District Judge dismissed the appellants' appeal with reference to Order XLIII, rule 1 (w) and Order XLVII, rule (7), of the Code of Civil Procedure.

We have before us an appeal and a revision petition, but the conclusion we have come to on the merits, makes it unnecessary for us to decide whether the former will lie.

Both are argued on the ground that the District Munsif's order on Execution Application No. 52 of 1913 was passed without jurisdiction because it offended against Order XLVII, rule 9, of the Code of Civil Procedure, being in effect an order reviewing the previous order refusing to restore the original execution petition, which he passed after granting a review on Execution Petition No. 39 of 1913.

In order to deal with this argument, close attention to the course of the proceedings is necessary. Execution Application No. 39 of 1913 was disposed of on the legitimate grounds that (1) Order IX, rule 9, of the Code of Civil Procedure required notice to the other side, which had not been given; (2) Order IX does not apply to execution proceedings at all [*vide*, *Hajrat Akramnissa Begam v. Valiunnissa Begam* (1) and *Dhonkal Singh v. Phakkar Singh* (2), authorities which have not lost their

(1) 18 B. 429; 9 Ind. Dec. (N. S.) 795.

(2) 15 A. 84 A. W. N. (1893) 36; 7 Ind. Dec. (N. S.) 770.

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validity]. Under the present Code (1) would no doubt have justified only a re-hearing after notice had been given. But (2) was a sufficient ground for the lower Court's re-call of its order of restoration at once, the result being only that Execution Application No. 36 of 1913 stood dismissed. It is not possible to enlarge the scope of this order by implication and hold that it in any way affected the order of dismissal of the original execution petition, since that order had never been the subject of any subsequent proceedings. In fact the whole effect of the order on Execution Application No. 39 of 1913 was that the proceedings subsequent to the order of dismissal were a nullity. There is accordingly no foundation for the contention that Execution Application No. 52 of 1913 which in terms asked for a review only of the original order of dismissal, was for a review of the later order on Execution Application No. 39 of 1913 or that the order passed on the former was for a review of the latter.

The appeal against appellate order and civil revision petition fail and are dismissed with costs, one set only allowed, those in the civil revision petition.

Appeal dismissed.

V. R. P.

MADRAS HIGH COURT.
APPEAL SUIT No. 424 OF 1914.
November 24, 1916.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Srinivasa Aiyangar.

MUTHAYA PILLAI AND OTHERS—
DEFENDANTS NOS. 4 TO 6—APPELLANTS
versus

TINNEVELLY SOUTH INDIA BANK,
LTD., THROUGH ITS AGENT G. V. SUBRAMA-
NIA AYYAR AND OTHERS—PLAINTIFF
AND DEFENDANTS NOS. 8 TO 14 AND 1 TO 3
RESPONDENTS.

Hindu Law—Joint family—Ancestral trade—Debts—Liability of co-parceners.

In the case of an ancestral business of a Hindu family all the members of the family, including the minors, are liable for debts incurred in the course of the business and such liability is not confined to their shares in the assets of the business but extends to their shares in the family property. [p. 230, col. 2.]

Sanka Krishnamurthi v. Bank of Burma, 11 Ind. Cas. 79; 14 Ind. Cas. 389; 35 M. 692; 21 M. L. J. 620;

(1911) 1 M. W. N. 385; 11 M. L. T. 56; *Ramlal Thakursidas v. Lakhmichand*, 1 B. H. C. R. App. 51; *Raghunathji Tarachand v. Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255, referred to.

Chelamayya v. Varadayya, 22 M. 166; 9 M. L. J. 3; 8 Ind. Dec. (N. S.) 118, distinguished.

Appeal against the decree of the Court of the Subordinate Judge. Tuticorin, in Original Suit No. 46 of 1913.

Messrs. M. D. Devadoss and T. Nallasivam Pillai, for the Appellants.

Mr. T. R. Rama Chandra Aiyar, for the Respondents.

JUDGMENT.—The evidence is ample to show that the money was borrowed for the purpose of a trade which was an ancestral one and carried on under a direction in the father's Will. It was argued as a matter of law that the appellants would not be liable except to the extent of their shares in the assets of the business, and in support of that proposition a ruling of this Court in *Sanka Krishnamurthi v. Bank of Burma* (1) was cited; but that case does not bear out the contention of the learned Pleader. It is clear from the judgment of the learned Chief Justice in that case that so far as the Hindu Law is concerned, which is the law governing the parties in this suit, he accepted the rulings in *Ramlal Thakursidas v. Lakhmichand* (2) and *Raghunathji Tarachand v. Bank of Bombay* (3) as correctly laying down the law on the subject. Those decisions held in clear terms that in the case of an ancestral business, all the members of the family including the minors are liable for debts incurred in the course of the business to the extent of their shares in the family property, and that seems to be only reasonable because a business like the one in question is carried on on the credit of the entire family property. The family property is swelled by the profits earned in the business and it would be not only unjust to confine liability to the extent of the share in the assets of the business but it would be impossible in a case of this nature to say what is the extent of the

(1) 11 Ind. Cas. 79; 14 Ind. Cas. 389; 35 M. 692 21 M. L. J. 620; (1911) 1 M. W. N. 385; 11 M. L. T. 56

(2) 1 B. H. C. R. App. 51.

(3) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255,

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property embarked in the business. The learned Pleader for the appellant also relied on a decision in *Chalamayya v. Varalayya* (4). But all that was held there was that in cases of this class, the separate property of the minor would not be liable. The reasoning in that case on the other hand makes it clear that, in the opinion of the learned Judges, the share of the minor in the whole of the family property would be liable.

The appeal is dismissed with costs.

Appeal dismissed.

V.R.P.

(4) 22 M. 166; 9 M. L. J. 3; 8 Ind. Dec. (x. s.) 118.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 546
OF 1915.

January 21, 1916.

Present:—Mr. Justice Beaman.

TEHILRAM GIRDHARIDAS—

PLAINTIFF

versus

LONGIN D'MELLO AND ANOTHER—

DEFENDANTS.

Mortgage—Moveable property—Mortgage, how effected—Contract Act (IX of 1872), ss. 108, 178, scope of—Estoppel—Holding out—Bona fide purchaser for value—Partnership—Partners, rights and liabilities of, inter se.

A mortgage of moveables can be as validly effected by parole as by a writing and the immediate effect of such a mortgage is to pass the property in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual possession of the chattels should be given. [p. 233, col. 2; p. 234, col. 1.]

Sections 108 and 178 of the Contract Act are enacted for the protection of *bona fide* purchasers and pledgees and are grounded upon principles of estoppel. [p. 237, col. 2.]

If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of and conferring a good title to it, and such a person does dispose of it, the true owner has no good ground of complaint against the *bona fide* purchaser for value. [p. 237, col. 2.]

Persons entering into agreements of partnership cannot be said to buy anything at all from each other. The most that any partner can be said to buy by putting money into a business in consideration of a partnership share in it is the right upon a dispute to a partnership account and division of any of the assets ultimately found due. [p. 238, col. 1.]

T. advanced to V. a certain amount on the hypothecation of some press machines. Later on D. entered into partnership with V. V. thereafter again took a

fresh advance from T. on the hypothecation of the same press. On a suit by T. D., who had no notice of the transactions of V., with T. resisted the suit on the ground that T. could not proceed against his half share in the press:

Held, that T. was entitled to bring all the property in suit to sale under his mortgages. [p. 238, col. 2.]

Messrs. Wadia and M. J. Mehta, for the Plaintiff.

Messrs. Kolaskar and Gupte, for Defendant No. 1.

JUDGMENT.

BEAMAN, J.—The plaintiff in this suit, a money-lender, claims to have a preferential right over all the creditors of the deceased Gabriel F. Vaz in respect of certain hypothecated property, being the press machines and other accessories of the Minto Printing Press.

The Official Assignee, a party defendant in this suit, has taken no part in it. I suppose that is because the deceased Vaz has no other assets worth troubling about than the subject-matter of the present suit.

The defendant D'Mello alleges that, on the 3rd of October 1914, he put Rs. 3,000 into what was thereon constituted a partnership between himself and Vaz for the working of the Minto Printing Press. He, therefore, contends that the plaintiff's claim, if in all other respects proved to be valid, must be restricted to a half share of the assets of that partnership upon a proper winding-up.

On the one hand, the defendant contends that the writings of hypothecation of the 11th of March 1913 and the 27th of February 1915 are fabrications, and that, if there was any transaction at all between the plaintiff and Vaz, it went no further than an ordinary money loan secured by promissory notes. On the other hand, the plaintiff contends that D'Mello paid no consideration whatever for his half share in the partnership and that if any transaction of the kind actually occurred in October 1914, it was entered into designedly in order to defraud him.

A great deal of evidence has been recorded, much of it to prove the respective contentions I have just barely outlined and much of it directly to prove that the plaintiff not only obtained the hypothecation of the property in suit in March

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1913 but actually took constructive possession thereof by affixing boards on the premises announcing to the public that he was a mortgagee in possession.

The defendant is not now in a position to prove that the plaintiff's principal document, Exhibit B in the case, dated the 11th of March 1913, was not what, on the face of it, it purports to be. Vaz died on the night of the 22nd or early morning of the 23rd of April 1915 by his own hand. He appears to have taken poison on or about the 19th of April and succumbed during the night of the 22nd. D'Mello has no knowledge of the transaction evidenced by Exhibit B in the case and can only argue upon general grounds that the writing of that date, viz., the 11th of March 1913, and the later writing of the 27th of February 1915, are fabrications made to support the plaintiff's case. Exhibits B and F, the document creating the second charge, are signed by Vaz. They are written in the vernacular, and the defendant's suggestion is that the plaintiff got Vaz's signature to papers the contents of which he did not understand. I may briefly dismiss the evidence and state my conclusions upon it. I see no reason on this record to hold that Exhibits B and F are not genuine papers, although I confess that I view them and their proprietor, the plaintiff, with considerable suspicion. Nor do I see any sufficient reason to doubt but that D'Mello paid Rs. 3,000 on the 3rd of October 1914 as consideration for a half share in the partnership thereupon constituted and evidenced by the partnership deed of that date, Exhibit No. 3 in the present case. There has been a great deal of dispute over the payment of this consideration, and the fact that the deed bearing date the 3rd of October is said, by some of the witnesses, to have been executed on the 5th. I attach little or no importance to these matters. I am satisfied that D'Mello gave valuable consideration for his share in the partnership, thenceforward intended to work the Minto Printing Press. I am further satisfied that D'Mello had no notice of the plaintiff's claim in October 1914. It is possible that the plaintiff may have

occasionally stuck up his board on the Printing Press, but the evidence on behalf of the defendant is far too good and far too strong to allow me to entertain any doubt but that a very great part of the plaintiff's evidence on this point is entirely false. And the defendant's evidence is such as to satisfy me that neither by means of these boards nor in any other way was notice given to D'Mello by the plaintiff of his alleged mortgage of the whole of the Printing Press plant. I could easily amplify my reasons for these conclusions, summarily stated, by an examination of the evidence more in detail, but I do not think it necessary to do so. Speaking generally, wherever that evidence conflicts with the defendant's evidence, I should not hesitate to reject the testimony given by the plaintiff, his nephew and his *bhayas*. With the single exception of Baptista, who appears to have acted very much in the plaintiff's interest in these matters, the whole of the plaintiff's evidence is of a character inviting the comment that it is completely subject to his control. It is of the quality to be expected from witnesses of that class. On the other hand, the defendant, D'Mello, has not only given what appeared to me to be candid and straightforward evidence himself but has supported some of his contentions at least by the testimony of credible and unimpeachable witnesses such as Brewin and Templeton. There cannot be the least doubt, I think, but that D'Mello not only purchased a share in the partnership but immediately assumed predominant control of it and from the 3rd of October 1914 to the 19th of April 1915 was in effect the sole manager of the Printing Press without any notice or suspicion of the plaintiff's claim to be a mortgagee of the entire plant. On the 19th of April 1915, becoming aware, I suppose, of Vaz's intended suicide, the plaintiff and his men hastened to the Press to assert their rights and declare that the plaintiff was mortgagee in possession. This led to a serious *fracas* on the morning of the 22nd. Complaints were made in the Police Court and the plaintiff was fined for trespass.

These being the material facts, all of which I hold to be proved beyond reasonable doubt, I have to consider what is the legal

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position of the parties and to determine their relative rights and liabilities in the light of the facts so found.

I should mention that the first mortgage, Exhibit B, was for Rs. 2,000 at 18 per cent. interest. On the 27th of February 1915, about three months after the partnership between D'Mello and Vaz had been constituted, Vaz is alleged to have borrowed a further sum of Rs. 1,000 from the plaintiff and to have executed a further charge, at the same time re-affirming the earlier mortgage, by the document F in the present case. That paper contains no allusion whatever to what was then an undoubtedly existing partnership between Vaz and D'Mello. It contains a list of all the Press plant and a statement that that plant had been assigned by a writing to the plaintiff on the 11th of March 1913. The rate of interest upon the total sum of Rs. 3,000 thus charged upon the plant of the Minto Printing Press was thenceforward to be 12 per cent. per annum.

The case has occupied me a considerable time, because it raises questions which have long interested me and upon the true legal answers to which I have for years felt much doubt. For that reason I have throughout suggested points and invited Counsel to collect authorities bearing upon them, which might serve, if possible, to elucidate some definite and intelligible principle. I am much indebted to the industry and patience of the learned gentlemen on both sides, who have laid before me in this way a very great number of cases, both Indian and English, so enabling me to take a comprehensive survey of the whole of this most difficult and much vexed field of the law. Many of the cases cited proved to have no direct bearing upon what I understand to be the material question of law standing here to be answered, but all of them have illustrated other points of equity or law indirectly bearing upon the main question. I think that the result has been to show how very difficult it is to extricate, from the mass of authority thus entangled by many converging and interpenetrating doctrines of the English Law, any satisfactory ground upon which to rest, in this country at any rate, what seems to have become settled as the legal doctrine of the mortgage of moveables. I have always felt almost insuperable theoretical difficulties in

the way of making any such doctrine suitable for practical application by the Courts in this country: indeed of its establishment at all as a proper extension of the corresponding doctrine governing the mortgage of immoveables. It might be thought that what is easy to state theoretically and administer practically in regard to immovable might be as easy to state and apply in regard to moveable property. This is by no means the case, and were the matter *res integra*, I should have no hesitation in deciding upon grounds of public policy, quite apart from theory, that the Courts have no business to recognise the mortgage, in the wider sense, of mere chattels. In the Statute Law of India it would be difficult to find anything making it imperative upon Courts to acknowledge any such doctrine. In the 3rd section of the Transfer of Property Act, amongst other definitions, the definition of a chose in action mentions the hypothecation of moveables as though that were an accepted part of the law of this country, and, again in the Stamp Act, section 2, clause 7, the like words are to be found. Elsewhere I do not believe that it would be easy to discover in the sufficiently voluminous Statute Law of this country any warrant for the assertion that the Courts of India are bound to recognise a mortgage of moveables. Nor after having considered the case-law, both of this country and England, which has gone to establish that doctrine, very carefully and critically for many years, am I able to discover any authority, in reason or equity, adequate to establish it. If, however, it is to be taken as a part of the law of India, and in the existing state of the case-law I suppose it must be, then it is very necessary to examine the essential ingredients of the mortgage of moveables and so arrive at a clear understanding not only of the nature of the legal notion but of all its legal consequences in relation to others who may have dealings with or rights in the moveables so mortgaged.

We may take it on the authority of all the text-book writers that a mortgage of moveables can be as validly effected by parole as by a writing, and that the immediate effect of such a mortgage is to pass the property in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual pos-

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session of the chattels should be given. Thus, unlike a mortgage of immoveable property, which, no matter what its value, can only be effected in this country by a writing or a transfer of possession, mortgages of chattels, having the effect of immediately transferring the property thereunder from the mortgagors to the mortgagees, can be made by mere parole and without the transfer of possession. It is only necessary to dwell for a moment upon this, in particular relation to the known conditions of life in India, to realise how heavily weighted such a doctrine must be with the gravest potentialities of mischief. I can hardly imagine any other legal doctrine that might be more mischievous or open a wider door to fraud and interminable litigation. There is no possibility, as far as I can see, of drawing any distinction between the so-called mortgages of moveables made by a few spoken words, unaccompanied by possession, and the like mortgages made by the most correct and artificial documents, accompanied by possession. The only possible justification which occurs to me for having accepted and enforced the principle of the mortgage of chattels in this country lies in the needs of considerable traders. Very true, in times of pressure and difficulty a trader may need large advances on the security of his stock-in-trade, and that security might be withheld if the stock-in-trade, whatever it might be at the time the payment was called for, could not be made primarily liable. Obviously too, the creditor could not take more than symbolical possession of the stock-in-trade without defeating the very object of the loan. So that in cases of that kind there might be a reason for permitting the hypothecation of moveables on a large scale by the execution of properly drawn formal documents duly registered. But as the doctrine has been imported in its entirety from England, its application in this country must be regarded as co-extensive with its application in England before a plentiful crop of abuses had necessitated the passing of the Bills of Sale Acts. And in England it was quite enough for any one borrowing to hypothecate orally anything and everything of which he might then be or in future become possessed as security for the loan. In such cases where

possession is not taken, it is very easy to see practical difficulties of the most serious kind and put cases in which the results must be anything but equitable. Take the following two very simple illustrations of what is at the present moment passing through my mind. A being in need of money and possessing a gold watch goes out into the street and successively mortgages it to B, C, D and E, in each case for £ 5, the four transactions all occurring on the same day. Now, what are the resultant rights of the mortgagees B, C, D and E? In England the text-book writers at any rate have gone the length of saying that once a mortgage of chattels is created, all the subsequent dealings are to be treated on the same footing and governed by the same principles as the like subsequent dealings in relation to a mortgage proper. But analysis shows that that can hardly be the case where chattels are made the subject of what is called a mortgage immediately transferring the legal estate; because we come at once in conflict with the principle to which expression is given in sections 108 and 178 of the Indian Contract Act. The mortgage of chattels, whether by parole or by a writing, instantly transfers the property in the goods from the mortgagor to the mortgagee, that is to say, immediately on the payment of the price, or loan or mortgage advance. But let this be regarded from whatever point of view be chosen, it works out to this and nothing else, that every hypothecation of that sort is an out-and-out sale subject to a condition that the vendee will re-sell the chattel to the vendor at a certain price and upon certain conditions. But if it be an out-and-out sale, then in the case supposed, the chattel mortgaged remains in the possession of the vendor with the consent of the vendee, and each subsequent oral mortgage becomes a sale in turn. In the case supposed, there could be no possibility of such circumstances existing as would put the second, third and fourth mortgagees, respectively, upon guard, while the possession of vendor would in each case be with the consent of the true owner. So that as far as I can see, in law the last mortgagee would be the only owner of the watch and the three prior mortgagees would have no claim upon it whatsoever. Or upon another view the first mortgagee might have

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the better claim and the others none. It could hardly be said that like the puisne mortgagees of real estate each had no more than a right to the equity of redemption. For that altogether ignores the very salutary and necessary principle of section 178 of the Indian Contract Act regulating what actually occurs when these mortgages of chattels are effected. The subject is doubtless confused by substituting the word 'mortgage' with all its legal associations for the word 'sale.' But slurring over difficulties by the use of this or that word or the application of special terminology to the matter in hand is but too shallow a way of dealing with what is really going to the root of the principle. And the second illustration I give is that of a trader in active business to whom *A* lends, let us say, £1,000 on the general faith of his solvency as exhibited by his possessions and more particularly by his stock-in-trade. Ten days later, *B* advances the same trade £1,000 upon an oral mortgage of every stick and chattel of which he is then or may in future be possessed. And later the trader becomes bankrupt or *A* takes out execution against him. Adopting the law of the mortgage of chattels, it is obvious that in both cases *B* will be the secured creditor with all preferential rights over *A* if in the former he has demanded the possession a day before the bankruptcy, though I am entirely at a loss to see what superior equity he has. It may be argued that *A* has been lending money upon the faith of reputed chattel possessions and takes his risk of their disappearing before he seeks re-payment. That is undoubtedly true. On the other hand, apart from the doctrine of the mortgage of moveables and assuming that the possessions (chattels) upon which the money is really, though not in so many words stated to be, lent in specie at the time the loan falls due, and supposing there is no question of preference, it is obvious that a creditor's remedy is exactly the same at law whether there be or be not any hypothecation, that is to say, in any money-decree a creditor may attach and sell any or all the property of his judgment-debtor. It thus becomes clear that it is only for the purposes of preference that there is the least need for this hypothecation of moveables. And then, again, it could only be in cases where they, or, at any rate, a part of them or substitutes, in law their

equivalents, exist in specie at the time the question of priority arises, that the hypothecation can be of value to the mortgagee. So that it really comes to this, that quite apart from any true equity, the creditor, who has been wise enough to stipulate in so many words that the money he advances is advanced on everything chattel which the borrower may then or thenceforward possess, is to have preference on that account over equally *bona fide* lenders, unaware of the oral contract, who have not been far-sighted enough to make such a contract of their own at the time of the advance; and it certainly appears to me that here we are faced with a very real difficulty, and with a doctrine of law, which, carried out logically, would certainly do more injustice than justice. For a man in a seemingly good way of business might go on for years borrowing money from creditors lending in good faith upon his apparent prosperity, while in fact everything moveable belonging to him may have been hypothecated orally to some other and earlier creditor, and so upon a case of preference arising, all later creditors would be unable to recover any part of their money: or in the event of each of them in turn having stipulated for the like hypothecation of all the debtor's moveables, a problem would arise, as I have already indicated, of which I do not believe any logical legal solution is possible.

I have felt it necessary to indicate, indeed within the compass of a judgment I can do little more than indicate, some points and lines of reasoning, which, being thoroughly exhausted and followed up, have convinced me that it is eminently desirable that the law of hypothecation or mortgage of moveables is in need of radical reform. This law, it is to be observed, has been transferred bodily from England to India as part of the old common law, and must, therefore, be administered here as it was in England before public policy required its correction and curtailment by the various Bills of Sale Acts. There are no such Acts in this country, and, in my opinion, we should be much better without them, provided that it were legislatively enacted that no Courts should recognize any mortgage of moveables for a less sum than, say, Rs. 5,000 evidenced by a registered writing. That would suffice to meet the legitimate exigencies of trade; and smaller

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loans upon the hypothecation of chattels, especial or general, should, I think, be ignored, unless they fulfil all the requirements of a pledge. In this country we have a very precise and easily administered law of a pledge. Where money is really advanced upon a chattel and the property in that chattel thereupon passes to the creditor, it is only right that he should take possession of it and so prevent other people lending money to his debtor on the faith of his being the ostensible owner of goods which really do not belong to him. I may note in this connection that several of the cases cited by Mookerjee, J., in the case of *Mahamaya Debi v. Haridas Haldar* (1), in support of his conclusion that a mortgage of moveables is recognized and established in this country as well as in England, appear to me to be cases which fulfil all the requirements of a pledge, and the only point with which the English Judges were concerned in those cases was the remedy of the mortgagee. The remedy of a pledgee is limited to sale, whereas in those cases the mortgagee was seeking foreclosure. That is a point with which I am not concerned here, inasmuch as I do not suppose that any Court in this country has yet decreed foreclosure of a chattel alleged to have been mortgaged.

Another point occurs to me in connection with the principal contention of the parties. The facts I have found show that the plaintiff's first loan was made to Vaz before Vaz entered into partnership with D'Mello. The question naturally suggests itself whether in such circumstances a creditor can recover against the partnership in excess of the share owned by his debtor therein. I do not think that the answer to that would be affected by any stipulation such as is to be found in Exhibit No. 3, that the partnership shall not be liable for any pre-incurred debts. It must, at once, I think, be conceded that in the case of a simple money loan not in form professing to be a hypothecation made to a debtor, at that time not a member of any partnership, it could not possibly be enforced against the partnership, that is to say, in

the case of a man, for example, who was not engaged in trade at all at the time he borrowed money but a year afterwards enters into partnership and carries on business. Is that conclusion affected by a change in the circumstances? Let it be supposed that *A* is a sole trader and borrows a sum of money for the purposes of his business. Presently, he takes *B* into partnership with him. Can the creditor now sue the partnership as a partnership for the money advanced to *A* as a sole trader? If that money has been employed upon the business and so entered as an ingredient into what actually became the subject-matter of the later partnership, there might be a strong theoretical reason for holding that the partnership was liable as a whole for the antecedent debt. The point is one of considerable nicety. In England the law seems to have been once at least laid down, without any doubt, or for that matter without giving any elaborate reasons, to the effect that *A* dealing with *B*, and *B* thereafter taking *C* into partnership and notifying *A* of the fact, *A* is put to his election upon the receipt of the notice whether to make *B* solely, or *B* and *C* jointly, answerable to him for the result of the dealing: *British Homes Assurance Corporation, Limited v. Paterson* (2). And in another and much earlier case, *Jackson Ex parte* (3), the Chancellor was very much perplexed over the law proper to be applied to such a state of facts. There the real debt was an ordinary bond-debt, and the debtor subsequently took two other persons into partnership. I gather from Lord Eldon's judgment that his opinion was that the partnership could not be made liable, if it were a genuine trading partnership, for the pre-existing debt. On the other hand, reasons could easily be suggested why that law might operate very harshly and unjustly. If *A* advances to *B*, a sole trader, a large sum of money on the faith of his stock-in-trade, and the next day *A* having no other means takes nine other persons into partnership with him, it is obvious that a very great injustice might be done to the lender. Such

(1) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 203; 20 C. L. J. 183.

(2) (1902) 2 Ch. 404; 71 L. J. Ch. 872; 86 L. T. 826; 50 W. R. 612; 18 T. L. R. 676.

(3) (1790) 1 Ves. (Jr.) 131; 30 E. R. 265.

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considerations are peculiarly proper to cases of ordinary loans, and having regard to the established legal doctrine of the mortgage of moveables, I do not think that unless a general proposition be firmly established that every partnership was liable for all antecedent debts incurred in the same business prior to the partnership, it could be of any practical value for the purpose of my present discussion, and I am not at all sure that such a general legal proposition ever did warrant it.

I must, therefore, start once more upon the found facts from the point that, on the 11th of March 1913, the whole plant of the Minto Printing Press passed out of the hands of Vaz into those of the plaintiff. The plaintiff on the execution of Exhibit B appears to have become in law, according to the old English doctrine, the true owner of all the property, the subject-matter of this suit. He allowed that property to remain in the possession of Vaz. I shall not again cover the ground in this judgment which I attempted to examine minutely and exhaustively in my judgment in the case of *Nandlal Thakersey v. Bank of Bombay* (4), touching the true meaning of the word 'possession.' Ever since the enacting of sections 108 and 178 of the Indian Contract Act, notwithstanding the fact that they are designedly worded quite differently from anything to be found in the old English Factors Act and the like, the Courts in India appear to have struggled to confine the application of those sections within the very much narrower meaning prescribed by the terminology of the English Acts. Over and over again very learned and eminent Judges have interpreted those sections as though the word 'possession' meant something very much more than in any known legal sense it does. But if the word had the meaning thus sought to be given to it and no more, many of the very cases which those sections were intended to cover would be excluded from their operation. Reading the sections as they stand, it is only too obvious that they were advisely worded to have much larger and freer scope than the English Factors Act. Commentators, I notice, referring to the discussion which arises over these sections before the Indian

Contract Act was passed record, objections to them on the score that they convert the whole of India into a market overt. But confining myself to section 108, at any rate, such an objection appears to be out of place. It is essential that possession should be with the consent of the true owner, and that, just as the proviso to section 178, excludes all cases of property which had been stolen or acquired by any dishonest means. And if the intention of the Legislature had been as the Courts have often enough interpreted it, that is to say, that possession in those sections should mean possession for a limited and specified purpose, it would have been easy enough to say so. The truth is that the sections are enacted for the protection of *bona fide* purchasers and pledgees and are really grounded upon principles of estoppel. If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of and conferring a good title to it, and such a person does dispose of it, the true owner, as far as I can see, has no good ground of complaint against the *bona fide* purchaser for value. I am not, therefore, disposed now any more than I was in the year 1909 to adopt the very narrow construction put upon these sections in the various decisions of the Indian High Courts. Their language appears to me to be too plain to admit of any doubt, and I do not think that we have any right to go behind that language and limit it by reference to a supposed historical tradition.

In the present case, then, I find that while the true owner of the plant of the Minto Printing Press in October 1914 was the plaintiff, Tehilram Girdhardas, Vaz was in possession with his consent. That being so, had Vaz sold the whole or any part of the property in suit to D'Mello without notice and in the absence of any circumstances putting D'Mello upon inquiry, and D'Mello had paid the sum in good faith, believing Vaz to be the real, as he was the ostensible, owner, then I should have no doubt whatever in holding that D'Mello had acquired a perfectly good and valid title against Tehilram. Unfortunately, that is not what occurred. And a further difficult question arises, *viz.*, what actually passes in such a transaction as that evidenced by Exhibit No. 3 in the present case. It cannot be said

(4) 4 Ind. Cas. 652; 11 Bom. L. R. 926.

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that Vaz sold any part of the Printing Press machinery to D'Mello. The contract is that D'Mello is to put Rs. 3,000 into the business and thenceforward is to become a jointowner with Vaz of all the Printing Press plant, etc. Now, persons entering into agreements of partnership, cannot be said to buy anything at all from each other. Both persons remain, as long as the partnership exists, joint owners *per mie et per tout* of all the partnership assets, and it is impossible to say at the date of the institution of the partnership what any partner may have acquired as consideration for the money he has paid in order to become a partner. That can only be ascertained upon a dissolution of the partnership when all the assets of the partnership, as they stood at the time it was constituted, may have finally disappeared. The most that any partner can be said to buy by putting money into a business in consideration of a partnership share in it is the right upon a dispute to a partnership account and division of any of the assets ultimately found due. It is clear that, on the 3rd of October 1914, D'Mello cannot be said in law to have purchased any part of the property left in the possession of Vaz by the true owner Tehilram. Nevertheless it might be contended that by parity of reasoning and on analogy, D'Mello, in equity, at any rate, should be entitled to exclude from the materials available for the satisfaction of Tehilram's debt one half of the partnership assets after such should have been ascertained upon a winding-up; and that is the view I should very much like to take because I think it is most consistent with the justice of the case; but long and anxiously as I have pondered over it, I am unable to discover any solid legal ground upon which to put it. If there was no sale of any definite chattel to D'Mello in October, it follows that he cannot take the benefit of section 108; and there is no other section in our Statute Law which extends that principle to a case like this. It could be by analogy and by breaking new ground altogether that D'Mello could be brought within the protection of section 108. In my opinion, although the equity of the case is very strongly on his side, as long as this very mischievous doctrine of mortgage of chattels is part of the law of the country, I see no escape from the consequence that Tehil-

ram, the plaintiff, was, on March 11th, 1913, and has since remained, and still is, the true owner of the property in suit covered by the mortgage-deeds of the 11th of March 1913 and the 17th of February 1915. It is not really a case of preference at all. As I understand the law, it is a case of property supposed to belong to A being found to belong to B; and if that be so, any one in possession of it admittedly from A, or claiming through A, would have no case against B. That I take to be the true legal position occupied respectively by D'Mello and the plaintiff in this case.

I have come to this conclusion only after long and anxious reflection and the study of a very great number of cases. I have come to it, too, with great reluctance; because it rests upon a doctrine which I should like to see wholly abolished, or, at any rate, confined within such narrow limits as to make it incapable of lending itself to further frauds and injustice. I am not in a position to make new law. I can only administer the law as I find it to be and understand it. Since there has been no transfer by sale or pledge of any part of the property belonging to Tehilram and left by him in possession of Vaz, it appears to me that his rights over it acquired in 1913 remained wholly unaffected by the illusory partnership, purporting to cover it, entered into between D'Mello and Vaz on the 3rd of October 1914.

I must, therefore, hold that the plaintiff, Tehilram, is entitled to bring all the property in suit to sale under his mortgage-deed of the 11th of March 1913, Exhibit B. And as to the second mortgage of the 22nd of February 1915, although there might be some theoretical difficulty in supposing that the amount is advanced on the security of his own property, yet being his own property in law I suppose it will have to be conceded that he is entitled to recover the amount of that charge also from the sale-proceeds.

This suit must now be decreed against both the defendants with all costs.

The order of the 5th of July 1915 to continue.

Liberty to both the sides to apply.

The sale to be effected after six months within which time D'Mello may redeem or settle with the plaintiff if he likes.

Suit decreed.

JITENDRA KUMAR PAL CHOWDHURY v. MOHENDRA CHANDRA SARMA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 299
OF 1910.

July 16, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Walmsley.JITENDRA KUMAR PAL CHOWDHURY
—DEFENDANT No. 1—APPELLANT*versus*

MOHENDRA CHANDRA SARMA AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Assam Land and Revenue Regulation (I of 1886), ss. 70, 79, 80, 85—Date of confirmation of sale—Sale certificate, whether conclusive as to date of confirmation of sale—Adverse possession—Defaulting proprietor adverse possessor of part of estate sold for arrears of, revenue, when becomes—Limitation Act (IX of 1903), Sch. I, Art. 144.

An entry in a sale-certificate as to the date of confirmation of sale cannot possibly affect the provisions of sub-section (2) of section 80 and sub-section (3) of section 85 of the Assam Land and Revenue Regulation. Such entry cannot, under section 85 of the Regulation, be conclusive evidence as to the date of confirmation of sale and the Court is competent to look beyond the sale-certificate to determine the date of confirmation of sale. [p. 240, col. 2.]

Title to property purchased at a sale held under the Assam Land and Revenue Regulation vests in the purchaser from the date when the sale becomes final under section 80, and the possession of a person who occupies portions of it becomes adverse to the purchaser from that date, and not from the date when possession is delivered to the purchaser by the Revenue authorities. [p. 240, col. 2.]

A person whose adverse possession of part of an estate has not, at the time of the revenue sale of the estate, continued for the statutory period so as to ripen into ownership, cannot be deemed a defaulting proprietor at the date of the sale. [p. 240, col. 1.]

Quære.—Whether Article 144 of the Limitation Act applies to a suit for recovery of possession of part of an estate on declaration of title by a purchaser at the revenue sale from a person who has been in possession as a trespasser. [p. 239, col. 2.]

Appeal against the decree of the Subordinate Judge, Sylhet, dated the 21st March 1910.

Babus Tarakishore Chowdhury and Brojo Lal Chakrabarty, for the Appellant.

Babus Sarat Chandra Roy Chowdhury and Gopal Chandra Das, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for declaration of title to land and for recovery of possession thereof. The plaintiffs-respondents claim title to the disputed property by purchase of a share of an estate at a sale for arrears of revenue held on the 25th October 1887,

under section 70 of Regulation I of 1886. On the 17th November 1888 the Sub-Divisional Officer issued to the purchasers a sale-certificate, in which it was stated that the sale had been held on the 25th October 1887 in accordance with the provisions of the Assam Land and Revenue Regulation and had been confirmed on the 31st October 1888. The present suit was commenced on the 26th October 1900. On behalf of the defendants, it was contended in the Court below that the suit was barred by limitation. This contention has been overruled by the Subordinate Judge. In this Court, in answer to the contention of the defendant-appellant that the suit is barred by limitation, the plaintiffs-respondents have argued that Article 144 of the Second Schedule to the Indian Limitation Act governs the matter. We shall assume that the rule of limitation applicable is contained in Article 144, which provides that a suit for possession of immoveable property, not otherwise provided for in the Limitation Act, must be brought within 12 years from the date when the possession of the defendant became adverse to the plaintiff. The question in controversy is, when did the possession of the defendants become adverse to the plaintiffs in the case before us? On behalf of the plaintiffs it was argued in the Court below that as the sale-certificate recited that the sale was confirmed on the 31st October 1888, the possession of the defendants became adverse to the plaintiffs from that date. This position was contested by the defendants, who raised a question as to the date when the sale became final under the provisions of the Regulation. The Subordinate Judge held that under section 85 the certificate was conclusive evidence as to the date of confirmation of sale. In our opinion this view is clearly erroneous, for sub-section (3) of section 85 lays down that the certificate granted to the purchaser is conclusive evidence of regularity of the proceedings, and does not provide that the certificate is conclusive evidence of the date of confirmation of sale. It is worthy of note that the expression 'confirmation of sale' does not find a place either in section 80 or section 85 of the Regulation. Sub-section (1) of section 80 provides that a sale, on which the purchase-money has been paid and against which no

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application under section 79 to set it aside has been preferred, shall, subject to the provisions of sections 81 and 82, be final at noon of the sixtieth day from the date of sale, reckoning the date of sale as the first of the sixty days. Sub-section (2), which deals with the case where an application has been preferred to set aside the sale, lays down that a sale against which such an application has been preferred and has been dismissed by the Chief Commissioner or Commissioner, shall, subject to the provisions of sections 81 and 82, be final from the date of dismissal, if more than sixty days from the day of sale, or, if less, then at noon of the sixtieth day as provided in sub-section (1). In the present case, an application was made to set aside the sale. The question is, when was that application dismissed by the Chief Commissioner? We have on the record a letter from the Secretary to the Chief Commissioner to the Deputy Commissioner, in which it is stated that the Chief Commissioner directs the confirmation of the sale held on the 25th October 1887. This letter bears date the 18th September 1888. It is thus plain that the application to set aside the sale must have been dismissed by the Chief Commissioner on or before the 18th September 1888. Consequently, under sub-section (2) of section 80, the sale became final on or before the 18th September 1888, and under sub-section 2 of section 85 the title to the property sold vested in the purchaser from such date. How the entry in the sale-certificate came to be made, is fairly clear from the record. It appears that the letter from the Secretary to the Chief Commissioner to the Deputy Commissioner was communicated to the Sub-Divisional Officer by whom the sale had been held; the latter officer, on the 30th October 1888, recorded an order of confirmation of sale and subsequently issued the sale-certificate which bore date the 7th November 1888. What is stated in the sale-certificate as the date of confirmation of sale cannot, however, operate in law as the date when the sale became final under section 80. But it has been strenuously argued for the respondents that the Court is not competent to look beyond the sale-certificate, and is bound to presume therefrom that under sub-section (2) of section

85, title vested in the purchaser from the date of the certificate, that is, from the 7th November 1888. This contention is obviously fallacious. Under sub-section 2 of section 85, the date of the certificate is the date when the sale became final, and under sub-section (2) of section 80 the date when the sale became final is the date of dismissal of the application to set aside the sale by the Chief Commissioner. An entry in the certificate, by the officer who drew up and issued the document, that the sale was confirmed on the 30th October 1888, could not possibly affect the provisions of sub-section (2) of section 80 and sub-section (3) of section 85. We hold accordingly that in this case the sale became final on or before the 18th September 1888. From that date, the title vested in the plaintiffs as purchasers at the revenue sale, and the possession of the defendants became adverse to the plaintiffs *prima facie* from such date. Consequently, under Article 144 the suit is barred by limitation.

It has been argued as a last resort that as possession was delivered to the purchasers by the Revenue Authorities on the 29th November 1888, the possession of the defendants must be taken to have become adverse to the plaintiffs only from such date, and, in support of this contention, reliance has been placed upon the decision in *Mozuffer Wahid v. Abdus Samad* (1). That case, even if it be assumed to have been correctly decided, is clearly distinguishable and has no application to the circumstances of this case. In that case, this Court applied to a revenue sale of an entire estate the principle laid down by the Full Bench in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (2) in relation to delivery of possession as between a decree-holder and a judgment-debtor. It was ruled by the Full Bench that in such a case, in contemplation of law, both the parties, that is, the decree-holder and the judgment-debtor, must be considered as present at the time when the delivery is made and that, consequently, as against the judgment-

(1) 6 C. L. R. 539.

(2) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68.

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debtor, the symbolical delivery thus given must be deemed equivalent to actual possession. The Full Bench, however, proceeded to observe that as against third parties, that is, persons not parties to the decree, this symbolical possession, as it is called, would be of no avail, because they are not parties to the proceeding. A similar principle has been applied by a subsequent Full Bench in the case of *Joggobundhu Mitter v. Purnanund Gossami* (3) as between an execution-purchaser and the judgment-debtor. Even if we assume, therefore, as was done in the case of *Mozuffer Wahid v. Abdus Samad* (1), that this principle is applicable as between a purchaser at a revenue sale and the defaulting proprietor, the doctrine would have no application to persons other than the defaulting proprietor, as was pointed out in the case of *Mir Waziruddin v. Lala Deoki Nandan* (4). Now, in the case before us, the appellant was not a defaulting proprietor. The case for the plaintiffs is that the appellant had no interest in the property sold; he was a trespasser and was, at the time of the revenue sale, in adverse possession of lands which are really included in the estate sold but which he claimed as situated within a neighbouring estate owned by him. His adverse possession, according to the plaintiffs, had not at the time continued for the statutory period so as to ripen into ownership. The principle recognized in *Rahim-ul-din v. Bhabingana Debya* (5) had consequently no application and he could not be deemed a defaulting proprietor at the date of the sale. He was thus a stranger to the proceeding for delivery of possession, and the symbolical delivery alleged to have been effected on the 25th November 1888 could not avail as against him. We hold accordingly that the suit is barred by limitation; and in this view it is needless to discuss the interesting questions as to the true effect of sections 70 and 72 of Regulation I of 1886 which have been ably argued before us by Counsel on both sides.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside in so far as it is not a decree by consent of parties, and the suit dismissed with costs. This order will not affect the decree of the Subordinate Judge in so far as it was a decree by consent of parties. We assess the hearing-fee in this Court at fifteen gold mohurs.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 392 OF 1913.

March 5, 1915.

Present:—Mr. Fawcett, A. J. C.

FIRM OF JANKIDAS-BANARSIDAS—
PLAINTIFFS
versus

DHUMANMAL AND OTHERS—DEFENDANTS.

Contract Act (IX of 1872), ss. 1, 211, 215, 216—Principal and agent—Agent, right of, to trade on his own account in business of agency without knowledge and consent of his principal—Trade usage inconsistent with Contract Act, validity of—Principal, right of, to repudiate transactions made by agent with himself in contravention of instructions of principal—Proof, quantum of.

In matters touching the agency, an agent must never place himself in a position where it would be possible that his own interests might stand in opposition to his duty towards his principal. [p. 245, col. 2.]

Where a commission agent, instructed to sell goods for future delivery 'in the market', purchased them himself under a fictitious name, and on the approach of the due date, being asked to fulfil the contract of sale by purchasing like goods of equal quantity 'from the market', purchased the same from himself under the same fictitious name, and concealed on both occasions the fact of himself being the purchaser and the seller respectively, but on the contrary misrepresented to his principal that the transactions were made with outsiders:

Held, that the concealment being dishonest was clearly disadvantageous to the principal, as the contracts being for future delivery, the agent had

(3) 16 C. 530; 8 Ind. Dec. (N. S.) 350.

(4) 6 C. L. J. 472 at p. 452.

(5) 1 Ind. Cas. 81; 13 C. W. N. 407.

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still several duties to perform for the principal, which almost necessarily came into conflict with the agent's interests, and that the principal was, therefore, entitled to repudiate the transactions under sections 211 and 215 of the Contract Act. [p. 245, col. 2; p. 246, col. 2.]

Damodar Das v. Sheoram Das, 29 A. 730, A. W. N. (1907) 245; 4 A. L. J. 587, *Joachimson & Co. v. Meghji Valji*, 3 Ind. Cas. 801; 11 Bom. L. R. 779; 34 B. 292 at 307; *Salomons v. Pender*, (1863) 3 H. & C. 639; 34 L. J. Ex. 95; 11 Jur. (N. S.) 432; 12 L. T. 267; 13 W. R. 637; 159 E. R. 682; 140 R. R. 651; *Andrew v. Ramsay and Co.*, (1903) 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 52 W. R. 126; 19 T. L. R. 620, referred to.

Where, however, a commission agent having purchased goods for future delivery from an outsider, closed the transaction on the due date by selling the same to himself on the market rate, the latter transaction was held binding on the principal, as the transaction was not disadvantageous to the principal and brought about no conflict of interests between the agent's duty to his principal and his own interests as a purchaser. The agent, however, was held not entitled to any commission on such a transaction. [p. 247, cols. 1 & 2.]

Salomons v. Pender, (1863) 3 H. & C. 639; 34 L. J. Ex. 95; 11 Jur. (N. S.) 432; 12 L. T. 267; 13 W. R. 637; 159 E. R. 682; 140 R. R. 651, referred to.

Obiter dictum—In India, a trade usage inconsistent with the terms of the Contract Act, *e. g.*, permitting an agent to trade on his own account in the business of the agency without the knowledge and consent of the principal, may be valid but it should be specifically pleaded and strictly proved. [p. 248, col. 2.]

Irrawaddy Flotilla Company v. Bugwandas, 18 C. 620, 18 I. A. 121; 15 Ind. Jur. 403 at p. 542; 6 Sar. P. C. J. 40; 9 Ind. Dec. (N. S.) 413; *Bhagvandas Narotandas v. Kanji Deoji*, 30 B. 205; 7 Bom. L. R. 611, *Chandu Lal Suklal v. Sidhruthrai*, 29 B. 291; 7 Bom. L. R. 165, referred to.

According to the law in England such a usage, even if proved, being both illegal and unreasonable, would not be binding on a principal not proved to have known it and agreed to be bound by it. [p. 248, col. 2.]

Robinson v. Mollett, (1875) 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544, referred to.

Mr. *Takibram Maniram*, for the Plaintiffs.

Mr. *Assanmal Bulchand*, for the Defendants.

JUDGMENT.—The plaintiffs sue as commission agents in Karachi to recover from defendants a sum of Rs. 2,522-3-0, alleged to be due on their account for the purchase and sale of grain for the defendants, a firm trading at Bareilly in the United Provinces. The account referred to is in respect of only two contracts on behalf of the defendants, the first for the sale of 150 tons of barley and the second for the purchase of 50 tons of wheat and the subsequent transactions relating to those contracts.

The defendants in their written statement

plead (1) that these contracts were in direct contravention of their instructions and are, therefore, not binding on them, and (2) that the transactions in question were also otherwise illegal. They claim, therefore, that the suit should be dismissed with costs. Without prejudice to the above, they further submit that they are not liable in any case for brokerage, commission, etc. The following issues were accordingly framed:

1. Did plaintiffs buy and sell goods for defendants according to the instructions of the defendants?

2. If not, were plaintiffs entitled to buy and sell as they have done?

3. Are plaintiffs entitled to brokerage, commission, and interest? If so, how much?

4. What is due to plaintiffs?

At the trial the 2nd issue was found to be based on the allegation that the plaintiffs had dealt on their own account in the business of the agency with regard to two contracts in question, and the issue is really narrowed down to one, whether the defendants are entitled to repudiate the transactions sued on under section 215 of the Indian Contract Act.

The main facts are as follows:—The defendants had admittedly sent one Badriparsad or (Badridas) to Karachi as their representative for certain purposes, and the two contracts referred to above appear to have been entered into on his initiative.

On the 9th July 1912, the plaintiffs sent a telegram in Badridas's name to the defendants to the effect that they had sold 150 tons of barley at the rate of Rs. 24-12-0, and the next day they wired that they had bought 50 tons of wheat at the rate of Rs. 31-1-0 on the previous day (Exhibits 22 and 23). On the 11th July they sent a letter to the defendants confirming these two telegrams, with the exception that the rate of wheat is given in the letter as Rs. 31-2-0 instead of Rs. 31-1-0, and stating that Badriparsad had made these transactions on defendants' account (Exhibit 58). Accompanying this letter were two contract notes of which the first (Exhibit 59) states that 150 tons of barley had been sold in the market. On the 15th July, the defendants, wrote a post card (Exhibit 9) to the plaintiffs acknowledging receipt of this letter and stating that they had credited

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and debited the amount accordingly. They added, "but in future do not sell or purchase without my writing to you. Please note that. Be writing to me".

No further correspondence appears to have passed between the parties until the 24th August 1912, when defendants wrote a letter (Exhibit 63) to the plaintiffs. In that letter the defendants, after mentioning that plaintiffs had not written before and asking them to write to them, state that Badridas had fallen ill and returned. They then gave instructions to the plaintiffs to receive 1,107 bags of barley from one Hiranand Versimal at Rs. 24-12-0 and to purchase 700 bags from the market with profit and give delivery. This must have been received by the plaintiffs about the 28th August, on which date they sent a telegram (Exhibit 24) to the defendants saying that they were taking delivery of 1,107 bags from Hiranand Versimal, and that they had bought 700 bags at Rs. 28. There was, however, some hitch about getting the bags from Hiranand and on the 31st August plaintiffs sent defendants an urgent telegram (Exhibit 25) informing them of this and asking them to wire Hiranand to give the barley. The next day they sent another telegram (Exhibit 26) informing defendants that they had bought 1,100 bags of barley at Rs. 29-8-0. Meanwhile on the 29th August, plaintiffs had sent defendants a letter (Exhibit 61) acknowledging receipt of defendants' letter (Exhibit 63) and confirming the telegram (Exhibit 24). They added that Hiranand had promised to give delivery of the goods, but that if he failed to do so by 31st August they would on that day purchase on defendants' account *from the market* and make delivery.

As regards the wheat contract nothing further appears to have passed between the parties until the 28th of September, when plaintiffs sent a telegram (Exhibit 27) as follows:—

"No reply. Wheat 29-6 reply in wire 48 hours put in fix or sell otherwise will sell market rate" On the 30th September they sent a further telegram (Exhibit 28) "No wire sold wheat 50 tons 29-4 new rule."

The plaintiffs' accounts regarding these transactions (Exhibits 16 and 29) show (and it is not disputed) that the 150 tons of barley, August delivery, sold by the defendants were purchased not by any outside merchant but by

plaintiffs themselves, although in Exhibit 59 they informed the defendants that the barley had been sold "in the market". In Exhibit 16 it is stated that the 150 tons were bought for the plaintiffs through brokers Chiranjilal and Rughunath, but plaintiffs' witness Radhakishen admits that he can show no entries of payments to the brokers, and the only one of them that was called as a witness, namely Rughunath, says nothing about being paid the amount of brokerage on this transaction. This is, however, explicable, as it appears brokers are not paid separately for each transaction, and there is evidence that at any rate Rughunath was employed as a broker, for he produces a *kobala* of 9th July 1912 (Exhibit 51) regarding 75 tons of barley, in which the plaintiff Jankidas Banarasidas is shown both as purchaser and seller. I think this *kobala* is genuine, but it is rather difficult to see why a broker should be employed in a transaction where the purchaser and the seller are the same person, unless it is done merely with a view to justify a charge for brokerage in the constituent's account. So far as I am aware, there was no constant fluctuation of market rates so as to make the employment of a broker desirable for the purpose of settling the rate [cf. Pollock and Mulla's Indian Contract Act, 3rd Edition, page 566, foot-note (s)].

In this *kobala* the last date for delivery is given as the 30th August, but Rughunath explains that he does not know whether there are 30 or 31 days in August and that he wrote 30th August under the supposition that it was the last day of the month. This explanation is probably true, and in any case the point is of no material importance. As already mentioned, the defendants on 28th August sent instructions regarding the delivery of barley in fulfilment of their contracts of sale and in Exhibit 63 told the plaintiffs to purchase 700 bags *from the market*. Admittedly, however, these 700 bags were sold to the defendants by the plaintiffs themselves at Rs. 28-8-0 on the 28th August 1912 (Exhibits 12 and 17), although in Exhibit 6 the plaintiffs impliedly represent the purchase as one from the market. In Exhibit 17 the words '*dookan khata*' (shop account) showing that the transaction was made by plaintiffs themselves has admittedly

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been first written and then scored out, and the transaction is shown as one on the account of "Murlidhar Pahalajrai", which is admittedly a pseudonym for plaintiffs' private transactions. The 1,100 bags, which, in Exhibit 61, the plaintiffs said they would purchase from the market on the 31st August, in the event of Hiranand failing to give delivery, were also really sold to the defendants by plaintiffs themselves, see Exhibits 18 and 45 in which the bags are shown as sold on the account of the same "Murlidhar Pahalajrai". These bags were also sold to the defendants not on the 31st August, but on the 1st of September. In the plaintiffs' account, Exhibit 31, regarding these barley transactions there is a further debit to the defendants of Rs. 191-12-0 on account of $6\frac{1}{2}$ candies of barley, which admittedly were not purchased by them. It is apparently inserted because the 1,800 bags of barley already referred to only accounted for $506\frac{1}{2}$ candies instead of 513 candies which make up 150 tons (Exhibit 12).

As regards the contract for the purchase of wheat, the plaintiffs' *sowla noonah* entry regarding this shows 50 tons of wheat, September delivery, as sold to the defendants on the account of Javhermal Hemandas through broker Radhakishen (Exhibit 20). The defendants' Pleader contended that this was a fictitious entry and that the wheat was really sold to the defendants by the plaintiffs. In support of this, at the time of his closing arguments, he relied on the fact that the entry, Exhibit 48, regarding the original purchase of this wheat by Javhermal Hemandas first showed it as of August delivery, subsequently corrected to September delivery.

The original entry of August might, however, have been a mistake, and in order to clear up this point I allowed plaintiffs to adduce further evidence. The original contract with Messrs. Ralli Brothers Exhibit 69 has been produced and shows clearly that the contract referred to in Exhibit 48 was really for September delivery. Radhakishen, Exhibit 12, says that Javhermal was a constituent of the plaintiffs, and although there is no full evidence on the record about it I see no reason to

disbelieve his statement. The remaining 50 tons out of the contract for the purchase of 100 tons from Ralli Brothers are alleged to have been bought for Shival Charanjilal and Dilsukhdas Gobindram, and Exhibits 66 to 68 point to these being genuine transactions. Similar evidence had not been adduced as regards Javhermal, but I think on this point the plaintiffs' account books may be relied on and that if the transaction had really been one for plaintiffs' own shop account it would have been shown as on account of Murlidhar Pahalajrai as in the case of the transactions regarding the barley contract referred to in Exhibits 17, 18 and 29.

Though, in my opinion, the plaintiffs did not sell the wheat to defendants, yet they admittedly bought it from defendants on the 30th September, (Exhibits 12 and 21). The transaction resulted in a loss to defendants, as they bought the wheat at Rs. 30 a candy (new rules) and sold it to the defendants at Rs. 29-4-0. Similarly Javhermal incurred a loss, as he bought from Ralli Brothers at Rs. 30-8-0 a candy and sold it to defendants at Rs. 30. This sufficiently explains why no payment was made or credit given to Javhermal on account of the defendants' failure to carry out their contract with him; and objections of this kind which were raised by defendants' Pleader, only wasted time and confused the real issue.

The main question in this suit is, whether the defendants are entitled to repudiate the transactions sued on (a) as being contrary to their directions or (b) because plaintiffs dealt on their own account in the business of the agency without defendants' knowledge or consent (sections 211 and 215, Contract Act). So far as the first point is concerned, the defendants clearly ratified their servant Badriparsad's action in entering into the two contracts of 9th July by their post-card Exhibit 9. It is, therefore, unnecessary to inquire what authority Badriparsad had to make those contracts on defendants' behalf, nor would any oral evidence regarding this be likely to be reliable. But Badriparsad in his evidence on commission (Exhibit 11) says that he asked the plaintiffs to sell the 150 tons of barley in the market and he

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never told them to buy the goods themselves at the market rate. So far as the statement is concerned, I think his evidence may be safely accepted, because it is corroborated by the fact that plaintiffs, though they really bought the 150 tons themselves, represented to the defendants in Exhibit 59 that they had been sold "in the market" and said nothing about their being the purchasers. If Badriparsad had authorised them to buy the 150 tons themselves, this would almost certainly have been stated in their letter Exhibit 58, and the misrepresentation in Exhibit 59 would not have appeared. But even if Badriparsad gave no definite instructions to plaintiffs on the question whether they should get the defendants' offer to sell accepted by an outsider, or accept it themselves, if they wanted to the effect will be just the same. Plaintiffs themselves represented that the 150 tons had been sold in the market, and under section 193 of the Contract Act the ratification of the defendants by Exhibit 9 must be taken as one limited to a sale in the market, as opposed to one to plaintiffs themselves. By Exhibit 59, plaintiffs themselves practically show that their instructions were to sell the 150 tons in the market, as Badriparsad says they were; and the subsequent ratification by Exhibit 9, for the reason just given, does not help plaintiffs: *cf. Damodar Das v. Sheeram Das* (1). Consequently I hold that plaintiffs did not act according to the instructions of defendants in regard to this contract.

The sale to plaintiffs also, I think, clearly comes within the scope of section 215 of the Contract Act as a transaction which can be repudiated by the principal. In the first place, the fact that plaintiffs had bought the barley was concealed from the defendants; not only that but there was a misrepresentation on the point. I think that there can be no doubt whatever that this concealment was *dishonest*. It was done with the intention of causing wrongful gain to the plaintiffs (*cf.* section 24 Penal Code), because they were thereby in a better position to keep any benefit which might result from the transaction contrary

(1) 20 A. 780 at p. 735; A. W. N. (1907) 245; 4 A. L. J. 587.

to the provisions of section 216, Contract Act, and to charge for brokerage, etc., as if it was a transaction with an outsider. The entry of the purchase in the *khata* of Murlidhar Pahalajrai (Exhibit 29) is also one which savours of dishonest concealment, although it is only fair to plaintiffs to say that they have made no attempt to conceal the fact that this *khata* is the one relating to shop transactions. At the same time it is doubtful whether the words 'any material fact' in section 25 include the fact of the agent dealing on his own account with the business of the agency, and the context and illustration (a) rather suggest the contrary. I do not, therefore, rely on this point in holding that the case falls under section 215.

The dealing of plaintiffs on their own account was, however, clearly disadvantageous to the defendants, because the contract was one for *future delivery*, and plaintiffs as agents for defendants still had duties to perform for defendants which would almost necessarily come into conflict with their interest as the actual purchasers from the defendants.

The mere possibility of the agent's duty to his principal and his own interests being in conflict is, I think, sufficient to bring the case under section 215, since the possibility of this conflict is in itself a disadvantage to the principal. This has been recognised in the case of *Damodar Das* (1) already cited, where at page 734 it is stated: "An agent must never place himself in a position in which it is possible that his duty to his principal and his own interests would stand in opposition to each other, and on this principle it has been held that an agent employed to settle a debt cannot purchase it on his own account." Again in *Jochimson & Co. v. Meghji Valji* (2), Chandavarkar, J., citing the passage in *Story on Agency*, page 262, section 210:—"In matters touching the agency agents cannot act so as to bind their principals where they have an adverse interest in themselves," describes it as "a principle which is fully recognised in the Indian Contract Act." In the same paragraph 210, *Story* says:—

"This rule is founded upon the plain and

(2) 3 Ind. Cas. 801; 34 B. 292 at p. 307; 11 Bom. L. R. 779.

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obvious consideration, that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with sole regard to the interests of his principal, so far as he lawfully may; and even if impartiality could be possibly presumed on the part of an agent, where his own interests are concerned, this is not what the principal bargains for, and in many cases it is the very last thing which would advance his interests."

This paragraph in *Story on Agency* was cited with approval in the two English cases of *Salomons v. Pender* (3) and *Andrew v. Ramsay and Co.*, (4). In cases like this, where the agent's duty to his principal continued after the purchase of defendants' forward contract to sell, I think the law in India must clearly be treated as the same as it is in England.

There is also evidence that this conflict of interests on the part of the plaintiffs was in fact disadvantageous to defendants. In their post card of 15th July (Exhibit 9) defendants told plaintiffs not to sell or purchase in future without instructions from them in writing, and asked plaintiffs to keep writing to them. It appears, however, from defendant's letter of 24th August (Exhibit 63) that plaintiffs had not written to them at all upto then. Also the evidence of Rallis' clerk, Exhibit 64, shows that there was already a rise in the rate of barley from Rs. 25 to 28 in August. If plaintiffs had been wholly disinterested they might have sent defendants information about this rise, which would have enabled defendants to buy barley earlier in August at a cheaper rate than that eventually charged against them: but the plaintiffs gave them no such information, and on the contrary it was in their interests as prospective sellers to defendants to wait as long as possible, so that they might get an advantage to themselves from the rising rates, and they even charged defendants the higher rate of September 1st, instead of the rate of August 31st, which

should have been charged in view of their letter Exhibit 61.

No doubt the rate at which the plaintiffs bought the barley from defendants is now shown to have been below the market rate. The rate of Rs. 24 (new rule) quoted by Rallis' clerk (Exhibit 64) was for barley deliverable by 25th July and not 31st August; and even if it be taken to be the right rate for August delivery, it is only about $1\frac{1}{2}$ anna over the rate of Rs. 24.12.0 (old rule) at which the contract in suit was made. This difference might be due to Rallis' being able to obtain slightly better rates than native merchants in the bazar, and plaintiffs have shown that they entered into other barley contracts on the 9th July at Rs. 24-6 0 and Rs. 24-9-0 (Exhibits 53 and 54). So far then as the rate is concerned, the transaction was not disadvantageous to defendants. But this is not sufficient to counteract the other disadvantages already mentioned, and in view of those disadvantages the defendants are entitled to repudiate this transaction under section 215. For the reasons already given they can also repudiate it under section 211.

The same remarks apply to the cross-contracts of purchase of 1,800 bags of barley in August on defendants' behalf. These were sold to defendants by plaintiffs themselves, although defendants' instructions regarding the 700 bags were to purchase them 'from the market' (Exhibit 63) and plaintiffs had similarly undertaken to buy the 1,100 bags from the market. They would scarcely have undertaken this unless they understood these to be defendants' instructions, as in the case of the 700 bags. Accordingly these purchases were not in accordance with defendants' instructions. The sale of 1,100 bags at the rate of 1st September instead of 31st August was also contrary to plaintiffs' own undertaking in Exhibit 61. Defendants are entitled to repudiate these transactions both under section 211 and section 215. There was dishonest concealment of the fact that the sale of the bags was by plaintiffs themselves (Exhibits 17, 18, 45 and 61) of a kind already mentioned in regard to the original contract; and the rate of Rs. 29-8-0 charged in respect of the 1,100 bags and the fictitious $6\frac{1}{2}$ candies was disadvantageous to defendants, having regard to the

(3) (1863) 3 H. & C. 639 at p. 642; 34 L. J. Ex. 95; 11 Jur. (N. S.) 432; 12 L. T. 267; 13 W. R. 637; 159 E. R. 682; 140 R. R. 651.

(4) (1903) 2 K. B. 635 at p. 637; 72 L. J. K. 865; 89 L. T. 450; 52 W. R. 126; 19 T. L. R. 620.

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fact that plaintiffs had undertaken to purchase on 31st August (Exhibit 61), when according to their own books the rate was Rs. 29-4-0 (Exhibit 44).

I, therefore, hold that plaintiffs are not entitled to the difference of Rs. 2,066-4-9 claimed in respect of these barley transactions. The authorities already cited show they are also not entitled to brokerage, commission or interest in respect of these transactions. In any case the brokerage claimed in respect of these transactions has not been proved.

The wheat transactions are, however, on a somewhat different footing. In this case, for the reasons already given, I hold that the sale of 50 tons to defendants on account of Javhermal Hemandas was a genuine transaction, and not a sale by plaintiffs themselves. The cross-contract of sale to the plaintiffs on 30th September was not disadvantageous to the defendants merely on account of any conflict of interests between plaintiffs' duty as agents and their own interests as purchasers, because the transaction closed the wheat contract and plaintiffs no longer owed any duty as agents to defendants with regard to it. It did not matter to defendants to whom the wheat was sold, so long as this was done at the market rate. No doubt according to Exhibit 64 the rate for barley—ready goods—on 30th September was Rs. 29-8-0 and not Rs. 29-4-0, the rate charged to defendants in Exhibits 21 and 41. But the difference may be explicable as already suggested; and I think that this evidence alone is insufficient to justify the Court in holding that Rs. 29-4-0 was not the proper rate in the market on the 30th September. In fact there was some doubt in the evidence (cf. Exhibit 64) as to whether Rs. 29-4-0 or Rs. 29-8-0 was the rate for that day, as the former was the rate that he first gave but subsequently corrected to Rs. 29-8-0.

In this transaction there was also not the same misrepresentation that the sale was 'in the market' as there was in the barley transactions. Also plaintiffs did not withhold information as to the state of the market from defendants, as they did in the other case. In Exhibit 61 the rate for wheat, September delivery, is given, and the opening words "No reply" in plaintiffs' telegram of 28th September (Exhibit 27) afford, I

think, reliable evidence that plaintiffs had made some communication to defendants about the wheat contracts, which has been withheld by defendants. In this telegram they asked for instructions and gave defendants notice that otherwise they would sell at the market rate (*not* 'in the market') so in this case there was no implied promise not to sell to themselves. As defendants gave no contrary instructions, though they had time to do so, the ordinary rule that 'silence gives consent' applies, and the sale was not one contrary to any instructions of the defendants.

No doubt, if it was shown that plaintiffs had made a profit out of their sale of 50 tons of wheat to the defendants, the defendants would be entitled to claim this from the plaintiffs, but this is not shown, at any rate as regards the wheat itself. It has not been shown at what price plaintiffs sold the wheat which they bought from defendants, nor is any such claim set up in defendants' written statement. The case is quite different from that in *Damodar Das v. Sheoram Das* (1), where the agents first substituted their grain for the principal's and then sold the latter at a profit, and where a distinct claim to this profit was made by the principal. As pointed out in *Joachimson & Co. v. Meghji Valji* (2), section 216 is merely enabling and if a principal does not claim the benefit of it, he cannot come in under it. But defendants have distinctly challenged plaintiffs' right to commission, and so far as that is concerned defendants are entitled to take advantage of section 216. The principle laid down in the leading case of *Salomons v. Pender* (3) applies here. As Bramwell, B., said in that case: "It is true that . . . the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say, 'what you have done has been done as a volunteer, and does not come in the line of your duties as agent'". Accordingly I hold that plaintiffs are not entitled to any commission in respect of the sale by defendants to plaintiffs of 50 tons wheat. It appears from Exhibit 41 that the commission at 8-annas per cent. has been calculated on the price of wheat bought by defendants (*viz.* Rs. 5,136-1-8), that is the opening transaction, whereas in Exhibit 31 it

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has been calculated on the later of the two transactions. In Exhibit 43 it has been calculated on the first transaction. Comparing these entries it is clear that plaintiffs' practice is to calculate it on whichever transaction gives the higher figures and so put more commission in their pockets. In the circumstances half of the commission must fairly be allocated to each of the two transactions. Therefore I hold, that plaintiffs are not entitled to recover Rs. 12-13-6 out of Rs. 25-11-0 charged as commission in respect of the wheat transactions.

The claim for brokerage in respect of this account has also not been proved. The broker Radhakishen through whom the purchase from Javerhmal is alleged to have been made (Exhibit 20) has not been called as a witness, and the broker's *noondh* book was not filed in Court (Exhibit 12, line 260), nor have any entries of payments for brokerage been shown or proved. With the brokerage must also go out the charges for charity, etc., which really form part of the brokerage charges.

The telegram and postage shown in Exhibit 13 have not been disputed and may be allowed, except as regards the postage charges included in the item of Rs. 15-14-6, which have not been shown separately.

I, therefore, disallow the item of Rs. 2,181-2-0 in respect of the 150 tons of barley, and allow only Rs. 147-3-0 instead of Rs. 174-11-6 in respect of the 50 tons of wheat.

The result is that plaintiffs' claim (excluding interest) is reduced from Rs. 2,365-1-0 to Rs. 157-6-6. I allow interest on this sum at 6 per cent. per annum from 1st October to date of suit, i.e., Rs. 9-10-0.

Before concluding I may note that, as the question is of considerable commercial importance, I have taken time to consider this judgment. But the law embodied in sections 215 and 216 of the Contract Act is clear and must, I think, be given effect to in this case. It may no doubt be true that commission agents in Karachi are in the habit of dealing on their own account in the business of the agency without the knowledge and consent of their constituents: they probably profit by doing so, and unless the practice is checked by the Courts, it will doubtless continue. Some evidence has been given

by plaintiffs as to such a practice, but it is certainly quite insufficient to establish a notorious trade usage which would bind defendants. And according to the law in England such a usage, even if proved, being both illegal and unreasonable, would not be binding on a principal not proved to have known it and agreed to be bound by it: see *Robinson v. Mollett* (5) and Halsbury's Laws of England, Volume 10, pages 269, 270, sections 492, 493. The remarks in section 493 are appropriate to this case, viz.:

"When a considerable number of men of business carry on one side of a particular business, they are apt to set up a usage which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a usage; but if on dispute before a legal forum it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Court has always determined that such a usage, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void".

No doubt under section 1 of the Indian Contract Act, a trade usage may be valid, though it is inconsistent with the provisions of the Contract Act: *Irrawaddy Flotilla Co. v. Bugwandas* (6). But before giving effect to any such usage the Courts will, of course, require strict proof of it. In Bombay a usage of the kind in question has been held legally established in the case of what are known as '*pakki adat*' transactions: *Bhagwandas Narotamdas v. Kanji Deoji* (7) but such a usage was held to be unavailable in a case where (as in this one) the plaintiffs sued as commission agents and neither pleaded nor proved the usage sought to be relied on: *Chandu Lal v. Sidhruthrai* (8).

For the above reasons I pass a decree for the recovery of Rs. 156-13-0 from defendants and dismiss the rest of plaintiffs' claim. As plaintiffs have substantially failed they must bear their own and half defendants' costs.

Suit decreed in part.

(5) (1875) 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 514.

(6) 18 C. 620; 18 I. A. 121; 15 Ind. Jur. 403 & 542; 6 Sar. P. C. J. 40; 9 Ind. Dec. (N. S.) 413.

(7) 30 B. 205; 7 Bom. L. R. 611.

(8) 29 B. 291; 7 Bom. L. R. 165.

RAJKISHORE MONDAL v. RAJANI KANT.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1907
OF 1913.

May 20, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.RAJKISHORE MONDAL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

RAJANI KANT CHUCKERBUTTY AND

OTHERS—PLAINTIFFS RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 23—Occupancy holding, rendering unfit of, for tenancy—Holding market on portion of holding, whether makes it unfit for tenancy—Injunction, grant of.

The withdrawal of one-tenth portion of an occupancy holding from actual cultivation for a purpose totally unconnected with agriculture, such as the establishment of a market, renders the holding unfit for the purpose of the tenancy within the meaning of section 23 of the Bengal Tenancy Act. [p. 250, col. 1.]

Where some of the landlords of an occupancy holding, in whose favour a deed of release has been executed by the tenants and to whom possession of one-tenth portion of the holding has been relinquished for the purpose of enabling them to hold a market thereon, attempt to erect structures and hold a market thereon, the other landlords are entitled to restrain them from executing their design [p. 250, col. 1.]

Section 23 of the Bengal Tenancy Act is applicable not only to cases where the land (of an occupancy holding) is made permanently unfit but also to cases where it is made temporarily unfit for the purposes of the tenancy. [p. 250, col. 1.]

Appeal against the decision of the Subordinate Judge, Faridpur, dated the 20th March 1913, modifying that of the Munsif, Chikandi, dated the 28th March 1912.

Babus Joges Chunder Roy and Akhoy Kumar Banerjee, for the Appellants.

Babu Satis Chandra Bhattacharya, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is a portion of a non-transferable occupancy holding. The first three defendants hold this tenancy, which comprises 20 *bighas* of land, under the plaintiffs-respondents and the other defendants, now appellants, as their landlords. It appears that the tenant-defendants on the 5th January 1911, executed a deed of release in favour of the landlords-defendants, to whom they also relinquished possession of one-tenth of the area of the entire holding. The object of this release was to enable the landlords-defendants to erect structures thereon and

to hold a market on the site. This, indeed, is admitted in the written statement of the landlord-defendants, who allege that as the plaintiffs had oppressed the shop-keepers of the neighbouring market, the defendants attempted to set up another market in order to protect the shop-keepers from tyranny and for the convenience of the people of the village. It has also been found that the defendants had commenced to construct huts on the land when this suit was instituted on the 18th January 1911 for a two-fold purpose, namely, *first*, to eject the defendants, and *secondly*, to obtain an injunction to restrain the defendants from altering the character of the land. The Trial Court granted complete relief to the plaintiffs. Upon appeal by the defendants, the Subordinate Judge has dismissed the claim for ejectment on the ground that partial surrender by the tenants in favour of the landlords-defendants did not operate as a forfeiture of their tenancy, though it might not bind the plaintiff landlords. The Subordinate Judge, however, has maintained the decree for injunction. On the present appeal, the defendants have urged that the injunction should be withdrawn.

Section 23 of the Bengal Tenancy Act, which defines the incidents of occupancy right, provides that when a *raiyat* has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy. In the present case, it has not been disputed that the purpose of the tenancy was agricultural. As there is no evidence to show that the land would be materially impaired in value by the establishment of the proposed market, the only question in controversy is whether what the defendants have done or intend to do on the land is calculated to render it unfit for the purposes of the tenancy. It has been argued, with reference to the decision of the Judicial Committee in *Hari Mohan Misser v. Surendra Narayan Singh* (1), that in order to determine this question, it is essential that the Court should have regard to the size of the holding, the area withdrawn from actual cultivation, and the effect of such withdrawal

(1) 34 C. 718; 34 I. A. 133; 6 C. L. J. 19; 11 C. W. N. 794; 9 Bom. L. R. 750; 17 M. L. J. 361; 2 M. L. T. 399.

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upon the fitness of the holding taken as a whole for profitable cultivation. But the case mentioned is clearly distinguishable. There the purpose for which a portion of the holding was withdrawn from actual cultivation was, according to the finding of the District Judge, directly connected with agricultural pursuits, namely, the erection of buildings suitable for indigo manufacture. In the case before us, the purpose for which a portion of the land is sought to be withdrawn from actual cultivation is totally unconnected with agriculture, for what the defendants seek to do is to establish a market on the site. It is immaterial that the market will occupy not more than one-tenths of the area of the entire holding; that circumstance cannot affect the nature and character of the unauthorized act. This is clearly a case where, if the defendants are permitted to execute their design, they will render the holding unfit for agriculture, for which purpose alone the land was let out to the tenants-defendants. It has been argued, however, that the establishment of the market would not permanently render unfit the land for the purposes of the tenancy and that consequently the act is not objectionable under section 23. We are not prepared to accept this contention as well-founded on principle. Section 23 is applicable not only to cases where the land is made permanently unfit, but also to cases where the land is made temporarily unfit for the purposes of the tenancy. The main contention of the appellants, consequently, fails and the order for an injunction must be supported.

It is plain, however, that the injunction has been too broadly formulated and requires modification. The injunction which restrains the defendants from changing the character of the disputed land in any way so as to render it unfit for agriculture, merely reproduces the phraseology of the Statute without any attempt to adapt it to the facts of the special case before the Court. We direct accordingly that the order of the Court below be modified and that the injunction do run in these terms: The defendants are restrained from erecting structures on the disputed land and holding a market thereon. The respondents are

entitled to their costs of this appeal, as the appellants have substantially failed. •

Appeal dismissed; Order modified.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 212 OF 1914.

April 19, 1916.

Present:—Mr. Hayward, A. J. C.

MOHANDAS THAKURDAS—PLAINTIFF

versus

TIKAMDAS HOTCHAND AND ANOTHER—
DEFENDANTS.

Provincial Insolvency Act (III of 1907), s. 37—Companies Act (VI of 1882), s. 213—'Fraudulent preference,' meaning of—Plea of fraudulent preference, whether can be put forward by debtor to avoid liability.

In order to succeed on a plea of 'fraudulent preference' it must be shown that the substantial or dominant object in making a payment was to give preference to a particular creditor in order to prevent the rateable distribution of the property of the debtor among all his creditors. [p. 251, col. 2.]

It cannot be inferred where a creditor has been pressing for his debt and payment is made to avoid the pressure. [p. 251, col. 2.]

Fraudulent preference cannot be pleaded by a debtor in defence to a suit filed against him in order to avoid his own obligation and not for the benefit of the creditors generally. It can be pleaded, if at all, only in the Insolvency Court. [p. 252, col. 1.]

Willmott v. London Celluloid Co. (1886) 31 Ch. D. 425 at p. 434; 55 L. J. Ch. 449; *Willmott v. London Celluloid Co.*, (1887) 34 Ch. D. 147 at p. 150; 56 L. J. Ch. 89; 55 L. T. 696; 35 W. R. 145, referred to.

Mr. Mulchand T. Asarpota, for the Plaintiff.

Mr. Hirdaram Mewaram, for the Defendants.

JUDGMENT.—The plaintiff, the endorsee, sues to recover Rs. 1,000-0-0 and interest from the defendant No. 1, the drawer of a promissory note drawn in favour of the defendant No. 2, the Sind Baluchistan Bank.

The defendant No. 1 pleads that the promissory note was never intended to be acted upon but was drawn merely for the accommodation of the Tatta Branch of the Bank and that there was no right of negotiation conferre don the defendant No. 2, the Sind Baluchistan Bank. Defendant No. 1 also pleads that no consideration was

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paid for the negotiation, and that in any case the negotiation was of no effect as it amounted to fraudulent preference on the part of the Bank.

The defendant No. 2, the Sind Baluchistan Bank, has not contested this claim. It is under liquidation under the Companies Act.

Now it appears that when the People's and Credit Banks failed difficulties arose for the Sind Baluchistan Bank and on the 26th September 1913, the promissory note in suit (Exhibit 14) was drawn by defendant No. 1 in his private capacity in order to bolster up the credit of the Tatta Branch of the Bank. The defendant No. 1 was interested in the matter, being the manager of the Karachi Branch of the Bank and being a share-holder of the Bank. The promissory note was negotiated on the 25th of November 1913 according to the endorsement upon it. It has been suggested that the negotiation was actually made on a later date, but no evidence has been adduced to that effect. On the 29th of November 1913, the Sind Baluchistan Bank closed its business and it has been alleged, though the date has not been definitely proved, that in the following February a petition was filed for winding-up the affairs of the Bank under the Companies Act.

There can, in my opinion, upon these facts, be no doubt that the promissory note was negotiable and was validly negotiated by the endorsement upon it on behalf of the Sind Baluchistan Bank. The defendant No. 1 has alleged that the promissory note was drawn simply for the purpose of being shown to the customers of the Tatta Branch of the Bank, but was not actually to be used to raise money to support the credit of that branch. He has not, however, been corroborated by any other evidence and his allegations cannot stand. It would, moreover, amount to pleading his own fraud—namely, that he had deliberately drawn a bogus promissory note to deceive customers into the belief that the sum mentioned therein was available to meet the liabilities of the Tatta Branch and to prevent their withdrawing their deposits from the Bank. No evidence at all has been adduced to show

that the endorsement on the promissory note was not made authorizedly on behalf of the Bank. And the presumption that it was a valid endorsement must prevail under section 118 (g) of the Negotiable Instruments Act.

There was also, in my opinion, good consideration for the negotiation. A sum of Rs. 500 was still due to the endorsee upon an unpaid fixed deposit and as cash was not available, the promissory note was endorsed in his favour on the understanding that he should recover therefrom the Rs. 500 due to him and pay the balance of the money, when recovered, to the Bank. This has been proved by the endorsee's statement corroborated by the documents (Exhibits 15 and 16) and the evidence of Mr. Chabaldas, the attorney for the liquidator of the Bank. No evidence, on the other hand, has been adduced to displace the presumption in favour of consideration arising under section 118, clauses (a) and (g), of the Negotiable Instruments Act.

Lastly, the defendant cannot, in my opinion, succeed on the plea of fraudulent preference. Such a plea could only be successful if it were proved that the substantial or dominant object was to give preference to the particular creditor in order to prevent the rateable distribution among all the creditors of the property of the Bank. That has not been proved here, for the evidence of the endorsee has clearly established the fact that he had been vigorously pressing for the repayment of the amount due to him on the fixed deposit, and he has been corroborated by the documents (Exhibit 15) including his Pleader's letter and by the evidence of the attorney of the liquidator of the Bank. No evidence whatever has been adduced to show that the offer to pay came from the Bank. The precise meaning of the term "fraudulent preference" has been clearly indicated in paragraph 471 of Volume 2 of Halsbury's Laws of England, where it is shown that it cannot be inferred in such circumstances.

But apart from this it has not, as a matter of fact, been proved that the alleged fraudulent preference occurred within three months of the liquidation, for it has not been definitely proved on what date in February,

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if it was in February at all, that the liquidation petition was filed. No fraudulent preference has, therefore, in any case been established within the meaning of section 37 of the Provincial Insolvency Act read with section 213 of the Companies Act, 1882. Finally, fraudulent preference cannot apparently be pleaded here, where it has been raised merely with the object of avoiding the debtor's own obligation and not for the benefit generally of the creditors. It could be pleaded, if at all, only in the Insolvency Court as pointed out in the case of *Willmott v. London Celluloid Co.* (1) and in the same case on appeal [*Willmott v. London Celluloid Co.* (2)]. The same conclusion results from a consideration of the words "invalid accordingly" and "wound up under this Act" occurring in the 1st clause of section 213 of the Companies Act of 1882.

It follows from what has been said that my findings on the issues must be:—On the issue—whether the promissory note was validly endorsed, in the affirmative; on the issue whether it was endorsed for consideration, in the affirmative; and on the issue whether the negotiation amounted to fraudulent preference, in the negative. There must, therefore, be a decree for Rs. 1,000 principal with Rs. 33-13-8 interest upto date of suit and with further interest at 6 per cent. per annum from date of suit to payment with costs against both defendants Nos. 1 and 2.

Suit decreed.

- (1) (1886) 31 Ch. D. 425 at p. 434; 55 L. J. Ch. 449.
 (2) (1887) 34 Ch. D. 147 at p. 150; 56 L. J. Ch. 89;
 55 L. T. 696; 35 W. R. 145.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1686
 OF 1910.

February 25, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
 and Mr. Justice Richardson.

AFTAR ALI AND OTHERS—DEFENDANTS—
 APPELLANTS

versus

BROJENDRA KISHORE ROY CHOW-
 DHURY—PLAINTIFF—RESPONDENT.

Assam Land and Revenue Regulation (I of 1886),

ss. 63, 70, 71—*Sale, auction, for arrear of revenue—Person having acquired title by adverse possession, whether defaulter—Purchaser, rights of.*

In an auction sale held under section 70 of the Assam Land and Revenue Regulation, 1886, what is sold is the estate and the purchaser is entitled to take that estate as against the defaulting proprietors. [p. 253, col. 1.]

Where, at the time a revenue sale takes place under section 70 of the Assam Land Revenue Regulation, 1886, a person has by adverse possession acquired a good title to a portion of the estate sold, he is also a defaulter by reason of section 63 of the Regulation and cannot assert a good title as against the purchaser as an unrecorded proprietor. [p. 253, cols. 1 & 2.]

Appeal against the decree of the District Judge, Sylhet, dated the 12th January 1910, reversing that of the Subordinate Judge, Sylhet, dated the 30th May 1903.

Babu Gurudas Sinha, for the Appellants.

Babus Dwarka Nath Chuckerbutty and Ramani Mohan Chatterjee, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof with mesne profits. The litigation, which was commenced on the 24th August 1900 and has lasted well nigh for fifteen years, has passed through various stages; but the facts material for the decision of the question in controversy at this the final stage may be briefly recited.

The plaintiff purchased an estate sold under the provisions of section 70 of the Assam Land and Revenue Regulation, 1886, on the 14th February 1890. The sale was confirmed on the 23rd August 1890. The plaintiff asserts that the lands now in dispute are comprised in *Mouza Ghora Dumbar* included in the estate purchased by him. The defendants contend on the other hand that the lands are comprised in *Mouza Pitaboi* owned by them; and they concede that they have no interest in *Mouza Ghora Dumbar*. The Judge has found that according to the *thak* map prepared in 1861 the lands in dispute are comprised within the estate purchased by the plaintiff; but he has also found that the defendants have been in possession ever since the time of the *thak*. The question in controversy is, what are the rights of the plaintiff as purchaser at a sale under section 70 of the Assam Land and Revenue Regulation, 1886, as against the defendants? It is not

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disputed that the plaintiff at the time of his purchase was an unrecorded proprietor of the estate. Consequently, the provisions of section 71, which lays down that the property sold under section 70 shall be sold free of all encumbrances previously created thereon by any other person than the purchaser, have no application; for the third clause to the proviso to that section expressly lays down that nothing in the section shall apply when the purchaser is a recorded or unrecorded proprietor or settlement-holder of the estate. The rights of the plaintiff must accordingly be determined with reference to the terms of section 70 alone. That section is in these terms: When an arrear has accrued in respect of a permanently settled estate or of an estate in which the settlement-holder has a permanent, heritable and transferable right of use and occupancy, the Deputy Commissioner may sell the estate at an auction. On behalf of the plaintiff-respondent, it has been argued that what is sold is the estate and that the purchaser is entitled to take that estate as against the defaulting proprietors. This contention is clearly well-founded. What, then, is the position of the defendants? They have failed to establish that the disputed lands are comprised within their property. They have, however, proved possession for more than 12 years before the date of the revenue sale. Consequently, at the time when the revenue sale took place, they had by adverse possession acquired a good title to the disputed land as against the proprietors of the estate in which it was included. No doubt, they professed to hold these lands as part of their estate; but that could not affect the position of the Government nor effect a division of the estate for revenue purposes. Consequently, on the 14th February 1890, when the sale was held by the Deputy Commissioner, the estate was the property of the original proprietors as also of the defendants who had acquired a good title to a portion thereof by adverse possession. In these circumstances, it is clear from the terms of section 63 of the Assam Land and Revenue Regulation, 1886, that the defendants were defaulters; and once it is held that they were at the time defaulters, the inference is irresistible that

they cannot assert a good title as against the purchaser.

The result is that the declaration of title and the decree for possession made in favour of the plaintiff by the District Judge must be maintained. But it is plain that the title to this property has been in great uncertainty, as is amply indicated by the varying fortunes of the parties in different stages of this protracted litigation. This is pre-eminently a case where no costs should be allowed to the successful litigant, nor mesne profits decreed. While, therefore, we maintain the decree of the Court of Appeal below as regards declaration of title and possession, we vary it in two respects: we direct that each party pay his own costs throughout the litigation and we disallow all claim for mesne profits up to this date.

Appeal dismissed; Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 685
OF 1915.

May 24, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

ASWINI KUMAR AICH—PLAINTIFF—
APPELLANT

versus

SARADA CHARAN BASU AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Ch. X, ss. 106, 109, scope of—Withdrawal of suit under s. 106, when bars civil suit—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3).

Order XXIII, rule 1 (3) of the Civil Procedure Code, in the absence of permission to bring a fresh suit, precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn; but the withdrawal of a suit without permission to bring a fresh suit under section 106, Bengal Tenancy Act, for a declaration that the entry of the defendant's name in the Record of Rights as the owner of a share in a *houla* was not correct, does not bar a suit in the Civil Court for declaration of the plaintiff's title to and for recovery of possession of the said share. [p 255, cols. 1 & 2]

The bar under section 103 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject-matter of the investigation made under Chapter X of the Bengal Tenancy Act. [p. 255 col. 2.]

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Questions relating to declaration of title to and recovery of possession of immoveable property are entirely foreign to the jurisdiction of a Revenue Officer under section 106, Bengal Tenancy Act, his work being confined to a decision of the point whether the entry in a Record of Rights is correct or not. [p. 255, col. 2.]

Appeal against the decision of the Subordinate Judge, Backerganj, dated the 23rd December 1914, reversing that of the Munsif, Perojpur, dated the 23rd July 1913.

FACTS of the case appear from the judgment.

Dr. Sarat Chandra Bysack (with him Babu Nilkanta Ghosh), for the Appellant.—The prayer expressly was that we might withdraw the suit with liberty to bring a fresh suit, that was our application and the order passed thereon was “permitted to withdraw suit.” The order does not reject the suit, otherwise the order would have been such, nor there are the words ‘with liberty to bring fresh suit’ added to the order. Moreover, under Order XXIII, rule 1, one may withdraw from the suit at any time or abandon part of the claim. What was the subject-matter of the suit under section 106 of the Bengal Tenancy Act? The proper scope of a suit under section 106 is the matter which is contained in a Record of Rights. There cannot be a suit for ejectment under section 106, *vide*, *Pran Krishna Saha v. Trailakhya Nath Chowdhury* (1), an earlier case is that of *Kali Sundari Debya v. Girija Sankar Sanyal* (2). This section is confined to proceedings to see whether entries are correct or not. In the present plaint there is no prayer for correction of entry. None of these prayers is a proper prayer under section 106. A suit can certainly be brought for declaration of title and possession. It sounds strange that a suit about property, say, of the value of Rs. 10,000 can be shut out, which should have gone up to the Privy Council, by the judgment of the Revenue Officer in a proceeding under section 106, Bengal Tenancy Act. Under section 107 of the Bengal Tenancy Act finality is attached to the decision of a Revenue Officer. There is no

decision here. Decision here means decision on the merits. If the case is dismissed for default [see *Parbati v. Toolsi Kapri* (3)] or withdrawn, then there is no decision. Decision means adjudication on the merits and does not include dismissal for default. The present suit cannot be barred by section 109 of the Bengal Tenancy Act.

Even assuming for the sake of argument that the scope of section 106 is the same as the scope of the present suit, still there is no *res judicata*; as there is no decision on the merits, it cannot have the effect of a decree. Section 109 also cannot help the other side, it must have a restricted application. A suit in the Civil Court for fair rent would have the same scope as a proceeding under section 105, Bengal Tenancy Act; and if the suit is withdrawn without liberty to bring a fresh suit, a fresh suit in a Civil Court is not barred under section 109, Bengal Tenancy Act, *Oheolath v. Tulsu Singh* (4). Section 109 is not a bar where there is no decision on the merits.

Babu Asita Ranjan Ghose, for the Respondents.—The order here is “permitted to withdraw the suit” and nothing more, and we cannot go behind the records. The order implies that the Judge was against him as to leave being granted to bring a fresh suit. Section 106, Bengal Tenancy Act, is clearly a bar and section 109 too is a bar to bring a fresh suit for recovery of possession. This section does not mean that the suit is to be finally decided. What is the utility of section 109 if it was not to prevent multiplicity of suits? In the present case the property is the same and the parties are the same. The plaintiff cannot bring a fresh suit to frustrate the ends of justice. If he loses the suit under section 106, can he bring a fresh suit with respect to the same property in a Civil Court? I submit he cannot.

Reply not called.

JUDGMENT.—In a Record of Rights under Chapter X of the Bengal Tenancy Act, the plaintiff was recorded as the owner of $\frac{2}{3}$ rd of a *howla* and the defendant

(1) 27 Ind. Cas. 883; 19 C. W. N. 911.

(2) 11 Ind. Cas. 184; 15 C. W. N. 974.

(3) 20 Ind. Cas. 1; 18 C. W. N. 604 at p. 605; 18 C. L. J. 128.

(4) 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467.

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of the remaining $\frac{1}{3}$ rd. The plaintiff brought a suit under section 106 of the Bengal Tenancy Act for a decision that the entry was not correct. That case was heard and remained pending for delivery of judgment. In this state of things, the plaintiff made an application to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The order on the application was: "The plaintiff is allowed to withdraw." No order was made that he was permitted to bring a fresh suit on the same cause of action.

The plaintiff then brought this suit in the Civil Court and his prayers are, *first*, that his title to the $\frac{1}{3}$ of the *howla* recorded in the name of the defendant be established; *secondly*, that his title by adverse possession to the same be established; *thirdly*, for recovery of possession of the same, if necessary; and *fourthly*, for any other relief that he may be entitled to.

Among other issues, issue No. 3 framed by the learned Munsif was—"Is Chapter X of the Bengal Tenancy Act a bar to the maintainability of the present suit?" At the hearing, this issue was not pressed. In his judgment, he says: "Issue No. 3 was not pressed at the Bar" and he decreed the plaintiff's suit.

The defendant appealed and in his grounds of appeal he did not even mention that any provision of Chapter X of the Bengal Tenancy Act was a bar to the suit. The learned Judge, however, at the hearing took up the issue in bar under Chapter X and held that the suit was barred under Order XXIII, rule 1, sub-rule (3) of the Civil Procedure Code, because the plaintiff had not obtained the permission of the Court to bring a fresh suit on the same cause of action.

We are clearly of opinion that the learned Judge is wrong in his conception of the law on this point. Order XXIII, rule 1, sub-rule (3), in the absence of permission to bring a fresh suit, precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn. Now, the subject-matter of the petition under section 106 was the correction of the Record of Rights; the subject-matter of the suit in the Civil Court,

however, is not the same. The plaintiff does not even make any prayer of this kind. The prayer is for declaration of title and for recovery of possession. These matters are entirely foreign to the jurisdiction of the Revenue Officer under section 106, his work being confined to a decision of the point whether the entry in the Record of Rights is correct or not. Supposing he holds that the entry is correct, that does not preclude the plaintiff from bringing a suit in the Civil Court to have his title declared and possession restored. The bar under section 100 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject-matter of the investigation made under the chapter and of decisions thereunder.

In this case, the subject-matters of the two proceedings, that is, of the proceedings under section 106 and of this suit, are entirely different and whether the suit under section 106 was disposed of in one way or another, the present suit is not barred.

In this view of the case, we set aside the judgment and decree of the lower Appellate Court and send back the case for decision on the merits.

Costs will abide the result.

The appellant will be entitled to a refund of the Court-fee on the memorandum of appeal to this Court.

Appeal allowed; Case remanded.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 1 of 1916.

February 28, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

KASHINATH VINAYAK BHAVE—

PLAINTIFF—APPLICANT

versus

RAMA DAJI KALE—DEFENDANT—

OPPOSITE PARTY.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 (b) (1)—Instalments, payment of, default in—Mortgaged property, sale of portion of—Final decree, whether required—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2).

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A holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under section 15 (b) (1) of the Dekkhan Agriculturists' Relief Act is not required to apply under Order XXXIV, rule 5 (2) of the Civil Procedure Code, 1903, to make the decree final before he can apply for sale of the necessary portion of the property under section 65 (b) (2) of the Dekkhan Agriculturists' Relief Act. [p. 256, col. 1.]

Civil Reference made by the District Judge, Ahmednagar.

Mr. W. B. Pradhan, *amicus curiæ*, for the Plaintiff.

Mr. A. G. Desai, *amicus curiæ*, for the Defendants.

JUDGMENT.—We are obliged to the learned Pleaders who, as *amici curiæ*, have assisted us with their arguments in this case.

This is a reference under Order XLVI, rule 1, from the learned District Judge of Ahmednagar, and the question, which is propounded to this Court, is in the learned Judge's words this: whether a holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under section 15 (b) (1) of the Dekkhan Agriculturists' Relief Act, must apply under Order XXXIV, rule 5 of the Civil Procedure Code, to make the decree final before he can apply for sale of the necessary portion of the property under section 15 (b) (2) of the Dekkhan Agriculturists' Relief Act.

In my opinion the answer should be in the negative.

It is true that by section 74 of the Dekkhan Agriculturists' Relief Act it is provided that, except in so far as the Civil Procedure Code is inconsistent with that Act, the Code shall apply in all suits and proceedings before Subordinate Judges under that Act. But, as it seems to me, the kinds of procedure laid down by the Civil Procedure Code and the Dekkhan Agriculturists' Relief Act respectively in the matter of sales in mortgage suits are inconsistent one with the other. By rules 4 and 5 of Order XXXIV of the Code a plaintiff-mortgagee must obtain both a preliminary decree for sale and upon his separate application a final decree for sale before the mortgaged property or sufficient part thereof can be sold. But section 15 (b), sub-sections 1 and 2 of the Dekkhan Agriculturists' Relief Act, which provide for the sale

of mortgaged property under that Act, contain, as I read them, materially different provisions. Sub-section 1 of the section empowers the Court, in its discretion in making a decree for sale, to direct that the amount payable by the mortgagor under the decree shall be payable in instalments, and sub-section 2, which is the important provision, is in these words:

"If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing...order the sale of such portion only of the property as it may think necessary for the realization of that sum."

It is necessary to contend on behalf of the judgment-debtor, and accordingly it has been contended, that the words which I have read mean no more than that the Court shall make a decree directing that in default of payment of the instalment the mortgaged property or a sufficient part thereof shall be sold. But the words which I have cited do not say that: they say a great deal more than that, and, as I think, must be taken to mean what they say, that is, that the Court shall make an out-and-out order for sale; nor is there anything in the Dekkhan Agriculturists' Relief Act to suggest that anything more than this order is required for the purpose of bringing the property to actual sale.

Although, as Mr. Desai has urged, the general scheme of the Dekkhan Agriculturists' Relief Act is to assist or favour the indebted defendant, I can see nothing repugnant in the construction which I have put upon the words of section 15 (b). For, the scheme of this section, making special allowance for instalments and requiring that only a portion of the mortgaged property shall be sold, seems to me to differ entirely from the general scheme of Order XXXIV of the Civil Procedure Code. Under the Dekkhan Agriculturists' Relief Act the mortgagor is favoured in these two respects, that he is enabled to make easy payments and that only a sufficient portion of his property is sold on the failure to pay any instalments. I see no difficulty in holding that that is the limit of the concessions which the Legislature was making in his behalf, and in my view neither the

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principle of those concessions nor the words of the Statute suggest that the intention was that, on the failure to pay each particular instalment, the mortgagee would not only have to obtain a definite order under sub-section 2 of section 15 (b), but would also have to follow it up at some later period by making a fresh application in each case and obtaining from the Court a fresh order. I am of opinion that the order made by the Court under subsection 2 is the order contemplated by the Legislature as effecting without more the sale of the requisite portion of the property.

SHAH, J.—I agree.

Answered accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3910
OF 1913.

May 27, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT.,
and Mr. Justice Roe.

MANIK CHANDRA BHOWMIK—

DEFENDANT—APPELLANT

versus

ABHOY CHARAN GOPE—PLAINTIFF—
RESPONDENT.

*Specific performance of contract for sale, suit for—
Plaintiff, what to show—Tender.*

In a suit for the specific performance of a contract the plaintiff has to show, *first*, that he has performed or has been ready and willing to perform the terms of the contract on his part to be then performed and *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done. A default on his part in either of these respects furnishes a ground upon which the action may be resisted. [p. 257, col. 2; p. 258, col. 1.]

A plaintiff who as purchaser brings a suit for the specific performance of a contract for sale, is not entitled to the assistance of the Court if he defaulted to tender the balance of the consideration on or before the date fixed for the completion of the contract, even though it is proved that such tender, if made, would never have been accepted by the defendant-vendor. [p. 258, col. 1.]

Appeal against the decision of the Subordinate Judge, Dacca, dated the 22nd August 1912, modifying that of the Munsif, Manikgunj, dated the 8th January 1913.

Babu Dwarka Nath Chakrabutty and Dr. Nares Chunder Sen. Gupta, for the Appellant.

Babus Mohini Mohan Chakrabutty and Krishna Kamal Maitra, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for specific performance of a contract of sale, made orally on the 1st February 1911. The price was fixed at Rs. 400; one rupee was paid on the date of the agreement, which was to be carried out and completed within ten days. The case for the plaintiff is that on the 5th February, he paid a second instalment of the consideration, namely, Rs. 104 and, that, although he subsequently offered to pay the balance, Rs. 295, the defendant did not accept the money and wrongfully refused to execute the conveyance. The defendant denies the alleged payment of Rs. 104, and the Courts below have concurrently found in his favour on this point. He contends that this is not a case where a Court of Equity will decree specific performance, for the plaintiff has failed to perform his part of the obligation, and never tendered Rs. 399 as the balance of consideration. The Trial Court gave effect to this contention, refused specific performance and made a decree for refund of one rupee. The Subordinate Judge has reversed this decree and has held the plaintiff entitled to specific performance as soon as he pays into Court Rs. 399 to the credit of the defendant. On the present appeal, the decision of the Subordinate Judge has been assailed as erroneous in law.

The principle applicable to cases of this description is well-settled. The plaintiff who seeks specific performance of the contract has to show, *first*, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; [*Bungseedhur Mullick v. Calcutta Auction Company* (1); *Ram Tunoo Koondoo v. Mullicka Dossee* (2); *Ghillis v. McGhee* (3); and *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done [*Walker v. Jeffreys* (4); *Vishvanath Atmaram v. Bapu Narayan* (5)]. A default on his part in either of these

(1) 1 Hydr 45.

(2) 14 W. R. 338.

(3) (1862) 13 Tr. Ch. R. 48.

(4) (1842) 1 Hare 341; 11 L. J. Ch. 206; 6 Jur. 236; 66 E. R. 1064; 58 R. R. 90.

(5) 1 B. H. C. R. 262.

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respects furnishes a ground upon which the action may be resisted [*General Bill-posting Company v. Atkinson* (6)]. In the case before us, it was obligatory upon the plaintiff as the purchaser to tender the balance of the purchase-money, namely, Rs. 399 to the vendor-defendant on or before the 11th February 1911. This he did not do; consequently, there was a default on his part in the performance of an essential term of the contract. But he contends that this default is immaterial, for a tender of what has now been found by the Courts below to be the true amount of the unpaid purchase-money, would have been of no avail because, as the Subordinate Judge has found, the defendant was anxious to resile from the contract and would have unquestionably refused to accept the money. The argument in substance is that non-performance on the part of the plaintiff is really attributable to the default of the defendant, and the defence is not sustainable, because, as pointed out in *Hotham v. East India Co.*, (7), non-performance of the plaintiff is excused when that has resulted from the default of the defendant. Here, however, the default on the part of the plaintiff was not due to default on the part of the defendant. The plaintiff defaulted to tender the balance of the consideration; all that is urged is that tender of the full amount would never have been accepted by the defendant. That, if true, does not, in our opinion, improve the position of the plaintiff. There was a breach of obligation on his part, and he is, consequently, not entitled to the assistance of the Court.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below. The amount, if any, deposited by the plaintiff pursuant to the decree of the Subordinate Judge will be returned to him.

Appeal allowed.

(6) (1909) App. Cas. 118 at p. 122; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178.

(7) (1787) 1 T. R. 638; 1 R. R. 333; 99 E. R. 1295

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 63
OF 1915.

March 23, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

R. K. MOTISHAW & Co.—

DEFENDANTS—APPELLANTS

versus

THE MERCANTILE BANK OF INDIA, LTD.

—PLAINTIFFS—RESPONDENTS.

Bill of exchange—Consignment of goods—War, declaration of, effect of—Acceptance—Royal Proclamation (12th December 1914), whether retrospective—Negotiable Instruments Act (XXVI of 1881), ss. 32, 43.

A German resident in Hamburg drew a bill of exchange upon the defendants on the 24th June 1914 in favour of the plaintiffs for a certain amount payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods bearing a certain mark per S. S. *Lichtenfels*, a German steamer. It was presented with the shipping documents and accepted on the 20th July 1914 payable at the office of the plaintiffs in Bombay. The S. S. *Lichtenfels* reached Bombay just before the outbreak of the war and in order to evade capture left Bombay and took shelter in a neutral port. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. The plaintiffs brought this suit, alleging that the British Government had made arrangements by which consignees of cargo per S. S. *Lichtenfels* could obtain delivery and they averred their readiness and willingness to hand over the documents against payment of the amount due under the bill.

Held, that the plaintiffs were entitled to succeed, inasmuch as if the acceptance was unqualified the defendants were bound to pay on the due date, and if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation dated the 12th December 1914, whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports. [p. 260, cols. 1 & 2.]

The Proclamation of the 12th December 1914 is not retrospectively operative for the purpose of validating a contract rendered invalid by the war but operates to permit performance, before it is too late, of the condition alleged. [p. 260, col. 2; p. 261, col. 1.]

Robinson v. Reynolds, (1841), 2 Q. B. 196; 1 G. & D. 526; 3 P. & D. 611; 9 L. J. Q. B. 249; 114 E. R. 76; 57 R. R. 649; *Thiedemann v. Goldschmidt*, (1859) 1 De G. F. & J. 4; 1 L. T. 50; 8 W. R. 14; 1 Giff 142; 33 L. T. (o. s.) 298; 5 Jur. (N. s.) 855; 45 E. R. 260; 125 R. R. 324; *Leather v. Simpson*, (1871) 11 Eq. 398; 40 L. J. Ch. 177; 24 L. T. 286; 19 W. R. 431; *Smith v. Vertue*, (1860) 30 L. J. C. F. 56; 5 C. B. (N. s.) 214; 7 Jur. (N. s.) 395; 3 L. T. 583; 9 W. R. 146; 142 E. R. 84; 127 R. R. 622; *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. 124; 47 L. J. Ex. 418; 38 L. T. 597; 3 Asp. M. C. 591, referred to.

Mr. Jinnah, for the Appellants.

MOTISHAW & CO. v. MERCANTILE BANK OF INDIA, LTD.

Mr. *Strangman* (with him Mr. *Campbell*), for the Respondents.

JUDGMENT.—The plaintiffs are a British Bank carrying on business in Bombay. The defendants are a firm of merchants, British subjects, carrying on business also in Bombay. On the 24th June 1914, George Alberti, a German, resident in Hamburgh, drew a bill of exchange upon the defendants in favour of the plaintiffs for £65-0-6 payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods bearing a certain market per S. S. *Lichtenfels*, a German steamer. The plaintiffs allege, and it is not disputed, that the bill was purchased by them in London for its full value and sent out to the plaintiffs in Bombay. It was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill. It was accepted on the 20th July 1914 payable at the office of the plaintiffs in Bombay. The bill, therefore, would fall due for payment on the 22nd August. The S.S. *Lichtenfels* reached Bombay just before the outbreak of war and in order to evade capture left Bombay and took shelter in the neutral port of Marmagoa, where she has since been lying. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. This suit was filed on the 30th September 1915, and it has been alleged in the plaint that the British Government had made arrangements by which consignees of cargo per S.S. *Lichtenfels* can obtain delivery, and the plaintiffs averred their readiness and willingness to hand over the documents against payment of the amount due under the bill.

The defence is contained in paragraph 4 of the written statement. It is to the following effect—that the documents consist of an invoice signed by an alien enemy, a bill of lading signed by the captain of a German steamer with a blank endorsement thereon by an alien

enemy, and an open policy of insurance of the North China Insurance Company countersigned by a German firm; and the defendants submit that the acceptance was a qualified acceptance, subject to the condition that the documents should be tendered to the defendants by the plaintiffs and that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading on C. I. F. C. I. terms. They admit the presentation of the bill for payment on due date, but submit that war having broken out in the meantime and in view of the Royal Proclamation issued on the 5th August 1914 and the Ordinances and Orders issued by the British and Indian Governments, the defendants were precluded from accepting the shipping documents tendered, against which the payment of the bill was asked for, and that consequently it became impossible for the plaintiffs to perform their part of the contract subject to which the defendants accepted the bill of the exchange.

The Proclamation relied upon was published in Simla on the 10th of August 1914 and in Bombay on the 13th of August. It warns all persons not to obtain from the German Empire any goods, wares or merchandise, or obtain the same from any person resident, carrying on business, or being therein; nor to trade in any goods, wares or merchandise coming from the said Empire, or from any person resident, carrying on business, or being therein; nor to enter into any new commercial, financial, or other contract with or for the benefit of any person resident, carrying on business, or being in the said Empire. By a Proclamation, dated the 12th December 1914, all British subjects residing or carrying on business in British India were authorised to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy country. At the time of suit, therefore, the plaintiffs were in a position to tender documents to the defendants under which the latter would be able to get delivery of the goods referred to therein.

The plaintiffs contend that the defendants' acceptance was unconditional and that, as the shipping documents for the goods

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mentioned in the bill of exchange were tendered at the time of presentation for payment, they are entitled to payment according to the terms of the bill and the acceptance.

They rely upon the cases of *Robinson v. Reynolds* (1), *Thiedemann v. Goldschmidt* (2) and *Leather v. Simpson* (3), all cases of bills drawn against bills of lading found to be forged and presented by indorsees for value. It is doubtful whether these cases can be used in favour of a party to a negotiable instrument. The plaintiffs here are the payees for whose protection the bill of exchange was drawn.

The law applicable to the case is contained in sections 32 and 43 of the Negotiable Instruments Act. Section 32 provides: "In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand"; and section 43 provides: "A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration or for a consideration which fails, creates no obligation of payment between the parties to the transaction."

The drawee's acceptance here may be regarded from two points of view. The plaintiffs say it is an unqualified and absolute acceptance, as the acceptor has added no qualifying words. The acceptor says it is qualified being drawn on him against goods and he need not pay till he is put in a position to receive the goods.

From either point of view the plaintiffs are entitled to succeed. If the acceptance was unqualified the defendants were bound to pay on due date; as Beaman, J. said: "they accepted unconditionally the obligation to repay the moneys advanced really on their account by the Bank to

Alberti before the war broke out,"—if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation of December whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports. Time is not of the essence and the claim of the plaintiffs may be enforced so long as it is not barred by limitation: see *Snith v. Fertue* (4).

It was contended on the authority of *Mirabita v. Imperial Ottoman Bank* (5) that the property had not passed to the defendants who would not be entitled to claim the goods from the S. S. *Lichtenfels* as owners. But it is stated by Cotton, L. J., in the case cited that "if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him." That is precisely the case here. The vendor dealt with the plaintiffs and drew the bill of exchange in their favour only to secure the contract price, which was to be treated in the defendants' accounts as paid to the vendor: therefore, on payment to the plaintiffs the defendants can claim the goods.

The fact that by the declaration of war the German shipowner's contract became void is not conclusive of the case, as it was in *Esposito v. Bowden* (6) followed in the recent case of *Karberg v. Green* (7). The contract here was between the British acceptor and the British payee, subject possibly to a condition which might be fulfilled after due date. All that was necessary for the fulfilment of the condition alleged was a license to take delivery from the enemy ship. That license was conferred by the Proclamation of the 12th December 1914. The Proclamation is not retros-

(4) (1860) 9 C. B. (N. S.) 214; 30 L. J. C. P. 56; 7 Jur. (N. S.) 395; 3 L. T. 583; 9 W. R. 146; 142 E. R. 84; 127 R. R. 622.

(5) (1878) 3 Ex. 164; 47 L. J. Ex. 418; 33 L. T. 597; 3 Asp. M. C. 591.

(6) (1857) 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1209; 5 W. R. 732; 119 E. R. 1430; 29 L. T. (O. S.) 295; 110 R. R. 822.

(7) (1915) Solicitors' Journal 25th December, 156.

(1) (1841) 2 Q. B. 196; 1 G. & D. 526; 3 P. & D. 611; 9 L. J. Q. B. 249; 114 E. R. 76; 57 R. R. 649.

(2) (1859) 1 De. G. F. & J. 4; 1 L. T. 50; 8 W. R. 14; 1 Giff 142; 33 L. T. (O. S.) 298; 5 Jur. (N. S.) 855; 45 E. R. 260; 125 R. R. 324.

(3) (1871) 11 Eq. 398; 40 L. J. Ch. 177; 24 L. T. 286; 19 W. R. 431.

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pectively operative for the purpose of validating a contract rendered invalid by the war, but operates to permit performance, before it is too late, of the condition alleged. The consideration for the acceptance, therefore, did not fail.

As soon as the last-mentioned Proclamation was notified the plaintiffs were, to use the terms of the 4th issue, in a position to make a valid tender of the documents relating to the goods. There must be a decree for the plaintiffs. The plaintiffs' suit was only filed, however, on the 30th September 1915. We think that a fair order regarding interest on the amount of the bill of exchange sued on will be that it should only run from that date, though it must not be inferred from this that the plaintiffs would not, in our opinion, be entitled to succeed but for the Proclamation of December. Subject to this variation, we affirm the decree and dismiss the appeal with costs.

Appeal dismissed; Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1175
OF 1913.

June 1, 1915.

Present:—Mr. Justice Walmsley and
Mr. Justice Newbould.

SIDHESWAR PANDA AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

PITBAS GAONTIA AND OTHERS—
DEFENDANTS—RESPONDENTS.

*C. P. Tenancy Act (XVIII of 1881), s. 138—
Lambardar Gaontia in Sambalpore District,
settlement of raiyati lands by, validity of.*

A lambardar Gaontia of a village in the District of Sambalpore has authority, according to custom, to make settlement of *raiya* lands without the consent of his co-sharer Gaontias. [p. 262, col. 1.]

Quære.—Whether he can grant a permanent lease of such lands. [p. 262, col. 1.]

Appeal against the decision of the Subordinate Judge, Sambalpore, dated the 4th February 1913, reversing that of the Munsif, Sambalpore, dated the 19th August 1912.

Babu Satish Chandra Ghose, for the Appellants,

Babu Surat Kumar Mitra, for the Respondents.

JUDGMENT.

WALMSLEY, J.—The plaintiffs prefer this appeal. They are co-sharer Gaontias in a village in the District of Sambalpore to the extent of twelve annas. Defendant No. 1 is another co-sharer Gaontia with an interest of two annas, and he is also the *lambardar* Gaontia. Defendants Nos. 2, 3 and 4 are co-sharers to the extent of the remaining two annas.

The case for the plaintiffs is that the *lambardar* took proceedings in the Court of the Deputy Commissioner for the ejectment of two tenants from their lands, obtained an order for their ejectment and took possession of their land on July 21st, 1909; and then without their approval granted a lease of the land to defendant No. 5, Dibakar. The plaintiffs say that the *lambardar* had no authority to grant such a lease, and that they served a notice on him warning him not to grant a lease, and they claim to be put in *khas* possession of the land to the extent of their interest.

The first Court decreed the plaintiffs' suit, but this decision was reversed by the learned Subordinate Judge on appeal.

The suit as originally framed related to the land of a third tenant also, but in the lower Appellate Court that part of the claim was withdrawn. So we are concerned now only with the land from which two tenants were ejected under the orders of the Deputy Commissioner.

The lower Appellate Court has reversed the Munsif's finding about the notice said to have been sent by the plaintiffs to the *lambardar*, and consequently we need not consider whether such a notice would affect the *lambardar's* powers.

The learned Subordinate Judge has found that the *lambardar* did grant a permanent lease of the land to defendant No. 5, and settled that defendant on the land after ejecting other tenants, and that in settling the defendant on the land he acted within the scope of his authority. We are asked to hold that this decision is wrong, and that the *lambardar* could neither settle a tenant on the land still less grant him a permanent lease without the consent of the co-sharers,

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and that the plaintiffs are entitled to *khas* possession. For information about the status of Gaontias and the *lambardar* Gaontia we have consulted Mr. Russell's Report on the Settlement of Sambalpur District, published in 1883. That contains a full account of the whole matter. It appears that the first point to be decided is the nature of the land, that is to say, whether it was included in the Gaontia's *bhagra*-land or was part of the land let to tenants on a rent assessed by the Settlement Department. It was cultivated land, so it must fall within one of those two classes. The Munsif does not refer to this point at all, but before the learned Subordinate Judge it is clear that the land was treated as *rai-yati* land, that is assessed land held by *rai-yats*, for the Judge more than once refers to it as *rai-yati* land, and no objection is taken to this description in the grounds of appeal.

Now as the land was assessed land, for the rent of which the *lambardar* was liable to Government, it would seem to be the duty of the *lambardar* after ejecting one set of tenants to settle another tenant on the land as quickly as possible. As pointed out by the lower Appellate Court, the *lambardar* does settle tenants: Bhagirathi (P. W. No. 2) says, "Whenever any tenant surrenders, he (*i.e.*, the *lambardar*, for defendant No. 5 must be a mistake for defendant No. 1) takes it; whenever any tenant has to be ejected he ejects him; * * * he gives leases to tenants for all kinds of lands." In the light of this statement by one of the plaintiffs it is clear that the *lambardar* was acting within the authority allowed to him by custom in settling the land with defendant No. 5. It follows that the plaintiffs cannot obtain *khas* possession. It is not necessary to consider whether the *lambardar* could grant a permanent lease. All that is decided by the lower Appellate Court is that the *lambardar* had authority to make the settlement, and that, therefore, the claim for *khas* possession must fail.

I would dismiss the appeal with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT:

SECOND CIVIL APPEAL No. 3027 OF 1914.

April 26, 1916.

Present:—Mr. Justice Mullick.

JOGESWAR RAI AND ANOTHER—DEFENDANTS
APPELLANTS
versus.

Maharaja KESHO PERSAD SINGH—

PLAINTIFF—RESPONDENT.

Landlord and tenant—Joint tenancy—Rent, suit for—Parties, necessary—Tenant, liability of, to pay whole rent.

Ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. [p. 263, col. 1.]

There is no presumption in Bihar that in every joint tenancy there is also a several promise by which each joint tenant agrees to be bound for the whole rent. [p. 263, col. 1.]

Kashi Kinkar Sen v. Satyendra Narain Bhadra, 7 Ind. Cas 840; 12 C. L. J. 642; 15 C. W. N. 191; *Ram Taran Chatterjee v. Asmatullah*, 6 C. W. N. 111, referred to.

Jogendra Nath Roy v. Nagendra Narain Nandi, 11 C. W. N. 1026, not relied upon.

Plaintiff brought a suit for arrears of rent against three joint tenants of an occupancy holding, two of whom filed a compromise petition admitting the rate claimed, and a decree was accordingly passed. The third defendant got the decree set aside as against himself, on the ground that he had not been properly served. In a subsequent suit for arrears of rent against the same persons, he was again not served:

Held, (1) that the admission of the rate of rent claimed by the two defendants did not amount to a promise to pay the whole of the rent themselves; [p. 263, col. 1.]

(2) that as the third defendant had not been properly served the suit must be dismissed. [p. 263, col. 1.]

Second appeal from a decision of the Subordinate Judge, Arrah, dated the 31st July 1914, reversing that of the Munsif, Buxar, dated the 9th January 1914.

Moulvi Mohammed Mustafa Khan, for the Appellant.

Rai Bahadur Krishna Sahay (with him Messrs. Pravash Chandra Mitter, Susil Madhav Mullick and Chandra Sekhar Prasad Singh), for the Respondent.

JUDGMENT.—The plaintiff is the landlord and the first and second defendants are two brothers Jogeswar and Baleswar, who are minors represented by their uncle Gharbaran Rai, and the third defendant is Ram Autar, son of Madho Rai; all three defendants jointly hold an occupancy holding. In 1905 the plaintiff brought a suit against defendants Nos. 1 and 2 and Madho Rai for the rents for the years 1309 to 1311 *Faslis* at the rate

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of Rs. 136-6 per year. Defendants Nos. 1 and 2 appeared in that suit and filed a compromise petition accepting the rate claimed. A decree was accordingly passed at that rate, but Madho Rai subsequently brought a suit and got the decree as far as he was concerned set aside on the ground that he was not properly served.

In 1909 the plaintiff again came to Court and brought a suit for the arrears for 1312 to 1315 *Faslis* impleading defendants Nos. 1 and 2 and Madho Rai. All the three defendants contested the suit and admitted only a rental of Rs. 70. The Court, finding that Madho Rai was not a party to the compromise by which the defendants Nos. 1 and 2 had admitted the rate of Rs. 136-6-0, gave a decree only for the admitted rental of Rs. 70 and left the question of the real rate open.

The present suit is the third and is laid against defendants Nos. 1, 2 and 3 and for the years 1316 to 1319 *Faslis* at the rate of Rs. 136-6-0. The Munsif decreed the suit at Rs. 70. On appeal the Subordinate Judge has decreed it at Rs. 136-6-0 against defendants Nos. 1 and 2 and has dismissed it as against defendant No. 3.

The present second appeal is by defendants Nos. 1 and 2.

Now ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. It is found as a fact that the defendant No. 3 has not been served in the present suit and, therefore, the suit cannot proceed, unless the plaintiff can show that there was a special contract between him and the defendants Nos. 1 and 2 by which these defendants agreed to be responsible for the whole rent not only jointly but also severally. There is no question of representation in this case. Now there is no presumption that in every joint tenancy in this Province there is also a several promise by which each joint tenant agrees to be bound for the whole rent. The case of *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (1) is authority for this proposition. The appellants rely on *Jogendra Nath Roy v. Nagendra Narain Nandi* (2), but it is not known whether in that case the facts showed that each

tenant had contracted to pay the whole rent jointly and severally. On the other hand, *Ram Taran Chatterjee v. Asmatullah* (3) shows that even where one of several joint tenants without the authority of the others gives a *kabuliyat* for the whole rent, he is liable not for the whole but for his proportionate share of the rent if there are materials before the Court for determining that share.

But it is contended that the compromise petition of 1915 constitutes a several promise by defendants Nos. 1 and 2 to be responsible for the whole rent at the rate of Rs. 136-6-0. I do not think this contention can prevail. The petition is not before me, but from the judgment of the lower Appellate Court it would seem that defendants Nos. 1 and 2 admitted that they held 22 *bighas* at Rs. 136-6-0. They nowhere contracted to pay the whole of this rental themselves.

There can, therefore, be no decree against them alone for the whole rent.

As there is no evidence of what their share is, the whole suit must be dismissed, the amount of rental being left open. The appeal succeeds and is decreed with costs throughout.

Appeal decreed.

(3) 6 C. W. N. 111.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 45
OF 1915.

February 8, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

PRANJIWANDAS KALIDAS AND OTHERS
—DEFENDANTS—APPELLANTS

versus

SHAMKOREBAI—PLAINTIFF—RESPONDENT.

Deed, construction of—Trust—Property divided into three lots—Limitation as to one, whether applicable to others—Intention—Addition of words, whether permissible.

In construing a deed of trust, whereby certain property belonging jointly to three brothers is divided into three lots and one lot is allotted to each of the brothers and a limitation is provided as to the share of the first deceased brother but not as to the others, the limitation regarding each scheduled share should

(1) 7 Ind. Cas. 84; 12 C. L. J. 642; 15 C. W. N. 191.

(2) 11 C. W. N. 1026.

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be read alike and if such a reading necessitates the addition of some words to the deed, it is permissible. [p. 265, col. 2.]

Greenwood v. Greenwood, (1877) 5 Ch. D. 954; 47 L. J. Ch. 298; 37 L. T. 305; 26 W. R. 5, referred to.

Mr. Kunga (with him Mr. *Inverarity*), for the Appellants.

Messrs. *Setalvad*, *Desai* and *Moos*, for the Respondent.

JUDGMENT.—We have to construe a deed the purport of which may be briefly summarised thus. There were three brothers, Vasta, Kalidas and Narsi, sons of Kallianji. They were the principal parties to the deed which was executed on the 8th September 1887. The deed provides that the property of the brothers, which is described as joint family property, is divided into three separate lots, one for each brother. There is also a house for residence and some provision for charity, but that is immaterial for the present purpose. The whole property is vested in four trustees out of whom the brothers are three. The object of the trust is thus described :

"And whereas the said three brothers, Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji, are desirous of apportioning all and singular the said immoveable properties, all of which are of the estimated value of Rs. 64,392, for the benefit and use of themselves jointly during their joint lives, and afterwards for the benefit and use of the survivor of them and of the family or families of such of them as may have predeceased and after the decease of the last survivor of them for the benefit and use of the respective families of each of the said three brothers in manner hereinafter appearing and for certain charitable purposes."

Then one of the lots which are entered in detail in Schedules A, B and C, is recited to have been allotted to Vasta, another to Kalidas and the third to Narsi. The operative part contains certain provisions as to residence and charity. Then comes this provision :—

"The said trustees shall hold and stand possessed as regards the several hereditaments and premises described in Schedules A, B and C hereunder written upon trust to recover, receive, collect and take the rents and profits thereof and pay the same after defraying all outgoings to them the

said Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji jointly for the use of themselves and their respective families during the joint lives of them all."

Next comes the provision for what is to be done after the death of any one of the three who may die first. Broadly speaking, each of the two surviving brothers is to be paid separately the rents and profits of his lot so long as he lives, and elaborate and special provision is made as to what the trustees are to do with the profits of the lot of the brother who dies first. There is no provision for what is to happen as regards the lot of the brother who next dies, when he dies; and similarly when the third brother dies. The specific trust continues in regard to the lot of the brother who dies first, but there is no specific trust in regard to the lots of the brothers who die second and third, after the death of each; though there may be a resulting trust.

What has happened is this : all the brothers are now dead. Vasta and Narsi left no issue. Kalidas, who died last in 1910, left three sons living and the widow of a fourth son who predeceased him. The widow sues and claims, as an heir, one-fourth share of the profits of the portion of the lot which constituted the share of Kalidas according to the deed, i.e., of the profits of the properties described in Schedule B. The defendants, the three surviving sons of Kalidas, oppose the claim.

The Trial Court decreed the claim and the defendants have appealed. The Trial Judge wrote as follows:

"I do not think there can be any doubt that the trust was to Kalidas for life, remainder to his sons for life, remainder to their heirs. If any son of Kalidas dies in lifetime of Kalidas, his heirs take his place, and on death of Kalidas succeed to that son's life estate, just as the heir of a son of Kalidas dying after the death of Kalidas would take for life that share."

But he did not give detailed reasons for his decision.

The exact terms of the operative provision in respect of each lot are as follows *mutatis mutandis*:—

"And further to pay and apply the rents and profits of the hereditaments and premises described in Schedule B hereunder written

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after making suitable provision thereout for repairs, maintenance taxes and all outgoings payable for the said premises to the said Kalidas Kallianji if he be one of the survivors of them three; the said Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji, for his natural life and if he be not one of such survivors then to the son or sons of the said Kalidas Kallianji and if more than one in equal shares for their respective natural lives, and after the death of the last survivor of such sons in trust to apportion or sell the said several hereditaments and premises described in the said Schedule B hereunder written, and in the event of a sale to divide the proceeds thereof amongst the respective heirs of such son or sons of the said Kalidas Kallianji *per stirpes*, provided always that on the death of any son of the said Kalidas Kallianji during the lifetime of his brothers the heirs of such deceased shall until final division as aforesaid be entitled to be paid by the said trustees the proportionate share of the said rents and profits which such deceased son himself would have been entitled to, if alive."

It is contended that the provisions in the operative part of the deed should be expanded by reference to the recital which purports to express the desire of the settlors in making the settlement. That recital is, as I read it, of a desire to apportion the properties scheduled A, B and C among the three settlors for the use and benefit of themselves jointly during their joint lives and afterwards for the benefit and use of the survivor of them (*i.e.*, the three settlors) and of the family or families of such of them as may have predeceased and after the decease of the last survivor (of the three settlors), for the benefit and use of the respective families of each in manner therein after appearing. In other words, the joint user is to continue till the death of the last of the three settlors and the distribution into severalty according to the schedules among the respective families of each is to be postponed till that event. But the Court is not agreed as to the intention expressed in this recital.

In the view above expressed the operative provisions of the deed depart from the proposed intention treating the settled properties as to be enjoyed jointly only until the death of the first dying of the three settlors. I

think therefore, the construction of the operative provisions will not be advanced by reference to the recital.

Upon the operative part, in so far as it concerns the scheduled share falling to Kalidas' family, two questions arise; *first*, does the remainder in favour of his sons take effect only if he is the first settlor to die or does it take effect on his death at any time; and, *secondly*, does the substitutionary proviso in favour of the heirs of a deceased son apply to the heirs of a son predeceasing Kalidas?

In my opinion both questions should be answered in favour of the respondent.

As regards the *first* question, the joint enjoyment by the three brothers of the scheduled property is necessarily broken by the death of any one of them, and two alternatives would then naturally arise: either the sons of the first deceased brother would then take his scheduled share or the joint tenancy of such sons and their uncles would continue for the lives of the other surviving settlors. The operative clause, however, clearly provides for the sons of the first deceased brother taking their father's scheduled share. It cannot, however, have been the intention that the limitations regarding each scheduled share should not be read alike, *viz.*, that, on the death of each brother, his scheduled share should go to his family. Such a reading necessitates the addition of the words "or having survived he die" after the words "one of such survivors." It appears to me that this is permissible in the circumstances—a similar case is *Greenwood v. Greenwood*, (1) where under a bequest in trust for the testator's widow for her life in trust for her children, followed by power of maintenance and advancement after the widow's death with an ultimate gift over after her death in default of children attaining vested interests, the Court supplied the words "and after her death" after the words "for her life."

As regards the *second* question, the words are "on the death of any son of the said Kalidas during the lifetime of his brothers the heirs of such deceased shall until final division be entitled," etc. This substitution is not limited in terms to heirs of sons surviving

(1) (1877) 5 Ch. D. 954; 47 L. J. Ch. 298; 37 L. T. 305; 26 W. R. 5.

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the testator; the only condition being that the heirs should be of a son of Kalidas predeceasing his brothers. Naturally every son of Kalidas must predecease the last surviving brother whose death marks the period of division and distribution. We have in a subsequent provision regarding the expectant shares of minors an indication that on the death of Kalidas as also of his brothers "remoter issue" (presumably remoter than sons) might in the contemplation of the settlors be entitled in expectancy to a share of the trust funds. This would only be possible if the substitutive proviso included sons predeceasing Kalidas.

The result is in accord with the conclusion arrived at in the lower Court. We affirm the decree and dismiss the appeal. We make no order as to costs.

Appeal dismissed.

PATNA HIGH COURT,
FIRST CIVIL APPEAL NO. 138 OF 1913.

April 18, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

JAGABANDHU CHOWDHRY—

APPELLANT

versus

GOREY LAL CHOWDHRY—

RESPONDENT.

Adjournment—Discretion of Court—Process-fee to be filed within reasonable time.

The question of granting time is always one of discretion and that discretion cannot be properly exercised until the general conduct of the party applying for time throughout the case has been scrutinized.

When a date is fixed for a case, it is the business of the litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for securing their attendance upon the date fixed. If he chooses to file a process-fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing.

First appeal from a decision of the 1st Subordinate Judge, Bhagalpur, dated the 13th July 1912.

Mr. Khurshed Hasnain, for the Appellant's.

Mr. Atul Krishna Roy, for the Respondent,

JUDGMENT.

ROE, J.—This is an appeal against an order of the Subordinate Judge of Bhagalpur, refusing a petition for time put in by judgment-debtors in a proceeding for the making absolute of a decree upon a mortgage. Two grounds are taken in support of the appeal. *Firstly*, that the learned Subordinate Judge was wrong in taking into consideration the number of times the defendants had taken adjournments in the original suit upon the mortgage, and, *secondly*, because on the 11th July, two days before the date upon which the application for time was rejected, an order had been issued for the summoning of witnesses, the Court was wrong in proceeding with the case until the summonses had been issued and the presence of the witnesses secured.

In the *first* of these contentions there is no force whatever. The question of granting time is one always of discretion and that discretion cannot be properly exercised until the general conduct of the defendants throughout the case has been scrutinized. It is clear, upon the face of the record, that throughout the proceedings the defendants have taken time far more often than parties genuinely interested in the defence of the suit should have been allowed to take.

In the *second* point also it is clear that there is no force. When a date is fixed for a case, it is the business of a litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for the securing of their attendance upon the date fixed. If he chooses to file a process-fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

DE VERTEUIL v. CANTONMENT COMMITTEE, KARACHI.

SIND. JUDICIAL COMMISSIONER'S
COURT.

ORIGINAL CIVIL SUIT No. 484 OF 1915.

December 6, 1915.

Present:—Mr. Crouch, A. J. C.

F. J. DE VERTEUIL—PLAINTIFF

versus

THE CANTONMENT COMMITTEE,
KARACHI—DEFENDANTS.

Cantonment House Accommodation Act (II of 1902), ss. 6, 35, 37—Orders passed under s. 6—Appeal—Civil Courts, whether can interfere.

A Civil Court has no jurisdiction to interfere with, or question the propriety of, orders passed on proceedings before special tribunals created by special legislative enactments for that purpose, and whose orders have been declared by the Legislature to be final. [p. 269, col. 1.]

Narendra Nath Basu v. Stephenson, 31 Ind. Cas. 618; 19 C. W. N. 129; *Ganjessar Koer v. Collector of Patna*, 25 C. 795; 2 C. W. N. 349; 13 Ind. Dec. (N. S.) 518; *Ganeswar Singh v. Ganesh Das*, 33 C. 1178 at p. 1182; 3 A.L.J. 698; 8 Bom. L. R. 719; 4 C. L. J. 177; 10 C. W. N. 969; 16 M. L. J. 365; 33 I. A. 134; 1 M. L. T. 308 (P. C.), referred to.

Section 35 of the Cantonment House Accommodation Act constitutes the Officer Commanding the Division the legal tribunal to which any person aggrieved by a notice issued under section 6 of the Act may have recourse, and under section 37 of the Act his decision is final. [p. 269, col. 1.]

Mr. Wadhmal Udham, for the Plaintiff.

Mr. T. G. Elphinstone, for the Defendants.

JUDGMENT.—Plaintiff Mr. De Vertueil, a practising Barrister-at-Law, seeks an injunction against the Cantonment Committee, Karachi, restraining them from taking possession of the house No. 29, European Lines, for the purpose of handing it over to a Military Officer. As the Cantonment Magistrate threatened to eject plaintiff by force, notice was issued to the defendant Committee to show cause why a temporary injunction should not issue pending disposal of the suit and, in the meantime, an *interim* injunction was granted.

Mr. Elphinstone has appeared to show cause and has put in correspondence and documents which disclose the whole history of the case.

The provisions of the Cantonment (House Accommodation) Act 1902 are clear and precise.

Where a Military Officer desires that a house in a cantonment occupied by a civilian who is not also the owner, shall

be vacated in order that he himself may occupy it, he proceeds under section 8 by making an application, through the proper channel, to the Cantonment Committee. The Committee, on receipt of such an application, inquires into the case, and before issuing a notice either to the landlord or to the occupier must satisfy itself that:—

(a) it is necessary or expedient for the Military Officer to reside in the Cantonment;

(b) that the circumstances are such as to require intervention;

(c) that the monthly rent proposed is reasonable; and

(d) that the house is suitable for the residence of the officer and that there is no vacant house in the Cantonment which is suitable for his residence.

On being satisfied on all these points the Cantonment Committee may under section 16 issue:—

(a) a notice to the owner requiring him to let the house to the Military Officer named in the notice and stating the amount of monthly rent proposed as reasonable for the house (section 9);

(b) a notice to the occupier requiring him to vacate the house within thirty days.

Where the rent of a house is registered in the Office of the Cantonment Committee, the rent so registered is presumed to be reasonable until the contrary is shown.

If the owner considers that the rent stated in the notice is not reasonable, he may demand arbitration (section 18).

If any owner, or any tenant of a house, is aggrieved by a notice issued under section 6, he may appeal to the Officer Commanding the Division (section 35) and the decision of such Officer is final (section 37).

If the tenant of a house refuses to vacate after notice, the Cantonment Magistrate can enforce its surrender after giving two hours' notice (section 13, rule 15).

Prior to October 1913, it appears to have been the practice for the Cantonment Magistrate to keep a register of applicants for certain bungalows and to allot them without reference to the owners. House-owners complained that they were not allowed to deal directly with the tenants,

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that they had no voice in the management of their own property and that, owing to the manner in which houses were allotted, they often lay vacant for long periods.

In October 1913, a circular was issued from Army Headquarters reciting the various grievances of house owners in Cantonments and issuing instructions that in future no registers should be maintained and that officers should make arrangements direct with owners of the houses which they wished to occupy.

In January 1914, the Cantonment Magistrate, Karachi, issued a notice to all house-owners stating *inter alia* "the result of these revised orders is that neither the Cantonment Magistrate nor the Station Staff Officer can in any way be a medium between an officer and a house-owner for the occupation of a house, except in the case of a relieving regiment".

The Army Headquarters circular and the notice of the Cantonment Magistrate seem to have been misconstrued by the house-owners in the Karachi Cantonment, for it is alleged that there was induced the belief that, in future, the policy of the Cantonment Committee would be to give no assistance to officers in securing houses and that if a house were in occupation by a civilian, the provisions of the Act would not be enforced to turn him out. But neither the circular nor the notice can be fairly construed as making such announcements; it has not been contended that the circular overrode or even purported to override the provisions of the Act.

In August 1915, Mr. De Verteuil took the house in dispute on a monthly tenancy. It is alleged on his behalf that he received an assurance from his landlord that there was no possibility of his being turned out, and that on such assurance he expended a substantial sum in repairing the house and improving the garden.

On the 29th September, Captain W. A. Spong, R.A.M.C., who was residing in civil lines, having received orders to go to quarters in the Cantonment, took proceedings under section 8 of the Act with a view to obtaining possession of the bungalow occupied by Mr. De Verteuil.

The matter was laid before the Cantonment Committee on the 5th October, when

it was resolved that a notice be issued under section 6 of the Act to the occupant of the bungalow. In an affidavit filed by the Cantonment Magistrate he deposes that the Cantonment Committee fully discussed the question.

Notice was issued to the plaintiff under section 6 on the 6th October.

On the 27th October, the plaintiff appealed to the Officer Commanding, Quetta Division. In his memorandum of appeal, he urged that on the strength of the circular he had been assured that he would not be turned out; that Captain Spong had some time been residing outside the Cantonment and there was no necessity for him to reside within it; that several other bungalows were available; that the Cantonment Magistrate had by his own notice led the public to believe that the Cantonment Committee would give no assistance to Military Officers in ejecting civilian tenants; and lastly that as no notice had been issued to the landlord requiring him to let the house to Captain Spong, the notice to the plaintiff was bad in law.

With regard to the last point taken, Colonel Cumberlege has stated in his affidavit that it has never been the practice to issue a notice to the landlord under section 6 unless he was refusing to let the house. As the rent of the house was registered, it was unnecessary to inform the owner what rent it was proposed should be paid by Captain Spong.

The appeal was rejected on the 15th November. On the 23rd November, the Cantonment Magistrate communicated the result to Mr. De Verteuil and gave him notice to quit forthwith. The present suit was filed on the 29th November. In his plaint Mr. De Verteuil relies on the same grounds as those set forth in the memorandum of appeal, adding only that Captain Spong had made no arrangement with the landlord.

Mr. Elphinston, in showing cause, has relied on three legal points:

(1) The suit is barred by section 80, Civil Procedure Code, no notice of action having been given.

(2) The suit is barred by section 44 of the Cantonment (House Accommodation) Act,

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(3) The alleged grievance may have been finally disposed of by the General Officer Commanding, Quetta Division.

The first point involves contentious questions which will be more appropriately dealt with in the final judgment, as also will the contention of Mr. Wadhwal that upto date the Cantonment Committee has not sanctioned the defence of this suit. At present, the Court has only to consider whether plaintiff has *prima facie* a grievance which this Court has power to redress and of such a nature that grave and irreparable injury would result unless protection in the special form of a temporary injunction were granted.

Now what is Mr. De Verteuil's real grievance?

He deems the notice which has been issued to him under section 6 to be bad in law and ineffectual to confer upon the Cantonment Authority power to forcibly eject him, and he desires that a competent legal tribunal shall find it bad and give effect to its finding by way of injunction. But section 35 of the Act constitutes the Officer Commanding the Division the legal tribunal to which any person aggrieved by a notice issued under section 6 of the Act may have recourse and section 37 of the Act declares that the decision of the Officer Commanding the Division shall be final. Mr. De Verteuil's real grievance, then, is that the tribunal specially appointed by the Legislature to decide the question whether or not he has a right to relief has found against him. But this constitutes no legal injury which a Court of Law can redress. This Court has no jurisdiction to interfere with, or question the propriety of, an order which has been passed by a duly constituted tribunal and which the Legislature has declared to be final: see *Narendra Nath Basu v. Stephenson* (1), *Ganjessar Koer v. Collector of Patna* (2), *Ganeswar Singh v. Ganesh Das* (3).

Further, section 44 of the Act declares in positive terms that no suit or other legal proceedings shall lie against any person for anything done, or in good faith intended to be done, under this Act. No *prima facie* case has been made out of *mala fides* on the part of the

(1) 31 Ind. Cas. 618; 19 C. W. N. 129.

(2) 25 C. 795; 2 C. W. N. 349; 13 Ind. Dec. (N. S.) 518.

(3) 33 C. 1178 at p. 1182; 3 A. L. J. 698; 8 Bom. L. R. 719; 4 C. L. J. 177; 10 C. W. N. 939; 16 M. L. J. 365; 33 I. A. 134; 1 M. L. T. 303 (P. C.).

Cantonment Authority in the action which they admittedly intend to take.

Mr. De Verteuil has no fair cause of complaint. By taking up his residence in a Cantonment he deliberately placed himself within the sphere of operation of the very stringent terms of the Cantonment (House Accommodation) Act under the jurisdiction of the Cantonment Authority and of the Officer Commanding the Division.

The petition for a temporary injunction is rejected and the *interim* injunction is dissolved.

After the temporary injunction was discharged, the plaintiff notified his intention to withdraw and the suit was accordingly dismissed with costs.

Injunction dissolved; Suit dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2527 OF 1914.

April 18, 1916.

Present:—Mr. Justice Mullick.

LACHMI NARAIN MARWARI—PLAINTIFF

— APPELLANT

versus

THE CHAIRMAN OF THE RANCHI MUNICIPALITY—DEFENDANT—

RESPONDENT.

Evidence Act (I of 1872), s. 106—Matters within the special knowledge of a party—Burden of proof—Corporations and individuals, position of.

In order to lay the burden of proving a particular matter on a party on the ground that he has special knowledge thereof, it must be shown that the knowledge is in the nature of something peculiar. [p. 270, col. 2.]

Nubo Kishen Mookerjee v. Promothonath Ghose, 5 W. R. 148, distinguished.

So far as the rule of burden of proof goes no difference can be made between corporations and individuals. [p. 270, col. 2.]

Second appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 19th July 1914, modifying that of the Munsif, Ranchi, dated the 9th June 1913.

Mr. Susil Madhav Mullick, for the Appellants.

Mr. Muhammad Fakhr-ud-Din, (Government Pleader), for the Respondent.

JUDGMENT.—The plaintiff is a resident of the Ranchi Municipality; the defendants are the Municipal Commissioners of that Municipality and are represented in the present suit by their Vice-Chairman. It appears that in 1902 the plaintiff pur-

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chased from one Piary Lal some *don* lands, which I understand to be lands cultivated by or fit for cultivation of paddy. About 1905 the defendants planted some trees along the road to the south of the plaintiff's lands, one of which trees was alleged by the plaintiff to have encroached upon his land. The plaintiff thereupon objected and a sub-committee of the Municipality made an investigation into the matter, with the result that the objection was found to be groundless. Thereafter in 1908 the plaintiff put a masonry wall upon the land with the permission of the Municipal Commissioners, but he proceeded to fill up a part of the land lying between that wall and the road and was prosecuted by the defendants on the ground that he had thereby encroached upon Municipal land, with the result that he was convicted and fined. The present suit is brought for a declaration of title to and recovery of possession of 10 feet of land lying between that wall and what the plaintiff considers to be the boundary of the defendants' road. The Munsif who tried the suit found the plaintiff's case proved, but as the plaintiff was willing to give up 4 feet adjacent to the road upon its southern boundary he gave a decree for only 6 feet immediately north of the wall. On appeal the learned Judicial Commissioner found that the plaintiff was entitled to only $1\frac{1}{2}$ feet from the wall, and that the remaining portion, namely, $8\frac{1}{2}$ feet, was the property of the Municipal Commissioners. Against this modified decree the plaintiff now prefers the present second appeal and asks for a decree in respect of the whole of the 6 feet which were decreed to him by the Munsif, that is to say, the appeal relates to $4\frac{1}{2}$ feet between the southern boundary of the portion given up and the wall.

Now the *first* point taken before me is that the learned Judicial Commissioner has thrown the burden of proof wrongly upon the plaintiff in saying that it is for the plaintiff to prove his case as in an ordinary action for ejectment. This part of the case is divided into 3 sub-heads. The first sub-head is that under section 106 of the Evidence Act it was for the defendants to show that the land in suit was theirs and that by reason of the special knowledge which the defendants possessed, the case is taken out of the ordinary rule which throws the burden of

proof upon the plaintiff, and reliance is placed upon the case of *Nubo Kishen Mookerjee v. Promothonath Ghose* (1). Now can it be said that there was any fact in connection with the dispute which was specially within the knowledge of the defendants? Ordinarily every defendant who has a good title to land has special knowledge with regard to his title, but in order to apply section 106 the knowledge must be in the nature of something peculiar and so far as I see there was nothing in the knowledge of the defendant Municipality with regard to the land in suit which was peculiar. It is said that a Corporation in this matter stands on a different footing to individuals but I am unable, so far as the rule of burden of proof goes, to make any difference between Corporations and individuals, and on principle I see no reason for making any such difference; but then it is said that there is evidence to show that the defendants made a survey of the land in suit in or about 1905 and that the facts disclosed by that survey were matters specially within the knowledge of the defendants. In my opinion that would not be sufficient to bring the defendants under the operation of section 106. The case of *Nubo Kishen Mookerjee v. Promothonath Ghose* (1) was altogether a peculiar case, in which the defendant claimed certain land as his *lakheraj* against the *zamindar* and the Court threw the onus upon him, because it was shown that for a long number of years preceding his claim he was in possession of the land as *patnidar* and was in a special situation in the peculiar facts of that case which would justify the throwing of the burden upon him. But that case is different to the present case and the principle of section 106, which is always a difficult principle to apply, has no application here.

The second sub-head of this part of the learned Vakil's contention is that at any rate section 114 of the Evidence Act applies and that it was the duty of the defendants to produce a certain survey map and as they did not produce it, it must be presumed that they had no title to the land in suit. Now it is not suggested, and there is no evidence to show, that there is any general map showing all the lands of the Muni-

(1) 5 W. R. 148.

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cipality. All that appears is that there was a map prepared for the purposes of the dispute of 1905. That was an item of evidence in the possession of the defendants and it was open to the plaintiff to call for it. He does not appear to have done so, and he cannot now say that by reason of section 114 the defendants must be presumed to have suppressed the map because they have no title. In my opinion no such presumption arises.

The third sub-head under this branch is that the onus does not lie upon the plaintiff because this is a case which comes within the principle of *Lukhi Narain Jagadeb v. Jodu Nath Deo* (2), but that again was a very special case of a dispute between two rival *zemindars* about a large tract of land where the boundary ran between waste lands, which had not been subject to definite possession and in respect of which no satisfactory evidence was obtainable. Now the land in the present suit is a very small part in the heart of the Municipality, which, according to the evidence, was under cultivation of, or capable of cultivation of paddy. There is no analogy between the waste land involved in *Lukhi Narain's* case (2) and that of the present suit. It was, as the learned Judicial Commissioner observes, perfectly competent to the plaintiff to produce evidence both of his time and the time of his predecessor to show up to what extent definite acts of possession had been committed in respect of the land. The principle, therefore, which puts the plaintiff and the defendant in the position of counter-claimants does not at all apply to the present case. This disposes of the question of the burden of proof. In my opinion the learned Judicial Commissioner, although he has not gone into the different sections applicable to the case, is right when he says that the burden of proof is upon the plaintiff.

The next branch of the learned Vakil's argument is that there has been a wrong admission of evidence. It is suggested that the learned Judicial Commissioner has wrongly admitted into evidence the opinions of Babu Radha Govind and Rai Saroda Charan, former Vice-Chairman of the Municipality, to the effect that the land belongs to the Municipality. Now if the Judicial

(2) 21 C. 504; 21 I. A. 39; 6 Sar. P. C. J. 408; 10 Ind. Dec. (N. S.) 966.

Commissioner had proceeded upon the mere opinions of these two gentlemen, no doubt those opinions would have been admissions within the meaning of the Evidence Act and, being admissions made by the defendants, would have been inadmissible in support of the case of the defendants. But on a careful perusal of the learned Judicial Commissioner's judgment together with the actual depositions of these two gentlemen, it is clear that the learned Judicial Commissioner has proceeded not upon the mere opinions of these two gentlemen but has adopted and accepted the inference drawn by these gentlemen from the observations made by them as to the condition of the land. That was a perfectly legitimate course for the learned Judicial Commissioner and I cannot see that he has proceeded upon the mere admissions of a party. The objection, therefore, under section 21 of the Indian Evidence Act does not apply. From the evidence of these gentlemen taken with certain other facts the learned Judicial Commissioner draws the inference that the road-side slope of the defendants' road extended to within $1\frac{1}{2}$ feet of the plaintiff's wall. That is a finding of facts which, not being vitiated by any error of law, is final. The judgment of the learned Judicial Commissioner may not be satisfactory from all points of view, but I cannot say that in arriving at his finding of fact he has been guilty of any error of law which would entitle me to interfere in second appeal.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 57
OF 1915.

March 23, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

RUTTONSEY ROWJI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

THE BOMBAY UNITED SPINNING AND
MANUFACTURING Co., LTD.—DEFENDANTS

—RESPONDENTS.

Contract Act (IX of 1872), ss. 1, 118—Contract for sale of goods—Variation in contract—Goods not according to sample—Rescission for breach—Mercantile custom, plea of, in variation of contract, whether sustainable—Evidence Act (I of 1872), s. 92 proviso 5—Arbitration, reference to, scope of—Right of arbitrators to rely on custom—Award decreeing allowance on reduction,

RUTTONSEY ROWJI v. BOMBAY UNITED SPINNING & MANUFACTURING CO., LTD.

equality of—'Delivery,' physical and constructive—Civil Procedure Code (Act V of 1908), Sch. II.

In a suit to recover goods contracted to be sold, a mercantile custom contradicting the written contract, which will have the effect of entitling the vendor to require the purchaser to accept that which was not in accordance with the description stipulated for, cannot be pleaded. [p. 274, col. 2.]

North Western Rubber Company, and Huttenbach and Co., In re, (1908) 2 K. B. 907 at p. 922; 78 L. J. K. B. 51, followed.

Walkers, Winsor & Hamm and Shaw Son & Co., In re, (1904) 2 K. B. 152; 73 L. J. K. B. 325; 40 L. T. 454; 53 W. R. 79; 9 Com. Cas. 174; 20 T. L. R. 274, not followed.

Evidence as to custom is, however, admissible provided it is not repugnant to the written contract or inconsistent with its expressed terms. [p. 274, col. 1.]

It is permissible for arbitrators, who are experts in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade, and, if it is within the scope of their reference, to award that the buyer should take the goods found not to be according to sample with a reduction of price. [p. 275, col. 1.]

Produce Brokers Company Limited v. Olympia Oil and Cake Company, (1916) 85 L. J. K. B. 160, referred to.

Where, under the terms of a contract for sale of goods, the buyer is to clear the goods on receipt of a delivery order by the seller, the vendor ceases to be liable after the transmission of the said delivery order and is entitled to interest and godown rent from that date. When the seller in possession holds the goods on account of the buyer, this has the same effect as physical delivery. [p. 276, col. 2.]

Per *Heaton, J.*—Variation from the written contract is inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance. [p. 277, col. 1.]

Messrs. *Sitalvad and Desai*, for the Appellants.

Mr. *Kanga* (with him Mr. *Strangman*), for the Respondents.

JUDGMENT.

SCOTT, C. J.—This is an appeal from the judgment of Mr. Justice Macleod in a suit filed by the plaintiffs, in which they claimed delivery of 113 bales of piece goods and tendered Rs. 7,236 as the price thereof. The defendants counter-claimed a sum of Rs. 20,000 which, they contended, was due to them by the plaintiffs in respect of goods not taken delivery of. Judgment was given for the defendants upon their counter-claim.

The defendants entered into various contracts, seven in number, in September and October 1913, for the sale and delivery of piece goods of certain specified descriptions. The contracts will be referred to under the letters A to G.

Contract A was for 251 bales of which

the plaintiffs took delivery of some, while the contract was cancelled as regards others and 84 bales remained the subject of dispute.

Contracts B, C and D covered 658 bales of which 159 were taken delivery of by the plaintiffs who refused to take delivery of the rest, on the ground that the defendants had broken a condition not to give delivery of similar goods to other dealers during the period fixed for delivery under the said contracts.

Contracts E, F and G covered 305 bales of which 150 were taken delivery of by the plaintiffs, while as to 42 the contract was cancelled and the plaintiffs demanded the balance of 113 on payment of the contract price Rs. 7,236.

The result, therefore, was that the plaintiffs claimed to eliminate from consideration the 84 bales under contract A and 49 bales under contracts B, C and D. The defendants' counter-claim is for payment of the bales which the plaintiffs claim to eliminate from consideration.

Dealing first with the disputed bales under contract A, by a contract, dated the 1st of October 1913, the plaintiff stipulated that as regards the goods to be delivered the quality and width was to be given according to the 'Textiles' goods Nos. 29½, 999, 9,999 and 99,999 and reinforced the stipulation in his signature by repeating that 251 bales according to the 'Textiles' goods were to be taken. The price of the goods was fixed at Rs. 5-10-0 a piece, each bale containing 60 pieces. The agreement as to price and quantity was confirmed by the defendants' secretary in a document of the same date. The contract signed by the plaintiffs was in a printed form containing nine numbered clauses, which appear in all the contracts the subject of this suit. For the purpose of the dispute regarding the 84 bales under contract A, it is sufficient to set out the 8th and 9th clauses:—

"8. If we have any objection as to finish, quality, width, number, stamp and heading, we agree to refer the same to the arbitration of two members of the Bombay Mill Owners' Association. Out of them one member shall be of our selection and one member shall be of your selection. Should the arbitrators be not unanimous then they are to appoint an umpire and both the parties are to agree to the umpire's award.

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"9. As to the objection mentioned in the said clause 8, we are bound to make the same known in writing within eight days after the goods are tendered and should we fail to do so, then we agree that our objection shall not at all prevail and we are bound to take delivery of the said goods."

After delivery of some of the goods had been taken under this contract, disputes arose, as the plaintiffs contended that the goods were not according to the contract. Upon this dispute a reference to arbitration took place under clause 8 of the contract. The defendants appointed Mr. Langley and the plaintiffs appointed Mr. Lalji Naranji as their respective arbitrators. The reference was made on the 8th of July 1914 in a letter addressed to the arbitrators by the plaintiffs' solicitors (Exhibit M), after a copy of it had been submitted to the defendants' attorneys on the 20th of June. The reference is in these terms:—

"Clause 8 of the contract provided for reference to arbitration of two members of the Bombay Mill Owners' Association if a difference arose between the parties. A difference has arisen between the parties under the above clause, as to whether the goods tendered are in accordance with the contract, and you gentlemen have been appointed arbitrators to decide the question. We understand you intend to make an appointment as to the time when you would go to survey."

The arbitrators were then requested to give timely intimation of the time of survey, as it was necessary for the parties to be present.

On the 31st of June the arbitrators published their award, which states that they met to settle the dispute between the defendants and the plaintiffs regarding a contract which stipulated that the goods were to be of the same quality as the goods of the Textile Mill Nos. 299½, 999, 9,999 and 99,999. That pieces of the Textile Mill manufacture were produced and inspected by both parties as a basis for arbitration and that in comparing them with pieces from the bales delivered by the defendants there was found to be a difference in finish, quality, width, and, in some cases, of design and colour. The arbitrators then proceeded to state that their award was that the buyer was entitled to an allowance of

4-annas per piece on 84 bales only and must take delivery as per terms of contract with this allowance. And they stated that in their opinion these 84 bales should be free of interest to the buyer up to the 31st of July and should be debited on that date.

Four days later the defendants' solicitors wrote to the arbitrators stating as follows:—

"With reference to your survey report of the 31st of July last regarding the dispute between our client and Mr. Ruttonsey Rowji, we are instructed to state that you were only requested to report on the quality, finish, etc., of the 84 bales in question. You had no right to state in the above report that, in your opinion, the said 84 bales should be free of interest to the buyer until the 31st of July and should be debited on that date. Our clients, therefore, do not bind themselves to accept the above statement."

The defendants were not the only objectors to the award; for, on the 10th of August, the plaintiffs' solicitors addressed those of the defendants referring to the arbitration and the award as follows:—

"We must state at once that our client has been advised that the direction in the award that our client should take the goods at the allowance specified is outside the scope of the reference. Our client is not bound to take the goods on an allowance and declines to do so."

With regard to these two letters, it is to be noted that the defendants merely stated that they did not bind themselves to accept the statement about interest and that the plaintiffs' refusal to be bound to take the goods on an allowance was not communicated until five days or more after the declaration of the European war.]

The question is whether the plaintiffs are bound to take the 84 bales at an allowance reducing the contract price. There is no such provision in the contract and, so far as there is any indication as to the result of a successful objection regarding the quality, etc., of the goods tendered, clause 9 impliedly indicates that the plaintiffs would not be bound to take delivery. The defendants' case, however, does not rest upon the terms of the contract. A day before the hearing commenced in the lower Court, the defendants' solicitors gave notice that at the hearing of

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the suit they would, if necessary, rely on a custom of trade in Bombay, applicable to the sale of goods to be manufactured of the quality and description referred to in the contracts in this suit, that a buyer has not a right to reject merely for difference in width, etc., provided that the difference is not unreasonable and is a matter that can reasonably be met by an allowance in the price.

At the hearing an issue was raised regarding the alleged custom. It was objected to by the plaintiffs, but was allowed by the learned Judge subject to amendment of the written statement by the defendants. Thereafter, at the trial, evidence was given of the alleged custom.

It is not contended that such evidence was inadmissible provided the custom proved did not annex an incident to the contract repugnant to, or inconsistent with, the expressed terms: see section 92 of the Indian Evidence Act, proviso 5.

The defendants rely upon the custom alleged to avoid the ordinary consequences of a breach of contract for sale of goods according to sample, resulting from the provisions of section 118 of the Indian Contract Act. They contend that such a custom modifying the consequences resulting from the application of section 118 would not, within the meaning of section 1 of the Indian Contract Act, be inconsistent with the provisions of the Act. Nor do the plaintiffs, as I understood the argument, contend that the custom would be inconsistent with the provisions of the Act. They insist, however, that it would be inconsistent with the provisions of the contract. The learned Judge held that the evidence conclusively proved that in the country piece goods trade, where a contract is made for unascertained goods either according to a particular sample provided by the buyer or according to a stock number of the manufacturer and the contract contains an arbitration clause under which all disputes are to be referred to arbitration, the arbitrators proceed on the footing that under the reference they are to survey the goods and either award that the goods may be rejected or must be taken with or without an allowance. This is not a custom regulating the rights of parties under the contract so as to be inconsistent with its express terms, but rather a customary

incident annexed to the powers of arbitrators on their appointment under contracts of this description.

It appears to me that such a custom, as is alleged in the amended written statement, would be inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price. The same question has, in England, given rise to differences of judicial opinion. In *Walkers, Winsor & Hamm and Shaw Son & Co. In re* (1) it was argued that the introduction of a price is merely to set up a standard of value, that is, the value of goods corresponding to the sample, and there may be a consistent custom providing for the variation in price upon a variation in quality, and Mr. Justice Channel held that if the custom went to the length of saying that there should be no remedy for any variation in quality, it would be unreasonable but being simply a custom that the buyer takes the goods with a variation in price and with the limitation imposed by the words "unless the same is excessive or unreasonable," it would not be inconsistent with the written contract. On the other hand, Lord Justice Moulton in *North Western Rubber Company, and Huttenbach and Co., In re* (2) expressed the opinion that such a custom contradicted the written contract relieving the vendor from his obligation and entitling him to require the purchaser to accept that which was not in accordance with the description.

It does not appear to me that the question whether such a custom, as is alleged, would be inconsistent with the written contract is affected in any way by the judgments of the House of Lords in the recent case of *Produce Brokers Company, Limited v. Olympia Oil and Cake Co.* (3).

I agree with the learned Trial Judge in preferring the reasoning of Lord Justice Moulton to that of Mr. Justice Channel.

This conclusion, however, by no means disposes of the question regarding the 84 bales. The arbitrator Langley has deposed

(1) (1904) 2 K. B. 152; 73 L. J. K. B. 325; 90 L. T. 454; 53 W. R. 79; 9 Com. Cas. 174; 20 T. L. R. 274.

(2) (1918) 2 K. B. 907 at p. 922; 78 L. J. K. B. 51.

(3) (1916) 85 L. J. K. B. 160.

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that he and his co-arbitrator made their award upon the footing that a custom did exist that the buyer of local piece goods must send the goods to be surveyed and is only entitled to reject if the surveyor decides the goods are so much off the sample that they are not saleable as of the quality ordered. If there is a difference which does not amount to this, he is bound to take it on an allowance. Langley and his co-arbitrator understood they were to proceed with the reference in the usual way and did so, awarding an allowance of 4 annas per piece. Lalji Naranji's evidence in examination-in-chief is to the same effect. The cross-examination was not directed to the practice before arbitrators but rather to the custom set up in the written statement.

It is permissible for arbitrators, who are experts in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade: see the judgment of Lord Loreburn in the case of *Produce Brokers Company Limited v. Olympia Oil and Cake Company* (3).

It is, however, contended for the plaintiffs that the practice of arbitrators in fixing allowances, even if sanctioned by custom, is irrelevant in the present case owing to the restricted terms of the reference of the 8th of July. It is contended that the arbitrators had no authority to decide any question but that stated in the reference, namely, whether the goods tendered were in accordance with the contract. This contention receives support not only from the defendants' solicitors' letter of the 3rd of August and the *post bellum* repudiation by the plaintiffs' solicitors but also from the decision of the Court of Appeal in England in *Re Arbitration between Green & Co. & Balfour, Williamson, & Co.* (4), in which it was held that under a very similar reference the arbitrators had no jurisdiction to award that the buyer should take goods found to be not up to the sample with a reduction of price. It is apparent, however, from the judgments delivered in that case that evidence would be admissible to show

that the arbitrators had in fact been asked to decide something more.

In the arbitration under contract A the facts are that at the survey the plaintiffs asked Lalji Naranji, who was his nominee, to award an allowance in the hearing of Lukhmidas Vussonji, the defendants' salesman, who represented them at the survey. No objection to such a course was taken by Lukhmidas nor have the defendants ever objected to the allowance made by the arbitrators. In this respect, therefore, they must be taken to have ratified the conduct of their representative in not objecting to the request of Raoji that an allowance should be made. Under these circumstances, I see no reason to differ from the conclusion arrived at by the learned Judge that it cannot be said that the question of the allowance was not properly referred to the arbitrators.

In this view of the case, the question whether the custom alleged would be inconsistent with the written contract standing alone, is not the crucial question. The plaintiffs are bound by the award made in pursuance of their request and not objected to by their opponents.

I may observe that there appears to me to be no foundation for the defendants' contention that the scope of the reference was not the subject of consideration in the Trial Court. It is, I think, perfectly clear that the learned Judge was dealing with this point in the passage in which he discusses the conduct of the plaintiffs at the time of the survey. It is equally clear that the same point has been urged on behalf of the plaintiffs in clause 10 of the memorandum of appeal.

For the reasons stated above, I am of opinion that the decision of the learned Judge regarding the 84 bales under contract A should be affirmed.

The remaining point is whether the defendants have broken the contracts B, C and D of September 1913, in which they agreed as follows:—

"We are to give delivery of the goods which may have been sold before this contract but we are not to give delivery of the same during your period."

Prior to these contracts the defendants had entered into contracts on similar print-

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ed forms with two other dealers for delivery of similar goods over certain periods, which were running in September 1912 but would expire before the periods for delivery of the plaintiffs' goods under contracts B, C and D would commence.

The common features of all the contracts material for the present point are clauses 1, 3, 4, 5, 6 and 7 in Exhibit O-I:—

"1. We have purchased the said goods under manufacture and we bind ourselves to take delivery of all the goods appertaining to this contract or a part thereof as you may give delivery."

"3. Should we fail to clear the goods within twenty-four hours of their being ready for delivery, then the goods shall remain at our risk and we are responsible for all kinds of damages.

"4. Your giving notice of the goods being ready is tantamount to your tendering the same. On the notice being posted to our address the same would be considered to have reached us.

"5. When you tender the goods we are bound to pay for and clear the same.

"6. If we do not clear the goods, then we are to pay interest at the rate of 9 per. cent. from the date on which the same should have been cleared. So also we bind ourselves to pay godown rent, insurance (charges) and whatever other expenses may be incurred.

"7. Should we fail to clear the goods in time, then you may sell the same at any time you like either by public auction or by private sale in one lot or in pieces at our risk and cost; and as to whatever loss you may suffer thereby we are to pay the same without (raising) any objection and as to whatever profit may be made we shall have no manner of right thereon."

In practice the defendants about once each month would send the buyer a delivery order in respect of such of the contract goods as were ready for delivery in the Company's godown and the buyer would sign an acknowledgment of delivery of so many bales and the goods would be debited to him by the defendants. If his obligation to clear the goods within twenty-four hours under clause 3 was not discharged, interest would begin to run as well as godown rent for the storage in

the defendants' godown and insurance, other charges under clause 6 to be followed on failure to clear and pay for the goods within a reasonable time by sale by the defendants at the buyer's risk and cost. Under clause 9 of the contract objections to the goods would not prevail if not made within eight days and the buyer would be bound to take delivery notwithstanding his objections.

The defendants contend that the debiting of goods to the buyer and sending him a delivery order for signature marks the period of delivery, for within twenty-four hours the defendants would hold uncleared goods as warehousemen and bailees for the buyers.

In my opinion this contention is correct. 'Delivery' within the meaning of the added clause relates to some act to be done by the sellers, but their obligations ceased with the debiting of the goods and their transference from the defendants' mills to their godown. Thereupon constructive delivery took place: "It is a change of possession without any change of actual custody...A seller in possession may assent to hold the thing sold on account of the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer or his servant, and is an actual receipt by the buyer:" see Pollock and Wright on Possession, page 72. Holmes, in the Common Law, page 233, remarks that—

"Where goods remain in the custody of a vendor, appropriation to the contract and acceptance have been confounded with delivery. Our law has adopted the Roman doctrine, that there may be a delivery, that is, a change of possession, by a change in the character in which the vendor holds, but has not always imitated the caution of the civilians with regard to what amounts to such a change."

Here, in my opinion, the provisions of the contracts preclude the possibility of doubt as to the point of time when the change occurs. It is not necessary to repeat the indications noted by the learned Trial Judge of the understanding of the parties in the matter, but we may add that the award itself affords an instance of the practical effect of clause 9 of the contract. The

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arbitrators, experts in the practice of the trade, held that with regard to the sales debited on the 30th May and objected to on the 5th June interest should only run from the 31st of July, the date of the award upon the objections. This would be the period of change of possession, if not of custody.

The decree of the lower Court must be affirmed and the appeal dismissed with costs on the appellants.

HEATON, J.—I agree that the appellants' contention as to contract A fails and that Macleod, J.'s judgment in this particular should be affirmed. But I am far from sure that it cannot be affirmed on the ground that there is not any contradiction or repugnance between the written contract and the contract as modified by the custom. Whenever a custom prevails, it necessarily leads to the establishing of a contract different in some particulars from the written contract, otherwise custom would be useless and would never be relied on. Variation from the written contract is, therefore, inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance; in some cases it is, in some it is not. In this particular case I think it is not. I need not develop the point, as the judgment of Macleod, J., is supported on other grounds.

As to the rest of the decision I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 33 OF 1915.

June 6, 1916.

Present.—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Asutosh

Mookerjee, Kt.

Srimati PRIYA SAKHI DEBI—PLAINTIFF

—APPELLANT

versus

BIRESHWAR SAMANTA AND OTHERS—

DEFENDANTS NOS. 6 TO 11—RESPONDENTS.

Mortgage, simple—Suit by simple mortgagee, nature

of—Adverse possession, title by, effect of, as against mortgagor and mortgagee—Limitation Act (IX of 1908), s. 28—Transfer of Property Act (IV of 1882), s. 58.

The enforcement of a title by adverse possession as against a person who has executed a simple mortgage of the property will not extinguish the right of the mortgagee to sue for his debt and realise his security within the time allowed by law. [p. 279, col. 2; p. 282, col. 1.]

Per Sanderson, C. J.—The term 'adverse possession' implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment the adverse possession begins. [p. 279, col. 2.]

Adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or, in other words, only the interest which the person having the right to immediate possession has in the property, when the adverse possession begins. [p. 279, col. 2.]

Where after a simple mortgage the mortgaged property is taken possession of by a third person, the latter takes possession only of what belonged to the mortgagor, viz., his equity of redemption, and, therefore, holds it subject to the liability of its being sold for the satisfaction of the mortgage-debt. [p. 279, col. 2; p. 280, col. 1.]

Aimadar Mondul v. Makhan Lal Dey, 33 C. 1015; 10 C. W. N. 904; *Partasarathi Naikan v. Lakshmana Naicken*, 9 Ind. Cas. 791; 35 M. 231; 9 M. L. T. 339; 21 M. L. J. 486; (1911) 1 M. W. N. 201, followed.

Prannath Roy Chowdry v. Rookea Begum, 7 M. J. A. 323; 4 W. R. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. K. 331 (P. C.), distinguished.

Per Mookerjee, J.—A simple mortgagee is not entitled under the Transfer of Property Act to take possession of the mortgaged premises, he holds the property as security for the loan while the mortgagor continues in possession thereof. [p. 281, col. 2.]

Sri Raja Papamma Rao v. Sri Vira Paratapa, 23 I. A. 32; 19 M. 249; 6 M. L. J. 53; 7 Sar. P. C. J. 10; 6 Ind. Dec. (N. S.) 879, referred to.

A suit by a simple mortgagee for the sale of the mortgaged property is in no sense a suit for possession of an interest in immovable property. [p. 284, col. 2.]

Vasudeva Mudaliar v. Srinivasa Pillai, 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 2 M. L. T. 333; 9 Bom. L. R. 1104; 34 I. A. 187; 30 M. 426 (P. C.); 6 C. L. J. 379, followed.

The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest therein subsequent to the mortgage. [p. 281, col. 1.]

Jaggiswar Dutt v. Bhuvan Mohan Mitra, 33 C. 425; 3 C. L. J. 205; *Bhaju Chowdhury v. Chuni Lal Marwari*, 5 C. L. J. 95; 11 C. W. N. 284, followed.

The question whether a third party has by adverse possession for the statutory period acquired a title paramount to both the mortgagor and the mortgagee should not be litigated in a mortgage suit, and any person claiming such a title in a mortgage suit should be discharged from the suit. [p. 281, cols. 1 & 2.]

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The dispossession of the mortgagor, subsequent to the execution of a simple mortgage, though it may operate by lapse of time under section 28 of the Limitation Act to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee, as he is not entitled to possession of the mortgaged property either under the Statute or under the contract. [p. 283, col. 1.]

Aimadar Mondul v. Makhan Lal Dey, 33 C. 1015; 10 C. W. N. 904, followed.

Prannath Roy Chowdry v. Rookea Begum, 7 M. I. A. 323; 4 W. R. 37 (P. C.); 1 Suth. P. O. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331 distinguished.

Nallamuttu Pillai v. Betha Naicken, 23 M. 37; 9 M. L. J. 258; 8 Ind. Dec. (N. S.) 420, dissented from.

Section 28 of the Limitation Act, which prescribes a rule for the extinguishment of right to property, is expressly limited to suits for possession. In respect of debts, the provisions of the Limitation Act merely bar the remedy but do not extinguish the right. Therefore, when a mortgagor in possession is dispossessed and does not institute a suit against the trespasser within twelve years of the dispossession, his equity of redemption, and *prima facie* nothing more, becomes vested in the adverse possessor. The dispossession of the mortgagor in a simple mortgage does not extinguish the title of the mortgagor by lapse of time under section 28 of the Limitation Act. [p. 281, col. 2; p. 282, col. 1.]

Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. [p. 283, col. 2.]

Appeal under the Letters Patent against the decree of Mr. Justice Fletcher, dated the 3rd March 1915, reported as 28 Ind. Cas. 917, in Appeal from Appellate Decree No. 876 of 1913.

FACTS.—The material facts appear from the judgment of Fletcher, J., reported as 28 Ind. Cas. 917 and of the First Appellate Court.

Babus Mohendra Nath Ray and Bepin Behary Ghose (Senior), for the Appellant.

Babus Ram Chandra Majumdar and Sarat Kumar Mitra, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the plaintiff from the judgment of Mr. Justice Fletcher*, whereby he set aside the judgment and decree of the Subordinate Judge of Burdwan.

The action was brought to enforce a mortgage-bond, dated the 27th June 1887, executed in favour of the plaintiff by the original defendants Nos. 1 and 2. Under the bond the principal was to be paid by instalments and it was provided that the whole amount remaining unpaid should become payable upon default in payment

*See 28 Ind. Cas. 917—*Ed.*

of any one of the instalments with interest at 2 per cent. per mensem. One of the instalments was not paid on 11th February 1893; there was, however, a payment of interest on 18th October 1892 and the suit was brought on the 22nd August 1905.

The dispute in this case relates to certain land which has been described as plot No. 1. It appears that on 16th February 1894, this plot of land was sold by the then owners, called Mullick, to the predecessor-in-title of defendants Nos. 1 and 2, and that these defendants and their predecessors were in possession of the plot from that date until 1892.

On the 7th May 1875 the Mullicks, although they had already sold the plot, purported to execute a mortgage of the said land in favour of defendant No. 3.

On the 27th June 1887 the defendants No. 1 and 2 (as already stated) mortgaged the plot to the plaintiff.

The defendant No. 3 brought a suit on his mortgage and on the 6th February 1891 he obtained a decree. On the 7th December 1891 at an auction, held in execution of the said decree, the defendant No. 3 purchased the said land and in 1892 obtained possession thereof and from that time up to the institution of this suit, on 22nd August 1905, he remained in possession.

The defendant No. 3, having been made a party to this suit, set up the defence that he had been in adverse possession of the said land for more than twelve years before the institution of this suit.

The case having come up on appeal, two learned Judges of the High Court, in a judgment of 23rd March 1910, remanded it for the decision of this question as far as defendant No. 3 was concerned and whether the plaintiff was entitled to bring the said plot to sale as against defendant No. 3.

The Court of first instance decided against the plaintiff. The Subordinate Judge, however, held that the plaintiff was not made a party to the mortgage suit brought by the defendant No. 3 and consequently she was not bound by it. Further, that if defendants Nos. 1 and 2, after executing the mortgage in favour of the plaintiff, had entered into any compromise with defendant No. 3 by which

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they relinquished their right to the said plot (upon which he came to no definite conclusion as to the facts), the plaintiff could not be bound thereby, as she was no party to that proceeding; and finally that the possession of the defendant No. 3 could not be held to be adverse to the plaintiff before the time when she could enforce the mortgage and, therefore, the learned Judge decided in favour of the plaintiff.

The learned Judge, Mr. Justice Fletcher, held that the possession of the defendant No. 3 was adverse to the plaintiff and consequently he reversed the judgment of the Subordinate Judge and decided in favour of defendant No. 3.

The mortgage was a simple mortgage and it is to be noted that this suit was merely one for the realisation of the plaintiff's security; the plaintiff asked for a decree for the principal and interest due and a sale of the mortgaged property.

It was held by the Subordinate Judge, when the case was first before the 1st Appellate Court, in his judgment of 4th May 1907 that the suit was not barred, for although there had been default in the payment of an instalment in February 1893, there had been a payment of interest on the 18th October 1893 and that consequently under section 20 of the Limitation Act a fresh period of limitation should be computed from the time when the interest was paid and that the suit being instituted on 22nd August 1905 was, therefore, in time.

This finding, so far as defendants Nos. 1 and 2 were concerned, was affirmed by the High Court on 23rd March 1910.

The matter, therefore, in this appeal is between the plaintiff and defendant No. 3, for whom it was argued that the possession of defendant No. 3 was adverse to the mortgagors, defendants Nos. 1 and 2, and it must, therefore, be taken as adverse to the plaintiff, the mortgagee, and no decree for sale of the property should be made.

It was argued on behalf of the respondent (defendant No. 3) that this question between plaintiff and defendant No. 3 must be treated as if it were a claim by the plaintiff for possession of immovable

property against defendant No. 3, and that Article 144 of the Limitation Act was applicable, that defendant's possession became adverse to the plaintiff in 1892, and as the suit was not brought until 22nd August 1905, the plaintiff's claim against defendant No. 3 is barred. Assuming that this Article is applicable to this suit, the question remains, when did the possession of defendant No. 3 become adverse to the plaintiff?

In my judgment the term "adverse possession" implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892, and indeed the plaintiff has never yet become so entitled. Consequently in my judgment Article 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim.

In my judgment the principle upon which this matter should be decided is that adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or, in other words, only the interest which the person, having the right to immediate possession, has in the property, when the adverse possession begins, can be affected by such adverse possession.

In this case the mortgage in favour of the plaintiff was created before the defendant No. 3 purchased the property at auction and obtained possession thereof in 1892. The position of the plaintiff, the mortgagee, then was that he had an interest in the property with a right to bring it to sale for the realisation of the mortgage-debt, but with no right to take possession of the property. When, therefore, the defendant took possession of the property after the mortgage to the plaintiff, he took possession only of what belonged to the mortgagor, *viz*, his equity of redemption, and in my judgment held it

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subject to the liability of its being sold for the satisfaction of the mortgage debt.

This conclusion is in accordance with the decision of this Court in *Aimadar Mondul v. Makhan Lal Dey* (1) and the judgment of the Madras High Court in *Parthasarathi Naikan v. Lakshmana Naicken* (2).

This last mentioned case, though reported in 35 Mad. was later in date than *Ramasami Chetti v. Ponna Padayachi* (3), which was one of the cases relied on by the learned Judge and which has now been overruled by a Full Bench in *Viyapuri v. Sonamma Bai Ammani* (4).

Karan Singh v. Bakar Ali Khan (5), which was considered by the learned Chief Justice in *Aimadar Mondul v. Makhan Lal Dey* (1), in my judgment, is not inconsistent therewith or with the principle above stated: for, in that case, if the defendant's contention had been maintained and he had been allowed to tack on to his own possession the possession of the Collector, and treat that as possession on his own behalf and adverse, then his possession would have begun before the mortgage, and in such case the operation of the adverse possession would not have been affected by the subsequent grant of the mortgage security.

It was necessary, therefore, for the Privy Council to consider the question of tacking, and their Lordships did not decide that the possession of the defendant standing by itself should be considered adverse to the plaintiff.

Nor do I think that the decision in the case of *Prannath Roy Chowdry v. Rookea Begum* (6), another of the cases relied on for the respondent, covers the case now under consideration. For these reasons the appeal, in my judgment, should be allowed with the costs of both hearings in the High Court, the judgment of the learned Judge of the High Court should

be set aside and the decree of the learned Subordinate Judge should be restored.

MOOKERJEE, J.—I am of opinion that the judgment of Mr. Justice Fletcher cannot be supported.

The plaintiff seeks to enforce a mortgage security granted to her by the first defendant on the 27th June 1887. The mortgage provided that, on default of payment of specified instalments, the entire mortgage money would become repayable with interest. As the result of such default, the mortgage money became recoverable on the 11th February 1893. Thereafter interest was paid by the mortgagors on the 18th October 1893. The present suit was instituted on the 22nd August 1905. The claim was resisted by the third defendant, who had been joined as a party, because the plaintiff found him in possession of one of the properties comprised in the mortgage security. His contention in substance was that the mortgage had ceased to be operative upon the property in his hands. The Trial Court decreed the claim in full, and this decision was affirmed by the Subordinate Judge on appeal. On a second appeal to this Court, the suit was remanded to the Court of First Instance for re-trial. That Court dismissed the suit in respect of the property held by the third defendant. This decision was reversed by the Subordinate Judge on appeal. Mr. Justice Fletcher next set aside the decision of the Subordinate Judge and restored the decree of the Primary Court. The plaintiff has preferred this appeal against the judgment of Mr. Justice Fletcher under clause 15 of the Letters Patent, and the question for determination is whether what has been called the first property claimed by the third defendant is liable for the satisfaction of the mortgage debt. The circumstances under which that defendant claims title to the property may be briefly narrated. The property belonged originally to a family of Mullicks who sold it to the Chaudhuris (the mortgagors of the plaintiff) on the 16th February 1874. Notwithstanding this sale, the Mullicks mortgaged the property to the Samantas (now represented by the third defendant) on the 7th May 1875. The Samantas sued in 1890 to enforce their

(1) 33 C. 1015; 10 C. W. N. 604.

(2) 9 Ind. Cas. 791; 35 M. 231; 9 M. L. T. 399; 21 M. L. J. 466; (1911) 1 M. W. N. 201.

(3) 9 Ind. Cas. 28; 26 M. 97; 9 M. L. T. 264; 21 M. L. J. 397; (1911) 1 M. W. N. 209.

(4) 31 Ind. Cas. 412; 29 M. L. J. 645; 2 L. W. 1080; (1915) M. W. N. 927; 18 M. L. T. 436.

(5) 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 82; 2 Ind. Dec. (N. S.) 1044.

(6) 7 M. I. A. 323; 4 W. R. 37 (P. C.) 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 F. R. 331.

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security, obtained a decree for sale on the 6th February 1891, and, in due course, purchased the mortgaged property in execution on the 7th December 1891. In 1892 the third defendant as purchaser obtained delivery through Court, and dispossessed the first two defendants (the Chaudhuris) who had meanwhile, on the 27th June 1887, granted the simple mortgage in suit. The case for the third defendant is that his adverse possession of the property from 1892 had by 1904 extinguished the title of all persons interested therein, whether as mortgagor or as mortgagee, and that, consequently at the date of the institution of the present suit on the 22nd August 1905, there was no subsisting charge on the property in his hands. Mr. Justice Fletcher has given effect to this contention.

It is desirable to observe at the outset that the defence raised by the third defendant is not a question of the rule of limitation applicable to the suit. The suit is obviously in time under Article 132 of the Indian Limitation Act, read with section 20; it is a suit to enforce payment of money charged upon immoveable property and it has been instituted within twelve years from the date when interest was paid on the sum due. The question raised is in essence one of title; the substance of the defence is that the third defendant has by adverse possession for the statutory period acquired a title paramount to that of both the mortgagor and mortgagee. On principle such a question should not have been litigated in a mortgage suit. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage [*Jaggewar Dutt v. Bhuban Mohan Mitra* (7)] and *Bhaju Chowdhury v. Ohuni Lal Marwari* (8). Consequently, the third defendant should have been discharged from this suit, when he claimed a title adverse to that of both the mortgagor and the

mortgagee. The parties, however, have deliberately adopted a different course, and the question in controversy has been raised and decided; both parties have in this Court expressed a desire that the matter in difference should be settled in this litigation, which has now lasted for over ten years. In these circumstances and in view of the qualifications to the general rule explained in the judgment in *Bhaju Chowdhury v. Ohuni Lal Marwari* (8), it is competent to this Court to determine, whether the third defendant holds the property free of the mortgage, in other words, whether the right of the mortgagee to appropriate the property to the satisfaction of his debt no longer exists. As there has been much divergence of judicial opinion on this topic, it is desirable to investigate it in the first instance as a question of principle apart from authorities.

Section 58 of the Transfer of Property Act defines a mortgage as the transfer of an interest in specific immoveable property. Consequently when the owner of a property executes a simple mortgage thereof, the entire interest originally vested in him is thereafter vested partly in him as the mortgagor and partly in the mortgagee. A simple mortgagee as such is not entitled under the Transfer of Property Act to take possession of the mortgaged premises, he holds the property as security for the loan while the mortgagor continues in possession thereof [*Sri Raja Papamma Rao v. Sri Vira Pratapa* (9)]. If, then, after the grant of the simple mortgage, the mortgagor is dispossessed, what is the effect of the possession of the adverse holder upon the title, *first*, of the mortgagor, and *secondly*, of the mortgagee? The answer depends obviously upon the true construction of section 28 of the Indian Limitation Act, which is in these terms: "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is plain that this section which prescribes a rule for extinguishment of right to property is expressly limited to suits for possession; it has accordingly been held that in respect of debts, the provisions of the Limitation Act merely

(7) 33 C. 425; 3 C. L. J. 205.

(8) 5 C. L. J. 95; 11 C. W. N. 284.

(9) 23 I. A. 32; 19 M. 249; 6 M. L. J. 53; 7 Sar. P. C. J. 10; 6 Ind. Dec. (N. s.) 879.

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bar the remedy, but do not extinguish the right [*Nursing Doyal v. Hurryhur Saha* (10) and *Moresh Lal v. Busunt Kumaree* (11)]. Consequently when the mortgagor in possession is dispossessed, he must, under Article 142, institute a suit for recovery of possession against the trespasser within twelve years from the date of dispossession; if he does not institute such a suit, his right to the property is extinguished. But what is his right to the property? Clearly the equity of redemption, which is all that remains in him after he has executed the simple mortgage and which is all that he had when the adverse possession commenced against him. From this it follows that after the lapse of the statutory period for the institution of a suit for possession, his equity of redemption, and *prima facie* nothing more, becomes vested in the adverse possessor, for, as pointed out in *Gossian Das Ohunder v. Issur Ohunder Nath* (12), *Jagrani Bibi v. Ganeshi* (13) and *Naradkumar Dobey v. Ajodhya Sahu* (14), the practical effect of section 28, when a person suffers his right to be barred by the law of limitation, is the extinction of his title in favour of the party in possession. The question next arises, what is the effect, if any, on the title of the simple mortgagee produced by the dispossession of the mortgagor? Does section 28 extinguish his interest? Obviously, the answer is in the negative. The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the Statute or under the contract. Section 23 clearly contemplates that the person whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property. Consequently, the dispossession of the mortgagor does not extinguish the title of the mortgagee by the lapse of time under section 23 of the Indian Limitation Act, and our attention has not been invited to any other statutory provision which is applicable to

(10) 5 C. 897; 6 C. L. R. 489; 3 Shome L. R. 154; 2 Ind. Dec. (N. S.) 1180

(11) 6 C. 340; 7 C. L. R. 121; 3 Ind. Dec. (N. S.) 222.

(12) 3 C. 224; 1 Ind. Dec. (N. S.) 731.

(13) 3 A. 435; A. W. N. (1881) 9; 5 Ind. Jur. 652; 2 Ind. Dec. (N. S.) 219.

(14) 11 Ind. Cas. 465; 14 C. L. J. 299; 16 C. W. N. 351.

the present case and which operates to extinguish interest in land. The true effect of a Statute of Limitation is lucidly stated by Angell: "The principle on which the Statute of Limitation is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by Statute" (Angell on Limitation, page 308). The question of the extinction of an incorporeal right by adverse possession thus presents considerable difficulties [*Lakshminarayana Aiyar v. Ulagammal* (15)] and I am not prepared to accept the view indicated by Subramania Iyer, J., in *Nallamuttu Pillai v. Bitha Naicken* (16) where, however, the adverse possession had commenced before the date of the mortgage. The broad proposition that a hypothecation right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor, was sought to be supported from the following passage of the Code (c. 7, 36, 1): "Long standing silence, supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge unless the debtors or those who have entered into their rights, command possession of the security" (Salkowski's Roman Law tr. Whitfield 503; Mackeldy's Roman Law tr. Dropsit 287.) But it must be remembered that in later Roman Law, in the case of a *pignus* as in that of a *hypotheca* the mortgagee was entitled to possession of the mortgaged property, in the former at the time of the transaction, in the latter when the debt became due (Salkowski 485, Mackeldy

(15) 26 Ind. Cas. 528; 28 M. L. J. 256.

(16) 23 M. 37; 9 M. L. J. 258; 8 Ind. Dec. (N. S.) 420.

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285; *Munter* 436, 447). This, however, is not the position of a simple mortgagee under the Transfer of Property Act, *Sri Raja Papamma Rao v. Sri Viru Pratapa* (9). On principle, accordingly, it is fairly plain that where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, under section 28, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee who is not entitled to possession of the mortgaged premises either under the Statute or under the contract. This is substantially the view taken in *Aimadar Mondul v. Makhan Lal Dey* (1). Mr. Justice Fletcher, however, has declined to follow the rule laid down in that decision, on the ground that it is inconsistent with two decisions of the Judicial Committee, namely, *Pramnath Roy Chowdhry v. Rookea Begum* (6) and *Karan Singh v. Bakar Ali Khan* (5). The respondent has endeavoured to support the decision of Mr. Justice Fletcher by a three-fold argument, namely, *first*, that the rule laid down in *Aimadar Mondul v. Makhan Lal Dey* (1) is inconsistent with the decisions of the Judicial Committee just mentioned and cannot consequently be treated as good law, *secondly*, that it is in conflict with the earlier decision of this Court in *Ram Coomar Sein v. Prosunna Coomar Sein* (17) and consequently a reference to a Full Bench is unavoidable under the rules of Court; and *thirdly*, that there is weighty judicial opinion in support of this view, for instance, *Ramaswami Chetti v. Ponna Padayachi* (3). In my opinion, these contentions cannot prevail.

As regards the *first* branch of this contention, I am of opinion that neither of the two decisions of the Judicial Committee supports the contention of the respondent. In *Pramnath Roy Chowdhry v. Rookea Begum* (6) the plaintiff, a mortgagee by conditional sale, had obtained a foreclosure order in proceedings instituted under Regulation XVII of 1806. He then sued to recover possession of the properties as owner from the defendant, who claimed under a purchase from the mortgagor which was neither proved nor admitted. The question was raised whether the plaintiff had validly (17) (1864) W. R. 375.

foreclosed the mortgage by conditional sale so as to entitle him to bring ejectment as owner, as the proceedings for foreclosure were taken more than twelve years after the due date for the repayment of the mortgage money. The law of limitation then in force was contained in section 14 of Regulation III of 1793, whereby a suit was barred where the causes of action had arisen twelve years before any suit was commenced on account of it. Lord Kingsdown pointed out that a suit for foreclosure against the mortgagor or against persons claiming privity with the mortgagor might not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage might be barred; but he did not say that the mortgagee's right might be barred by the possession of an adverse claimant even if the mortgagee's right to possession had not accrued or where the mortgagee was not entitled to possession at all. It was not necessary to make such a pronouncement, because it was found that the possession of the claimant had been originally not adverse to but consistent with the mortgage title, and there was nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the foreclosure suit. On the other hand, there are passages in the judgment of James, L. J., in *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (18) and in *Brannonath Koondoo Chowdhry v. Khelut Chunder Ghose* (19) which indicate that adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. The case of *Karan Singh v. Bakar Ali Khan* (5) also does not support the contention of the respondent. There the Collector had, for protection of the Government revenue, taken possession of the property in 1861, pending the settlement of disputes between rival claimants. The mortgages were executed in 1862 on behalf of one

(18) 14 M. I. A. 101; 16 W. R. 19 (P. C.); 8 B. L. R. 122; 2 Suth. P. C. J. 457; 2 Sar. P. C. J. 698; 20 E. R. 724.

(19) 14 M. I. A. 144; 16 W. R. 38 (P. C.); 8 B. L. R. 104; 2 Suth. P. C. J. 480; 2 Sar. P. C. J. 711; 20 E. R. 740.

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set of claimants, namely, the daughter's sons of the last male owner. In 1863, by an award of arbitrators, the title of the defendant, who was the brother's grandson of the late owner, was established against the daughter's sons. The mortgagee was not a party to these proceedings and was not bound thereby. The Collector then made over possession of the property, together with the arrears of income of the estate in his hands, to the successful claimant. In 1874, the mortgagee sued to enforce his securities. The defendant pleaded that he had been in adverse possession for the statutory period from 1861 on the assumption that the possession of the Collector was his possession. If this contention was well founded, the case would be, not that of the dispossession of a mortgagor after he had granted a simple mortgage, but that of the grant of a mortgage by a person previously dispossessed: in such a contingency, the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee, for in the words of Lord Kingsdown in *Prannath Roy Chowdhry v. Rookea Begum* (6), a cause of action is not prolonged by mere transfer of the title. The Judicial Committee, however, found that the defendant could not tack to his possession the possession of the Collector and had consequently not been in adverse possession for the statutory period since 1863. Sir Barnes Peacock observed, first, that the possession of the Collector was possession on behalf of the rightful owners, and, secondly, that the rightful owners were the daughter's sons and not the brother's grandsons, as found in a proceeding of the arbitrators whose decision did not bind the plaintiff as his bonds were prior to the submission to arbitration. I must decline to hold that the Judicial Committee by implication decided a question of law which was not argued before them and which upon the pleadings and facts found could not arise for consideration. There is no warrant whatever for the inference that the Judicial Committee assumed that a suit for sale by a simple mortgagee was a suit for possession. Sir

Barnes Peacock expressly referred to the change in the law effected by the Limitation Act of 1871 and could not have held that a suit for sale was a suit for possession, as might possibly have been held under the Limitation Act of 1859 [*Surwan Hossein v. Shahazadah Golam Mahomed* (20), *Jumeswar Dass v. Mahabeer Singh* (21) and *Chetti Goundan v. Sundaram Pillai* (22)]. Under the present law, however, a suit for sale such as the present is in no sense a suit by a simple mortgagee for possession of an interest in immovable property, *Vasudeva Mudaliar v. Srinivasa Pillai* (23). The Judicial Committee could hardly have overlooked the distinction between section 1, clause 12, of Act XIV of 1859 and Article 145 of Act IX of 1871, the former of which they have characterised as an inartificially drawn Statute and the latter as a more carefully drawn Statute [*Maharana Pattehsangji Jaswantsangji v. Desai Kullianraji Hakoomutraji* (24) and *Delhi and London Bank Limited v. Orchard* (25)]. I think it is reasonably plain that the decisions of the Judicial Committee in *Prannath Roy Chowdhry v. Rookea Begum* (6) and *Karan Singh v. Bakar Ali Khan* (5) do not conclude the question in controversy and do not directly or indirectly support the contention of the respondents.

As regards the second branch of the contention of the respondent, I am of opinion that the decision in *Ram Coomar Sein v. Prosunno Coomar Sein* (17) does not conflict with that in *Amador Mondul v. Makhan Lal Dey* (1). The earlier case arose out of a suit by a mortgagee for possession after foreclosure and was decided under the Limitation Act of 1859. The provisions of that Statute were, as I have just explained, radically different from those in the Limitation Act now in force, and that decision cannot be treated as an authority now binding upon us. I do not, however,

(20) 9 W. R. 170; B. L. R. Sup. Vol. 879.

(21) 3 I. A. 1; 1 C. 163; 25 W. R. 84; 3 Sar. P. C. J. 58; 3 Suth. P. C. 222; 1 Ind. Dec. (N. s.) 105.

(22) 2 M. H. C. R. 51.

(23) 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 2 M. L. T. 333; 9 Bom. L. R. 1104; 34 I. A. 187; 30 M. 426; 6 C. L. J. 379.

(24) 1 I. A. 34; 13 B. L. R. 254; 21 W. R. 178; 10 B. H. C. R. 281; 3 Sar. P. C. J. 306.

(25) 4 I. A. 27; 3 C. 47; 3 Sar. P. C. J. 721; 3 Suth. P. C. J. 423; 7 P. R. 1878; 1 Ind. Jur. 467; 1 Ind. Dec. (N. s.) 622.

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decide that the case of *Ram Oommar Sein v. Prosunno Coommar Sein* (17) was correctly decided even under the law as it stood in 1859; indeed, it appears to me to be incapable of reconciliation with the principle deducible from the decision of the House of Lords in *Pugh v. Heath* (26), namely, that on foreclosure, a fresh right of action arises for possession as owner, or, as it is said, the decree absolute gives a new right, confers a new estate and thereby absolutely bars the Statute of Limitation. I cannot, consequently, accept the contention that the decision in *Ram Oommar Sein v. Prosunno Coommar Sein* (17) assists the respondent and the same observation applies to *Sheoumber Sahoo v. Bhowaneedeen Kulwar* (27).

As regards the third branch of the contention of the respondent, it is indisputable that the balance of judicial opinion is in favour of the appellant. The earlier cases are reviewed in my judgment in the case of *Nandkumar Dobey v. Ajodhya Sahu* (14), where the question was expressly left open for future consideration and need not be analysed afresh. It is sufficient to state that the conflict of judicial opinion in Madras, as indicated in *Parthasarathi Naikan v. Lakshmana Naicken* (2) and *Ramasami Chetti v. Ponna Padayachi* (3), has now been settled by a Full Bench in *Viyapuri v. Sonamma Boi Ammani* (4) which, upon an exhaustive examination of the question from various points of view, affirms the principle that the possession of the trespasser who has dispossessed a simple mortgagor is not adverse to the simple mortgagee [see also *Peria Aiya Ambalam v. Shunnugasundaram* (28)]. The same view has been adopted in Allahabad [*Nandan Singh v. Jumman* (29) and *Raj Nath v. Narain Das* (30)]. It is not necessary to consider the class of cases of which *Lalla Kanhoo Lal v. Musammat Manki Bibi* (31) and *Tarubai v. Venkatrao* (32) may be taken as the type,

(26) (1882) 7 A. C. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553.

(27) 2 N. W. P. H. C. R. 223.

(28) 22 Ind. Cas. 615; 38 M. 903; 26 M. L. J. 140; 15 M. L. T. 112; 1 L. W. 119.

(29) 17 Ind. Cas. 632; 34 A. 640; 10 A. L. J. 278.

(30) 24 Ind. Cas. 997; 36 A. 567; 12 A. L. J. 982 (F. B.).

(31) 6 C. W. N. 601.

(32) 27 B. 43; 4 Bom. L. R. 721.

where a question arose as to the effect of adverse possession against a mortgagee upon the title of the mortgagor: nor need we consider the law on the subject in England which, as shown in *Nandkumar Dobey v. Ajodhya Sahu* (14), does not support the contention of the respondent and lays down in fact that a charge on the property can be enforced against a trespasser who has acquired a title by adverse possession [see the judgment of Farwell, J., in *Nisbet Pott's Contract, In re* (33) and *Ludbrook v. Ludbrook* (34)].

I hold, accordingly, that this appeal must be allowed with costs, the decree of Mr. Justice Fletcher reversed and that of the Subordinate Judge restored.

Appeal allowed.

(33) (1906) 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297; 54 W. R. 286; 22 T. L. R. 234.

(34) (1901) 2 K. B. 96; 70 L. J. K. B. 552; 84 L. T. 485; 49 W. R. 465; 17 T. L. R. 397.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 461 OF 1914.

August 23, 1915.

Present:—Mr. Pratt, J. C.

MESSRS. SANDAY PATRICK & Co.—
PLAINTIFFS

versus

THE BRITISH INDIA STEAM NAVIGATION Co.—DEFENDANTS.

Contract Act (IX of 1872), s. 65—Contract, void, when becomes—Bill of lading, construction of—“Or so near thereunto as a ship may go”, meaning of—Restraint of Princes, what amounts to—Reasonable apprehension.

In India a contract becomes void when its performance becomes impossible. [p. 291, col. 1.]

English Law on the subject and *Hills v. Sughrue*, (1847) 15 M. & W. 253; 153 E. R. 844; 71 R. R. 651, referred to.

The clause usually inserted in bills of lading to the effect that the goods shipped are to be delivered at a certain port “or as near thereunto as the ship may safely get”, must be taken to refer not to the voyage or the carriage of the goods but to their unloading or delivery. It means that the ship should get within the ambit of the port although she may not be able to enter it. The clause would not justify a shipowner delivering the goods at a different destination owing to war or natural causes. [p. 287, col. 2.]

Nobel's Explosives Co. v. Jenkins, (1896) 2 Q. B. 326 at p. 330; 65 L. J. Q. B. 638; 75 L. T. 163; 8 Asp. M. C. 181; *Schilizzi v. Derry*, (1855) 4 El. & Bl. 873; 24 L. J. Q. B. 193; 1 Jur. (N. S.) 792; 3 W. R. 374; 119 E. R. 324; 25 L. T. (O. S.) 66; 99 R. R. 802; *Castel v. Trechman*, (1884) 1 C. & E. 276; *Metcalf v. Britannia*

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Ironworks Co., (1877) 2 Q. B. D. 423; 46 L. J. Q. B. 443; 36 L. T. 451; 25 W. R. 720; 3 Asp. M. C. 407 and *Dahl v. Donkin or Nelson* (1881) 6 A. C. 38 at p. 57; 50 L. J. Ch. 411; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392, referred to.

The exception as to 'restraints of Princes' will justify a shipowner refusing to ship goods, which he has agreed to carry to a certain port, if he has a reasonable apprehension that the adventure will be frustrated by restraints of Princes. It is not necessary that the apprehension should be due to a restraint in operation at the date of the refusal. [p. 289, cols. 1 & 2.]

Geipel v. Smith, (1872) 7 Q. B. Cas. 404; 41 L. J. Q. B. 153; 26 L. T. 361; 20 W. R. 332; 1 Asp. M. C. 268; *Rodoconachi v. Elliott*, (1874) 9 C. P. 518; 43 L. J. C. P. 255; 31 L. T. 239; 2 Asp. M. C. 399; *Embricos v. Sydney Reid & Co.*, (1914) 3 K. B. 45; 83 L. J. K. B. 1348; 111 L. T. 291; 19 Com. Cas. 263; 30 T. L. R. 451, referred to.

Ciampa v. British India Steam Navigation Co., (1915) 2 K. B. 774; 84 L. J. K. B. 1653; *Atkinson v. Ritchie*, (1809) 10 R. R. 372; 10 East 530; 103 E. R. 877, distinguished.

Defendants agreed on 29th July 1914 to carry 1,250 tons of seeds for the plaintiffs to Antwerp by the 'September shipment.' On August 4th war broke out between England and Germany, and by September 19th the latter had overrun Belgium. On the latter date the defendants refused to ship the goods:

Held, that the defendants could avail themselves of the exception as to restraints of Princes contained in the bill of lading, as they had a reasonable apprehension that Antwerp was no longer a safe port. [p. 290, col. 2.]

Obiter dictum.—The apprehension of restraint of Princes may be reasonable, though it is unfounded. [p. 290, col. 1.]

Occurrences subsequent to the refusal of a shipowner to ship goods may be taken as a test of what was the true state of things when the breach of agreement to ship occurred. [p. 290, col. 2.]

Savona, The, (1900) P. 252; 69 L. J. P. 95; 49 W. R. 303, referred to.

Mr. T. G. Elphinston, for the Plaintiffs.

Mr. E. Raymond, for the Defendants.

JUDGMENT.—This is a suit for damages for breach of a contract of affreightment.

The plaintiffs, who are exporters of grain from Karachi, made a contract on the 29th July 1914 with the defendant company of shipowners for the carriage of 1,250 tons of seeds to Antwerp by September shipment at the rate of £0-11-0 a ton. On the contract being concluded, the defendants delivered to plaintiffs' manager Mr. Kenyon the shipping order; Exhibit 1, which stated that the steamer would be subsequently notified.

On the 1st September Mr. Kenyon wrote to the defendants as follows:—

"1000 D/W Tons Freight, Antwerp, September shipment.

"With reference to your shipping order No. 1 dated 29th July 1914 for above-named freight, we shall be glad to hear as soon as possible what steamer you are going to declare and when she is due. We are quite agreeable to transfer the order from Antwerp to London or Hull, if that suits you."

The defendants replied that they would have no sailings to Antwerp during the war. Some further correspondence ensued and on the 19th September the defendants definitely refused to perform the contract, on the ground that war had broken out and Antwerp was not a safe port.

The plaintiffs then shipped these seeds not to Antwerp for that was then impossible, but to London at the rate of £0-17-4½ a ton. They paid this higher rate of freight and sue to recover the difference of freight as damages.

The following issues were framed:—

1. Was the contract made subject to the defendant Company's bill of lading and/or the Eastern Trading Company's form of bill of lading?

2. Are the defendants protected by the clause referred to in paragraph 4 of the written statement (*i.e.*, the 'exception of restraints of Princes')?

3. Did plaintiffs ship the goods to London, and if so, are they entitled to claim damages under the contract, in view of the port of destiny under the contract?

4. To what damages, if any, are plaintiffs entitled?

5. General.

It was agreed to reserve trial of the 3rd to 5th issues until after the finding on the 1st and 2nd issues.

The 1st issue arises in this way. The shipping order is not the contract but an authority given in pursuance of the contract to the plaintiffs to require the master of a ship to be named to find cargo space for him. The shipping order is in fact addressed to the master. It requires that "Bills of lading must be filled in upon the Eastern Trade form and state contents and value of packages." But a footnote to the shipping order is to the following effect: "Cargo is booked subject to all conditions as per Company's bill of lading." The document would, therefore, imply that one set of conditions would

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apply while the agreement was executory and another set of conditions while the agreement is being executed. On looking at the two bills of lading and the nature of the contract I can find no meaning or reason for such a distinction. The plaintiffs' contention may, therefore, be admitted that there was an omission to alter the words in the footnote of the shipping order and that the contract was subject to the conditions of the Eastern Trade form bill of lading, Exhibit 2. The point is, however, of no importance, as the exceptions on which the defendants rely as to King's enemies and restraints of Princes occur in both the forms of bill of lading.

This disposes of the first issue, but before proceeding to the second issue it would be well to clear the ground of some pleas that plaintiffs have raised since the issues were framed.

The *first* is that there was a novation of the contract of affreightment and that the defendants had agreed to carry plaintiffs' goods to London. There is not a word about this novation in Mr. Kenyon's evidence or in the plaint. The only suggestion of such a plea is contained in Mr. Kenyon's letters to the defendants, Exhibits 13 and 15 of the 25th and 26th September. In these letters Mr. Kenyon says that defendants enquired by telephone early in September whether he would be prepared to ship to London or Hull instead of Antwerp if they declared the *S. S. Chybassa*. This telephonic communication led to the offer made by Mr. Kenyon in his letter of the 1st September, Exhibit 3, to transfer the order from Antwerp to London or Hull. The defendants do not admit Mr. Kenyon's version of the telephonic conversation, but even Mr. Kenyon's version as given in his letters is only that defendants enquired, "in the event of our declaring the *Chybassa* are you willing to ship to London or Hull?" It is clear, therefore, that no agreement to ship to London or Hull was concluded and the suit has not been brought on the basis of any such agreement.

The *second* point raised is that under the contract of affreightment evidenced by the shipping order, the defendants were obliged to ship to the nearest safe port (probably

London or Hull) in the event of Antwerp proving unsafe. This contention, it may be observed, is inconsistent with the allegation of a novation of the contract: also quite inconsistent with Mr. Kenyon's letter offering to transfer the order to London or Hull. It is founded on the clause in the bill of lading that the goods are to be delivered at the port of Antwerp "or so near thereunto as she may safely get." It is said that if Antwerp was not safe, the defendants should have taken the goods to the nearest safe port; presumably London or Hull, and delivered them there.

But this construction involves a complete misconception of the scope of the clause. The words refer not to the voyage or the carriage of the goods but to the unloading or the delivery of goods. The shipping order mentions Antwerp only as the port of destination. The words in the bill of lading are, "and to be delivered subject to the exceptions and conditions hereinafter mentioned in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of.....or so near thereunto as she may safely get." These words are, therefore, expressly limited to delivery and this distinction was pointed out in *Nobel's Explosives Co. v. Jenkins* (1). That the clause refers to the place of unloading is evident from the observation of Lord Chief Justice Campbell in *Schulizzi v. Derry* (2) that the words mean that "she should get within the ambit of the port although she may not be able to enter it." Further, the shipowner himself cannot rely upon these words as justifying delivery at a different destination when an impediment occurs at a distance from her destination, either owing to the war—*Castel v. Trechman* (3) quoted at page 99, Lord Justice Scrutton's work on Charter Parties—or owing to natural causes—*Metcalf v. Britannia Ironworks Co.* (4)

(1) (1896) 2 Q. B. 326 at p. 330; 65 L. J. Q. B. 638; 75 L. T. 163; 8 Asp. M. C. 181.

(2) (1855) 4 El. & Bl. 873; 24 L. J. Q. B. 193; 1 Jur. (N. S.) 795; 3 W. R. 374; 119 E. R. 324; 25 L. T. (O. S.) 66; 99 R. R. 802.

(3) (1884) 1 O. & E. 276.

(4) (1877) 2 Q. B. D. 423; 46 L. J. Q. B. 443; 36 L. T. 451; 25 W. R. 720; 3 Asp. M. C. 407.

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quoted with approval in *Dahl v. Donkin or Nelson* (5).

It is also urged that the defendants were bound to carry the cargo to London or Hull because of the following condition in the bill of lading which is incorporated in the contract:—

"In case of blockade or interdict of port of discharge, or of the entering of, or discharging in the port, shall be considered by the Master unsafe by reason of war or disturbances, the Master may land the goods at the nearest safe and convenient port, at the expense and risk of owners of the goods; and the ship's responsibility shall cease when the goods are so discharged into proper and safe keeping, the master giving immediate notice of the same to the consignees of the goods, so far as they can be ascertained."

Now this condition was inserted in bills of lading because it was held that the 'so near thereunto as she can safely get' clause did not justify a ship in proceeding to a different destination on account of war risks. It is a condition inserted for the protection and benefit of the shipowner and is not a condition of which the freighter can avail himself. It is a privilege accorded to the shipowner to commit a breach of contract and yet recover his freight. The shipowner is not obliged to undertake a contract he cannot perform merely because one of the conditions exempts him in case of breach. This would be tantamount to the freighter compelling the shipowner to commit a breach.

It is idle, therefore, to suggest that the defendants, being amalgamated with the P. and O. S. N. Co., could have carried the plaintiffs' goods to London in the P. and O. S. S. *Morea* which sailed on the 26th September. No doubt they could have done so, but there was no legal obligation on them so to do.

I now proceed to the 2nd issue, which involves the main defence to the suit. Are the defendants exempted by the clause in the bill of lading excepting the King's enemies and restraints of Princes? Plaintiffs' Pleader blows hot and cold. Although he strongly relies on the clauses of the

bill of lading as "to the nearest safe and convenient port or so near thereunto as she may safely get" in support of his claim to carriage to London or Hull, yet when the defendants plead the clauses as to restraints of Princes in the same bill of lading, he takes the objection that these clauses only operate after the goods are on board. In other words, his contention is that the exception as to restraints of Princes is not available so long as the contract is executory. But the contract is one entire contract involving the performance of different acts—to receive on board, to carry and to deliver. If the shipowner is prevented from delivering the cargo by restraints of Princes he is under no obligation to receive it on board. Not only as to this argument, but as to the argument that the defendants should have taken the goods on board and at least made an attempt to get to Antwerp, the answer is that given by Cockburn, C. J., in *Geipel v. Smith* (6):—"The answer of the defendants is that the contract is one entire contract and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance." The reasonable time referred to by Cockburn, C. J., was as in the present case the duration of the war.

It is next argued that the exception of restraints of Princes is limited to something that supervenes during the voyage and is not available, as in the present case, when the voyage was never commenced. In support of this contention the very recent case of *Ciampa v. British India Steam Navigation Co.* (7) was cited. In that case the defendant Company's ship had sailed with a foul bill of health from Mombasa to Naples. At Naples she shipped a cargo of lemons which were destroyed by the French Government's disinfection of the ship at Marseilles. It was held that the defendants could not avail themselves of the exception of restraints of Princes, because the ship was inevitably doomed before the commencement of the voyage to disinfection. It was also said that the

(5) (1881) 6 A. C. 38 at p. 57; 50 L. J. Ch. 411; 44 L. T. 381 29 W. R. 543; 4 Asp. M. C. 392.

(6) (1872) 7 Q. B. Cas. 404; 41 L. J. Q. B. 153; 26 L. T. 361; 20 W. R. 332; 1 Asp. M. C. 268.

(7) (1915) 2 K. B. 774; 84 L. J. K. B. 1653.

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exception restraints of Princes must be limited to circumstances supervening after the ship had started on the voyage. These expressions must be limited in their application by the facts of the case. What the Judge meant was that if the particular restraint is known to the shipowner before he starts on the voyage he must be held to have contracted to run that risk, for a contract to run a blockade is lawful. Or he may have intended to proceed on the equitable ground recognized in clause 3 of section 56 of our Contract Act, viz., that the impossibility of performance was known to the shipowners but not to the freighter.

I think it is now well settled that the shipowner need not receive the goods or start on his voyage if he has a reasonable apprehension that the adventure will be frustrated by restraints of Princes.

There is one case in which a contrary view was taken, that of *Atkinson v. Ritchie* (8) cited by plaintiffs' Pleader. It was there said that the restraint be an actual and operative restraint and not a merely expected and contingent one. But the facts of the case were peculiar. The master of the vessel was under a contract to load at Kronstadt cargo for London. When he had loaded half he sailed away on hearing rumours of war between England and Russia. War did not break out till several weeks later and there had been no change in the political relations of England and Russia at the time the master abandoned the contract. The Court intended rather to condemn the unreasonable act of the master than to lay down a general principle. This is the criticism Lord Justice Scrutton makes on the case in his work on Charter Parties at page 209 and I think it very just. All the subsequent cases make it clear that a reasonable apprehension of restraint is sufficient.

In *Geipel v. Smith* (6) the plaintiff had chartered a vessel to load and carry coals to Hamburg, but after the making of the charter party war broke out between France and Germany and Hamburg was blockaded by the French fleet. It was held

that the apprehension of restraint by the blockading fleet discharged the shipowners.

In *Rodoconachi v. Elliott* (9) the goods were being carried from Shanghai to London via Marseilles and Paris. The goods reached Paris, but were not sent any further as the German armies were in possession of the railway between Paris and Boulogne. It was held that the exception of restraints of Princes applied although the goods had not been seized, and that there had been a destruction of the contemplated adventure.

In *Nobel's Explosives Co. v. Jenkins* (1) the plaintiffs shipped dynamite, which was contraband of war, on defendants' ship for carriage to Yokohama. The ship arrived at Hong Kong and on that day war broke out between China and Japan. There were several Chinese vessels outside the harbour and if the master had attempted to sail, there was great danger that they would confiscate the goods and perhaps seize the ship. The master landed the goods at Hong Kong, and it was held that the ship was not liable for breach of the contract to carry to Yokohama as the exception in the bill of lading as to restraints of Princes applied. The case of *Atkinson v. Ritchie* (8) was cited in argument in this case, and indeed it had also been cited in *Geipel v. Smith* (6), but as to this the Judge said:—

"It was said that the fear of seizure, however well founded, was not a restraint and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* (6) and *Rodoconachi v. Elliott* (9). The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed."

So in the present case there was fear that if the plaintiffs' cargo were carried to Antwerp it and the ship would there be seized by the Germans. It is sought to differentiate the present case on the ground that risk of seizure should be due to a restraint existing at the time of the breach. For in

(8) (1809) 10 R. R. 372; 10 East 530; 103 E. R. 877.

(9). (1874) 9 C. P. 518; 43 L. J. G. P. 255; 31 L. T. 239; 2 Asp. M. C. 399.

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Geipel v. Smith (6) there was an actual blockade of Hamburg; in *Rodoconachi v. Elliott* (9) the Germans were on the lines of communication to Boulogne and were investing Paris; in *Nobel's Explosives Co. v. Jenkins* (1) the Chinese men of war were lying in the offing and probably knew the ship was carrying contraband, for they could see that she was flying a red flag and was anchored off the Government magazine at Hong Kong.

But this distinction is not one of principle but only of degree. The apprehension must be a reasonable one. And the most recent case shows that the apprehension may be reasonable even though it is unfounded. This was the case of *Embiricos v. Sydney Reid & Co.* (10). A Greek ship had been chartered to load a cargo at Temrieuk in the Sea of Azoff for a port in the United Kingdom. The ship proceeded to Temrieuk and loaded a part of the cargo on the 2nd October 1912. On that day the charterers discontinued loading, as there were rumours of war between Greece and Turkey and it was anticipated that the Dardanelles would be closed. On the 18th October war was declared and on the 21st the charterers cancelled the contract. It was held that the clause in the bill of lading as to restraints of Princes was available to the charterers as well as to the shipowner, and that, as there was no reasonable probability that the Turks would allow Greek ships to pass the Dardanelles, the charterers were justified in abandoning the contract. Now the remarkable point about this case is that the Turks did as a matter of fact open the Dardanelles to Greek laden vessels from the 16th to the 24th October and again from the 12th to the 19th November. At the time the contract was cancelled the Turks had opened the Dardanelles for a week, and if the cargo had been loaded, the ship could have passed the Dardanelles in the second period of opening from the 12th to the 19th November. Nevertheless, as it could not be anticipated that the Turks would again open the Dardanelles, the apprehension of seizure was held to be sufficiently reasonable to justify the non-performance of the contract.

This case seems to me to dispose of the contention that the apprehension must be due to a restraint in operation at the date of breach. When the merchants threw up his charter in *Embirico's* case (10), the Dardanelles were open and their apprehension that owing to the declaration of war they would not be opened again was not justified by subsequent events.

The present case seems to me to be much stronger. The defendants' apprehension that they would be prevented from carrying plaintiffs' goods to Antwerp was due to the declaration of war between England and Germany and it was justified by subsequent events, for if the goods had been shipped on the 19th September they would have reached Antwerp on the 18th October after Antwerp had been occupied by the enemy.

The contract was for September shipment and the defendants might have shipped the goods on the 1st September, which would then have arrived about the 30th September, probably just in time to avoid capture. But there was no obligation on them to ship the goods before the end of the month, i. e., the 30th September and on that date the impossibility of performance had become quite evident, for the bombardment of the forts round Antwerp had already begun on the 23th. On the 19th they decided to cancel the contract and the case may be judged by the facts existing on that date. On the 19th the enemy had overrun Belgium; Liege and Namur had fallen and Brussels had been occupied. On the 7th September the daily press had announced that a strong German army had left Brussels to cut the communications between Antwerp and Ostend; on the 8th and 9th September that the dykes near Antwerp had been opened and the Germans and Belgians were fighting waist deep in water. Surely these events were sufficient to give rise to a reasonable apprehension that Antwerp was not a safe port. Gorell Barnes, J., in *The Savona* (11) said that what happened afterwards may be taken as a test of what was the true state of things at the time when the question of breach has to be considered. If these tests were applied, it is quite clear that the

(10) (1914) 3 K. B. 45; 83 L. J. K. B. 1348; 111 L. T. 291; 19 Com. Cas. 263; 30 T. L. R. 451.

(11) (1900) P. 252; 69 J. P. 95; 49 W. R. 303.

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apprehension on the 19th September was reasonable.

Mr. Kenyon produces two charter parties which had been concluded by his firm in London on the 13th and 17th August, Exhibits 25 and 26. The steamers chartered were to load at Karachi in September and proceed at the charterer's option to any one or two of several ports, one of which was Antwerp. It is urged that he might have ordered these steamers to proceed to Antwerp and this is put forward as evidence that Antwerp was a safe port. This is absurd, for Mr. Kenyon did not select Antwerp and these steamers never went to Antwerp. In such charter parties it is the duty of the charterer to select a safe port—*The Teutonia* (12). If Mr. Kenyon had selected Antwerp, I think it almost certain that the shipowner would have treated that selection as a breach of the contract.

I am clearly of opinion that the defendants were justified by the exception as to restraints of Princes in refusing to perform the contract.

Even if the defendants had not been protected by this exception, the result would have been the same under section 56 of the Indian Contract Act. In England a man who contracts to do a thing is not generally excused because it becomes impossible. A well known illustration of this is the case of *Hills v. Sughrue* (13); where a charterer under contract to proceed to Ichaboe and load a cargo of clean guano was held liable although there was no clean guano at Ichaboe. It is for this reason that exceptions and conditions are introduced into bills of lading and charter parties to transfer the risk to the freighter. But under the Indian Law the general rule is adopted that a contract is void, when it becomes impossible and it is quite clear from what I have said already that performance of the contract had become impossible on the 19th September.

Plaintiffs' suit must, therefore, fail and the remaining issues as to damages do not arise. Mr. Kenyon's grievance apparently

is that the defendants did not accommodate him by a transfer of the shipping order to London. But defendants were not legally bound to do so, and I doubt if plaintiffs have really suffered any loss. I am sure that Mr. Kenyon on the 19th September did not desire that his goods should be carried to Antwerp and delivered there in the middle of October. If by some miracle the defendants had succeeded in performing this feat, I doubt if Mr. Kenyon would have found a market for his goods.

I dismiss the suits with costs.

Suits dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 919 of 1914.

March 7, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

BASANGAVDA CHANNAPPAGAVDA—

DEFENDANT—APPELLANT

versus

GANGAVA KUMANGAVDA—

PLAINTIFF—RESPONDENT.

Vatan property—Gordon Settlement—Holder of such property, liability of—Widow of last holder—Maintenance.

If a property is held under a *sanad* under the Gordon Settlement, each successive male holder of such property substantially holds an estate of inheritance in tail male unburdened by any duties of service and such holder is liable for maintenance of the widow of the last holder. [p. 292, col. 1.]

Second appeal from the decision of the Assistant Judge, Dharwar, in Appeal No. 128 of 1913, reversing the decree passed by the Joint Subordinate Judge, Dharwar, in Civil Suit No. 405 of 1912.

Mr. S. Y. *Abhyankar*, for the Appellant.

Mr. A. G. *Desai*, for the Respondent.

JUDGMENT.—The plaintiff, who is the mother of the last male holder of property admittedly *vatan*, having been postponed in the succession to the defendant as the nearest male member of the *vatandar* family, under section 2 of Bom. Act V of 1886, has brought this suit to recover maintenance on the ground that she as the widow of a deceased male holder is entitled to maintenance from that holder's successors. The learned Trial Judge dismissed the suit on the

(12) (1872) 4 P. C. 171 at p. 181; 3 Moore P. C. (N. S.) 411; 41 L. J. Adm. 57; 26 L. T. 48; 20 W. R. 421.

(13) (1846) 15 M. & W. 253; 153 E. R. 844; 71 R. R. 651.

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ground that service and uncurtailed remuneration must go hand in hand unless the service incumbent on the hereditary office has been commuted, and that even if the property had been the subject of the Gordon Settlement, it would not affect the incidents of *vatan* property unless it were shown that such incidents had been expressly altered or cancelled.

The lower Appellate Court, being of opinion that the property must, for reasons stated, be taken to have been the subject of the Gordon Settlement, allowed the plaintiff's claim on the ground that he who takes the benefit of an inheritance must bear the burdens annexed to it in his predecessor's hands.

If the property is held under a *sanad* under the Gordon Settlement, each successive male holder is substantially holding an estate of inheritance in tail male unburdened by any duties of service, in which case the objections expressed by the Trial Judge to the incumbrance of an estate assigned as remuneration for public services may be disregarded.

In this view the hearing of the second appeal was adjourned in order that the Pleaders might ascertain whether the property is held by the defendant under a Gordon Settlement *sanad*. We have now been informed by the Pleaders that the suits should be decided on this assumption. We, therefore, hold that the defendant, having taken by inheritance an estate which the public interest does not require to be held free from the incumbrances binding on his predecessors within the limits of the *vatandar* family, is liable for the plaintiff's maintenance. We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

FUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 100 OF 1915.

March 27, 1916.

Present:—Mr. Justice Shadi Lal and

Mr. Justice LeRossignol.

MANOHAR LAL—PLAINTIFF—

PETITIONER

versus

Musammat SADIQA BEGAM—DEFENDANT

—RESPONDENT.

Punjab Courts Act (III of 1914), s. 44—Revision—Material irregularity—Failure to determine provision of law applicable—Limitation Act (IX of 1908), s. 6, Sch. I, Art. 164—Application to set aside ex parte decree—Minority, whether extends limitation—General Clauses Act (X of 1897), s. 6.

Failure to determine whether an application is governed by the provisions of the Limitation Act of 1877 or by those of the Act of 1908, amounts to a material irregularity and is a good ground for revision. [p. 294, col. 1.]

Pandit Rama Kant v. Pandit Ragdeo, 60 P. R. 1897; *Delhi Cloth and General Mills Company, Limited v. Hardian Singh*, 6 Ind. Cas. 939; 72 P. W. R. 1910, referred to.

Section 6 of the Limitation Act of 1908, which replaces section 7 of the Act of 1877, confines the operation of the plea of minority to suits and only one kind of applications, namely, those for execution of decrees. Therefore, an application to set aside an *ex parte* decree does not come within the exception created by section 6 of that Act. [p. 294, col. 1.]

An *ex parte* decree was passed against the defendants, some of whom were minors, on 20th August 1908. On 1st May 1914, some of the defendants applied to set aside the *ex parte* decree:

Held, that the application was governed by the provisions of the Limitation Act of 1908 and not by those of the Act of 1877; that section 6 of the Limitation Act of 1908 did not apply to the application and the period of limitation prescribed by Article 164 of the Act for such applications could not, therefore, be extended on the ground of minority. [p. 294, cols. 1 & 2.]

Ghidambaram Chetty v. Karuppan Chetty, 8 Ind. Cas. 542; 35 M. 678; (1910) M. W. N. 711; 9 M. L. T. 75; *Hope Mills, Ltd. v. Vithaldas Pranjivandas*, 7 Ind. Cas. 982; 12 Bom. L. R. 730; *Jia Bibi v. Ilahi Baksh*, 30 Ind. Cas. 573; 13 A. L. J. 837; 37 A. 597, referred to.

Sahib Dad v. Rahmat, 90 P. R. 1904; 88 P. L. R. 1904, distinguished.

It is doubtful whether an application to set aside an *ex parte* decree can be deemed to be a 'right' or 'privilege' within the purview of section 6 of the General Clauses Act. If it is a right, it is acquired, not under the Limitation Act, which merely regulates the period within which the remedy must be sought, but under the Civil Procedure Code. [p. 294, col. 1.]

Civil revision from the order of the Subordinate Judge, Rohtak, dated the 15th January 1915.

MANOHAR LAL V. SADIQA BEGAN.

•ORDER OF REFERENCE.

SHADI LAL, J.—(January 20th, 1916.)—On the 25th November 1900 Razi-ud-din, a petition-writer of the town of Rohtak, mortgaged certain house properties to the plaintiff by a registered deed, and entered into certain stipulations for the payment of the debt. He died without discharging his liability, and on the 24th July 1908 the mortgagee instituted a suit for the recovery of the money against the mortgagor's representatives, namely, his mother *Musammât* Rafi-ul-Nissa, his widow *Musammât* Rauf-ul-Nissa, and his minor children under the guardianship of their mother and grandmother. The defendants did not appear in obedience to the summonses issued to them, and the Court after directing *ex parte* proceedings passed a decree in favour of the plaintiff on the 20th August 1908.

In execution of the decree, notices were, on different occasions, issued to the judgment-debtors, the mortgaged property was sold by auction, the objections preferred by certain persons were rejected, and the sales confirmed by the Court in favour of the decree-holder. The houses purchased by him were subsequently sold to one Ali Muhammad by a deed dated the 1st February 1913.

On 1st May 1914, nearly six years after the date of the decree, five children of the mortgagor—three adults personally, and two minors through their maternal grandfather—applied to the Subordinate Judge for setting aside the *ex parte* decree, and this application has been accepted by the Court. The main question for determination was whether the application was barred by time and whether the Limitation Act of 1908 or the Act of 1877 applied to the case. Now, the Subordinate Judge, without recording a finding whether the old or the new law governed the application, has disposed of the matter in a summary manner with a brief observation to the following effect: "There is no period of limitation running against the minors as they were, as such at the time of the institution of the suit."

The plaintiff has preferred an application for revision against the order setting aside the *ex parte* decree, and having regard to the

definition of the word "case" in *Pandit Ramu Kant v. Pandit Ragdeo* (1) and in view of the decisions in *Delhi Cloth and General Mills Company, Limited v. Hurdhian Singh* (2) and Civil Revision No. 52 of 1914, I am of opinion that an application for revision is competent and that the omission of the lower Court to determine the crucial point in the case amounts to a material irregularity.

It will be observed that section 6 of the Limitation Act of 1908 is materially different from section 7 of the Act of 1877, and that, under the new law, the plea of minority is available only in the case of suits and applications for execution.

An application for setting aside an *ex parte* decree is not mentioned in section 6 and the period of limitation prescribed by Article 164 cannot, therefore, be extended. It seems to me that the Limitation Act of 1908 prescribes the rule of limitation and that the application of the respondents is barred by time. The decision of the Madras High Court in *Chidambaram Chetty v. Karuppan Chetty* (3) favours the applicability of the new Act, and, as at present advised, I am disposed to accept the rule of law enunciated in that judgment. The point is, however, of some importance and should, I think, be authoritatively decided by a Division Bench. I accordingly refer the case for decision to a Division Bench and direct that an early date be fixed.

Bakshi *Tek Chand*, for the Petitioner.

Shaikh *Umar Baksh*, for the Respondent.

JUDGMENT.—The relevant facts are set out in the order dated the 20th of January 1916 referring the case for decision to a Division Bench. The point for determination is, whether the application made on the 1st of May 1914 by some of the defendants to set aside the *ex parte* decree passed against them on the 20th of August 1908 is within time. The decision of the matter depends upon the answer to the question, whether the Limitation Act of 1908, or the repealed Act XV of 1877, prescribes the law governing

(1) 60 P. R. 1897.

(2) 6 Ind. Cas. 939; 72 P. W. R. 1910.

(3) 8 Ind. Cas. 543; 25 M. 678; (1910) M. W. N. 711; 9 M. L. T. 75.

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the application. Now, this is the crucial point in the case, and the lower Court has committed a material irregularity in omitting to determine it, though it was distinctly raised by the decree-holder and formed the subject of an issue.

It is contended by Mr. Umar Baksh for the respondents that as against the defendants, who were minors at the time of the decree, the period of limitation does not begin to run until the cessation of their minority. This contention is no doubt based upon section 7 of the old Act, because section 6 of the Limitation Act of 1908, which replaces the aforesaid section, confines the operation of the plea of minority to suits and only one kind of applications, namely, those for execution of decrees. It is manifest that an application to set aside an *ex parte* decree does not come within the exception created by section 6 of the present Act, and that the defendants cannot under that section invoke their minority as a bar to limitation.

The application in question was made, as already stated, on the 1st of May 1914 more than five years after the enforcement of the Limitation Act of 1908, and it is *prima facie* governed by that Statute, unless the operation thereof is excluded by some rule of law. The learned Pleader for the respondents places his reliance upon section 6 of the General Clauses Act, and argues that the right to make an application to set aside the *ex parte* decree accrued under the repealed Act and is not affected by the provisions of the new Limitation Act. This contention is, in our opinion, altogether untenable, and cannot be accepted. We doubt very much whether the alleged right to make an application of this nature can be deemed to be a "right" or "privilege" within the purview of section 6 of the General Clauses Act. However that may be, we are clear that the right, if any, was acquired, not under the Limitation Act which merely regulates the period within which the remedy must be sought, but under the Civil Procedure Code.

Further, section 6 of the General Clauses Act provides in explicit terms that the rule laid down therein is to be enforced, if an intention to the contrary is not expressed by the Legislature. As pointed out by the

Madras High Court in *Chidambaram Chetty v. Karuppan Chetty* (3), the intention of the Legislature is manifested in more places than one. We find that section 3 of the new Act provides that subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first Schedule shall be dismissed, although limitation has not been set up as a defence. Now, there is nothing in the aforesaid sections to save the limitation in respect of an application to set aside an *ex parte* decree, and under Article 164 of the First Schedule the Court is bound to reject the application, if it is made after the expiry of thirty days from the date mentioned therein.

A further indication of the intention of the Legislature is to be found in section 30 of the Indian Limitation Act of 1908, which prescribes a period of two years after the enforcement of the Act for the institution of those suits, the limitation for which has been curtailed by the new law. It will be observed that the section makes no reference to applications, and the obvious inference, therefore, is that the Legislature intended to apply the provisions of the Act to all the applications, even where the limitation prescribed thereby is shorter than that prescribed by the old Act. It is noteworthy that the Act of 1908, though passed in August 1908, did not come into force until the 1st of January 1909, and the intervening period of five months was ample time, within which the persons concerned could become acquainted with its provisions and take steps to enforce their remedy.

We find that Article 164 of the new Act is materially different from Article 164 of the old Act, and that the Bombay and Allahabad High Courts have held in *Hops Mills, Ltd. v. Vithaldas Pranjivandas* (4) and *Jia Bibi v. Ilahi Buksh* (5) that an application made after the 1st of January 1909 to set aside an *ex parte* decree passed before that date is governed by Article 164 of the new Act and not by Article

(4) 7 Ind. Cas. 682; 12 Bom. L. R. 730.

(5) 30 Ind. Cas. 573; 37 A. 597; 13 A. L. J. 887.

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164 of the old Act. The principle to be deduced from these two cases is that the law to be applied in a case of this kind is the law existing at the time when the application is made.

The decision in *Ohidambaram Chetty v. Karuppan Chetty* (3) is exactly on all fours with the present case, and the learned Pleader for the respondents admits that he is unable to suggest any distinction. The ruling of a Full Bench of this Court in *Sahib Dad v. Rahmat* (6) has no bearing on the point before us, because the learned Judges, who decided that case, did not find any contrary intention in the Punjab Limitation Act, I of 1900, and accordingly held that a cause of action, which arose under the old law, was not affected by the provisions of that Statute. The intention of the Legislature in the present case is unmistakably manifested in various ways, and we have, therefore, no hesitation in holding that the Limitation Act of 1908 governs the case.

Upon the merits the facts are simple and do not admit of any real doubt. It is clear that the suit was instituted upon the footing of a mortgage executed by one Riaz-ud-Din, a petition-writer of Rohtak against his widow, mother and minor children, as representing his estate. It appears that the widow was appointed guardian *ad litem* of her own children, and the mother guardian *ad litem* of the deceased's children by another wife, who was dead at that time. Both the ladies were served with notices in their personal capacities as well as on behalf of the minors; and the Code of Civil Procedure of 1832 did not contain any provision requiring personal service upon the minors. There was, therefore, no defect in the service of the summonses, and under Article 164 the application, having been made after the expiry of thirty days from the date of the service, is clearly barred by time.

Assuming that the date of the knowledge of the decree is to be regarded as the *terminus a quo*, we think the facts and the circumstances of the case make it abundantly clear that the respondents must have acquired knowledge of the existence of the

decree long before thirty days prior to the date of the application. The record shows that in execution of the decree notices were on different occasions issued to the judgment-debtors, the mortgaged property was sold by auction, the objections preferred by certain persons were rejected, and the sale confirmed by the Court in favour of the decree-holder. The property purchased by him was subsequently sold to one Ali Muhammad by a deed dated the 1st of February 1913, who, it is alleged, expended a considerable sum of money on rebuilding and improving it. Now, all these acts took place in Rohtak, the very town wherein the property is situate and the judgment-debtors reside. It is almost inconceivable that in spite of all these proceedings they remained ignorant of the decree against them during a period extending over nearly six years. Conceding that one of the children was major at the time of the suit, it is manifest that she must have known of the decree long before thirty days prior to the date of the application.

For the aforesaid reasons we hold that the application dated the 1st of May 1914 is barred by limitation under Article 164 of the Limitation Act of 1908. Setting aside the order of the lower Court, we accept the application for revision with costs in both the Courts.

Revision accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 41 OF 1915.

February 15, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

CHITTA BHULA—DEFENDANT—

APPELLANT

versus

BAI JAMNI—PLAINTIFF—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 76—Trusts Act (II of 1882), s. 90—Bombay Land Revenue Code (Bom. Act V of 1879), ss. 56, 153—Mortgage—Redemption—Tagavi claims, non-payment of—Sale of mortgaged property—Benami purchase—Mortgagee, liability of—Purchaser, not bona fide—Equity enforceable.

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The defendant No. 1 was a *san*-mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1901 the plaintiff's mother for the benefit of those interested in the property took an advance by way of *tagavi* and gave a charge upon one of the survey numbers, viz., 311, as collateral security for payment of the loan. In 1903 the plaintiff's mother on behalf of herself and the plaintiff, her minor daughter, executed a mortgage-deed with possession in favour of the mortgagee and put him in possession of all the property previously charged under the *san*-mortgage including the survey No. 311. The survey No. 311 was sold in 1906 to satisfy the claim of Government in respect of the *tagavi* advance and was purchased by the defendant No. 2 *benami* for the defendant No. 1. Subsequently it was purchased by the defendant No. 3, who had a notice of everything that had occurred in connection with the property. The plaintiff sued to redeem the property in 1912, being entitled to the benefit of the Dekkhan Agriculturists' Relief Act:

Held, (1) that the *tagavi* advance granted to the mortgagor by the Government was of a "public nature" within the meaning of section 76 of the Transfer of Property Act and that inasmuch as the sale took place owing to the default of the mortgagee, section 90 of the Trusts Act applied and that the defendant No. 1 could not obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee; [p. 297, cols. 1 & 2.]

(2) that section 56 of the Land Revenue Code did not apply, inasmuch as there was no forfeiture under section 163 of that Code; [p. 297, col. 1.]

(3) that the defendant No. 3 could not resist the suit, inasmuch as he was bound by the equities enforceable against the vendor by reason of his not being a *bona fide* purchaser without notice. [p. 296, col. 2.]

Second appeal from the decision of the District Judge, Broach, in Appeal No. 6 of 1914, amending the decree passed by the Subordinate Judge, Ankleshvar, in Civil Suit No. 509 of 1912.

Mr. T. R. Desai, for the Appellant.

Mr. B. F. Dastur, for the Respondent.

JUDGMENT.—From the year 1894 to 1903 the 1st defendant was a *san*-mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1900 the mortgagor died, and in the following year his widow Kohili for the benefit of those interested in the property took an advance by way of *tagavi* from the *mamlatdar*, and gave a charge upon one of the survey numbers, namely 311, as collateral security for payment of the loan. In June 1903 acting on behalf of herself and the plaintiff, her minor daughter, she executed a mortgage-deed with possession in favour of the 1st defendant, and put him in possession of all the property previously

charged under the *san*-mortgage including the Survey No. 311. The plaintiff has brought this suit in 1912 to redeem, she being entitled to the benefit of the Dekkhan Agriculturists' Relief Act.

The only question in the appeal is with reference to Survey No. 311. That survey number was sold in or about 1906 to satisfy the claim of Government in respect of the *tagavi* advance, and it was purchased ostensibly by the 2nd defendant who was the *gumasta* of the 1st defendant; mortgagee. From him it was subsequently purchased by the 3rd defendant, who is the uncle of the plaintiff and who had for many years been cultivating the land as tenant under the mortgagee, and prior to the mortgage under the mortgagor. The 3rd defendant claims to be entitled to hold Survey No. 311 free from any liability to be redeemed by the mortgagor. Upon the findings of the lower Court he must be held to have had notice of everything that occurred in connection with the property, and cannot claim the position of a *bona fide* purchaser without notice of Survey No. 311, if there were in fact any claims enforceable against the vendor with reference to that plot. It must also be taken on the findings of fact of the lower Courts that the 2nd defendant, purchaser, was a *benamidar* for the 1st defendant, mortgagee.

It is contended on behalf of the plaintiff that the mortgagee has in effecting the purchase availed himself of his position as mortgagee to gain an advantage in derogation of the rights of the mortgagor. If the sale took place at the instance of the *mamlatdar* in consequence of some wilful default on the part of the mortgagee, it may fairly be said that in acquiring the property through his *benamidar* at such sale he has availed himself of his position as mortgagee to gain an advantage spoken of in section 90 of the Indian Trusts Act. The question, therefore, is whether the sale took place owing to his default. Section 76 of the Transfer of Property Act lays down that "when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the

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property, pay the Government revenue, and all other charges of a public nature accruing due, in respect thereof during such possession". So far from there being no contract to the contrary in the mortgage-deed, the mortgagee agrees henceforth to pay all *sarkari* claims in relation to the property. The expression which we have translated "claims" is an expression which is not usual to describe merely Government revenue. The point has been dealt with by the learned District Judge as follows:—"Are *tagari* dues a 'charge of a public nature' within the meaning of section 76 (c)? I think they are. I think that the clause should be liberally construed, as it has for its object the protection of the land from forfeiture or sale for default in payment of Government demand accruing due in respect of the land while it is in the possession of the mortgagee." It is clear, therefore, that he had in his mind the question whether this was a Government demand accruing due in respect of the land while it was in the possession of the mortgagee, and he comes to the conclusion that it was. It is argued that as the *tagari* advance preceded the mortgage with possession, it would not be a Government demand accruing due in respect of the land while in the possession of the mortgagee. That is a question which might have been settled by evidence if it had been put in issue in the lower Court: the learned Judge feels no doubt as to what the answer should be, and we are not prepared in second appeal to entertain any doubt as to the correctness of his finding. That being so, section 90 of the Trusts Act would apply, because the sale has taken place owing to the default of the mortgagee. But it was said that once the sale takes place the provisions of section 56 of the Land Revenue Code would apply, and, if so, there would be no room for the application of section 90 with reference to the conduct of the mortgagee as such, because *ex hypothesi* the operation of section 56 of the Land Revenue Code would have extinguished all rights of the mortgagee. We are of opinion that section 56 of the Land Revenue Code does not apply, as it has been held as a fact that there has been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to

the application of the provisions of section 56 for the purpose of recovering dues as arrears of land revenue. The argument also appears to us to be slightly circuitous, because *ex hypothesi* it is by reason of his default as mortgagee, and by his improperly availing himself of his position as mortgagee, that the sale has taken place. How then can it be said that he is to obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee? This, it appears to us, is also the answer to a point which we do not think was appreciated by the learned District Judge, a point of the same nature as that argued under section 56 of the Land Revenue Code, and based upon the words of the proviso to section 7 of the Land Improvement Loans Act, which by implication would put an end, upon the sale by the Collector for recovery of a Government loan, to the interest of the borrower and of the mortgagee of that interest. For these reasons we think that the decree of the lower Appellate Court was right and should be affirmed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3259 OF 1915.

July 20, 1916.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

AHMAD KHAN—DEFENDANT—

APPELLANT

versus

ALAM KHAN—PLAINTIFF AND OTHERS—

DEFENDANTS—RESPONDENTS.

Appeal, second - Question of law—Question of fact—Construction of document—Sale or mortgage.

If a question decided by the lower Appellate Court is a question to be decided on the construction of a deed then the question is one of law, but if it is to be decided not on the construction of the deed but on the deed combined with surrounding circumstances then it is a question of fact. [p. 298, col. 2.]

For instance, if the question a Court has to answer is, is this document, taken on its own wording, a sale or a mortgage, then the question is one of law, if on the other hand the question to be answered by the Court is, this document on the face of it is a mortgage, but was the contract actually entered into between the parties something different, namely a sale, and if in order to decide this question the Court has to consider the terms of the mortgage and the

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surrounding circumstances, then it is a question of fact. [p. 2nd8, col. 2.]

Fateh Chand v. Kishen Kumar, 16 Ind. Cas. 67; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579; 17 C. L. J. 1; 39 I. A. 247 (P. C.); *Diwan Chand v. Sundar*, 36 Ind. Cas. 197; 182 P. W. R. 1916; 68 P. R. 1916; *Narain Singh v. Jagat Singh*, 14 Ind. Cas. 331; 190 P. W. R. 1912; *Budha Mal v. Gulab*, 36 P. R. 1899; *Sunder Das v. Dhanpat Rai*, 16 P. R. 1907; 104 P. L. R. 1908; 127 P. W. R. 1907, referred to.

Second appeal from the decree of the District Judge, Mianwali, dated the 11th of May 1915, affirming that of the Subordinate Judge, Sargodha, dated the 23rd November 1914, decreeing the claim.

Mr. Nand Lal, for the Appellant.

Mr. Mokand Lal Puri, for the Respondents.

JUDGMENT.—In this case the two grounds stated as grounds of second appeal are, *first*, that the transaction in connection with which the pre-emption suit was brought is a mortgage and not a sale as held by the lower Courts, *secondly*, that inasmuch as Rs. 2,000 was paid before the Sub-Registrar, the lower Appellate Court should have held that whole of it had been paid as consideration in good faith and that the market value was not less than Rs. 2,000. An objection is raised that these questions are questions of fact and cannot be agitated in second appeal. As regards the *second* question raised, there can be no doubt that it is a pure question of fact, and inasmuch as it has been held plainly that Rs. 1,500 of the mortgage money was returned after registration, this finding, being based upon the evidence of witnesses, cannot be touched.

As regards the *first* question the matter is more difficult and I have been referred to several rulings, which have been rather treated by Counsel in arguments before me as conflicting, but which are really to my mind not conflicting at all. On behalf of the appellants I am referred to a Privy Council ruling, *Fateh Chand v. Kishen Kumar* (1), *Diwan Chand v. Sundar* (2),

(1) 16 Ind. Cas. 67; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579; 17 C. L. J. 1; 39 I. A. 247 (P. C.).

(2) 36 Ind. Cas. 199; 182 P. W. R. 1916; 68 P. R. 1916,

Narain Singh v. Jagat Singh (3). Now if these rulings be carefully read, it will be seen in every one of them the proposition laid down is substantially this that, if the question decided by the lower Appellate Court is a question to be decided on the construction of a deed, then the question is one of law, but that, if it is to be decided not on the construction of the deed but on the deed combined with surrounding circumstances, then it is a question of fact. To put the point in another way, if the question the Court has to answer is, is this document, taken on its own wording, a sale or a mortgage (or whatever may be the actual controversy in the case), then the question is one of law; if on the other hand the question to be answered by the Court is, this document on the face of it is a mortgage, but was the contract actually entered into between the parties something different from this, namely a sale, and if in order to decide this question the Court has to consider the terms of the mortgage and the surrounding circumstances, then it is a question of fact. The rulings quoted on the opposite side are Civil Appeal No. 163 of 1896 of this Court, *Budha Mal v. Gulab* (4), *Sunder Das v. Dhanpat Rai* (5). Properly read, these rulings lay down much the same principles as those already quoted, and, in my opinion, the line of demarcation between questions of law and questions of fact in this connection is quite clear.

Now in the present case, the deed we are considering is certainly on the face of it a mortgage-deed, but the lower Courts have decided that as a matter of fact that deed does not contain the contract between the parties, who, as a matter of fact, sold and bought the land. This inference is drawn from the extremely onerous terms of the so-called mortgage and from outside circumstances and the finding is that as a matter of fact the defendant No. 4 sold the land to defendants Nos. 1 to 3 and did not mortgage it.

(3) 14 Ind. Cas. 331; 190 P. W. R. 1912.

(4) 36 P. R. 1899.

(5) 16 P. R. 1907; 104 P. L. R. 1908; 127 P. W. R. 1907.

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For these reasons I hold that no second appeal lies, and I dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 1013 OF 1914.

February 17, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

HARI GANU BHAGADE AND OTHERS

—DEFENDANTS—APPELLANTS

versus

GANGADHAR VITHAL GULAVNI.

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Khoti lands—Kolaba District—Transfer without permission of khot—Forfeiture—Transferee, liability of.

An alienation by a *khoti* tenant of his *khoti* lands without the permission of his *khot* in the Kolaba District works as a forfeiture and the *khot* is entitled upon such transfer to enter upon the land to the prejudice of the transferee.

Narendra Narayan Roy Chowdhry v. Ishan Chandra Sen, 13 B. L. R. 274 at p. 288; 22 W. R. 22, referred to.

Second appeal from the decision of the first class Subordinate Judge at Thana, in Appeal No. 77 of 1914, confirming the decree passed by the Subordinate Judge, Roha, in Civil Suit No. 112 of 1913.

Messrs. K. H. Kelkar and M. M. Karbhari, for the Appellants.

Mr. V. B. Virkar, for the Respondents.

JUDGMENT.—The plaintiffs sue to recover possession of certain lands in the Kolaba District, on the ground that they were entitled so to do by reason of their occupancy tenants having assigned those lands to other persons without permission of the plaintiffs, who were the *khots*.

The learned Trial Judge has cited a number of decisions, which establish that alienation by a *khoti* tenant of his *khoti* lands in the Kolaba District works as a forfeiture.

The lower Appellate Court, accepting that custom as established, discusses a counter-custom set up by the defendants to the effect that *khoti* tenants were entitled to transfer their holdings, and he holds the custom is not proved.

The learned Pleader for the appellants argues that although the custom may be established that a *khoti* tenant cannot transfer his occupancy holding without the permission of his *khot*, it does not follow that the *khot* can upon such transfer enter upon the land to the prejudice of the transferee. It may be that the expression 'forfeiture' is inappropriate to the consequences which result from an unauthorised transfer of an occupancy holding, but the result must be that the *khot* is entitled to re-enter for the reasons stated by Sir Richard Couch in the analogous case in Bengal of the *zemindar* and his occupancy tenants. In *Narendra Narayan Roy Chowdhry v. Ishan Chandra Sen* (1) the learned Chief Justice says: "If a *ryot* having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the *zemindar* from recovering the possession from the person who claims under the transfer." That decision was applied by a Bench of this Court to the case of an unauthorised sale of land by a *khoti* tenant: see *Nagardas Sobhagyadas v. Ganu Balu* (2). The remedy appears to be appropriate, even if it be taken that prior to the passing of the *Khoti Act* of 1880, no *khot* was anything more than a farmer of revenue, for he was under an obligation to pay a certain revenue to Government, and if the occupancy tenant, to whom he looked to render his share of the revenue, transferred the land to some one whom the *khot* did not approve of, the remedy of the *khot* would be to go on to the land and collect the produce for himself so as to be able to discharge his obligations to Government. The finding, however, of custom in favour of the plaintiffs does not dispose of the case, because the receipt book shows that the transferees have paid *khoti* profits to the *khot* which have been accepted. The contention of the defendants in

(1) 13 B. L. R. 274 at p. 288; 22 W. R. 22.

(2) (1891) P. J. 107.

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appeal to the lower Appellate Court was that they had paid *dhara* and *fayda* since 1897, and the plaintiffs knew of their possession under the transfer, but accepted the *dhara* and *fayda* at their hands, and, therefore, had indirectly consented to the alienations, and had no right to maintain the suit. The learned Trial Judge disposed of that point by saying that the fact of plaintiffs' knowledge of the transfers was not proved by the defendants. The learned Judge with appellate powers, however, notwithstanding the reference to the point in the judgment of the Trial Judge, says: "The appellant did not urge in the Court below that the plaintiff knew of the alienation to him, and it is now too late to urge that plea." He appears to have overlooked the reference to the point in the judgment of the lower Court. But it is necessary for the decision of the case that that point should be decided. We must, therefore, remand to the lower Appellate Court for decision the issues—When the plaintiffs first knew of the alienations by the *khoti* tenants to the other defendants, and whether with such knowledge they accepted payment of *dhara* or *fayda* from the transferees, and whether such conduct amounts to a waiver of forfeiture or ratification of the transfer? The finding to be returned within one month. No further evidence to be taken.

Issues remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2786 OF 1915.

June 7, 1916.

Present:—Mr. Justice Chevis.

BUDH RAM AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RALLI RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 57, 85—Accounts, suit on—Proof—Evidence, value of balance as—Suit on advances in cash and grain—Limitation.

Article 85 of Schedule I of the Limitation Act does not apply to a case where the plaintiff alone has been the banker, making advances and receiving part-payments from time to time, there being no mutual account or reciprocal demands and the balance being always in his favour. [p. 301, col. 1.]

Jas Ram v. Attar Chand, 30 Ind. Cas. 491, 16 P. R. 1916; 118 P. W. R. 1915; 178 P. L. R. 1915, distinguished.

A suit to recover advances made both in kind and in cash is not governed by Article 75, Schedule I, of the Limitation Act. [p. 301, cols. 1 & 2.]

There is no general rule that a defendant in a suit on accounts cannot go behind a balance struck by him. In such a suit the plaintiff must prove what is due to him on the accounts. The striking of a balance is merely a piece of evidence the value of which must depend on the circumstances of each case. [p. 301, col. 2.]

Second appeal from the decree of the District Judge, Ambala, dated the 15th July 1915, varying that of the Subordinate Judge, Ambala, dated the 30th April 1915, dismissing the claim.

Lala Sangam Lal, for the Appellants.

Mr. Manohar Lal, for the Respondents.

JUDGMENT.—The plaintiff Kundan Lal (now represented by his sons) sued for Rs. 700 principal and Rs. 900 interest due on *baki* accounts, terminating with a balance for Rs 700 struck on *Poh Sudi 10 Sambat* 1965=1st January 1909. The defendants are Budh Ram (defendant No. 1) and his nephew Balla (defendant No. 2). The last balance is thumb-marked by defendant No. 1 only.

The issues struck were as follows:

1. Is plaintiff due the amount claimed, i.e., Rs. 1,600?
2. Is the suit as against defendant No. 2 within time and is he liable for part of the claim?

I will first dispose of the case as regards defendant No. 2. The first Court held that defendant No. 2 was not liable. That Court after going into the accounts held that the suit failed on the merits as regard defendant No. 1 and dismissed the suit.

The plaintiff appealed and in ground 4 of the memorandum of appeal pleaded that defendant No. 2 was also liable. But the learned District Judge says in his judgment, "in appeal it is not contended that defendant No. 2 is liable." And in this Court too plaintiff's Counsel admits that there should be no decree against defendant No. 2. It is clear, therefore, that defendant No. 2 must be freed from liability. But the District Judge, after finding that plaintiff is due Rs. 700, gives plaintiff a decree for this amount. The decree does not stand as a

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decree against defendant No. 1 alone, so the decree makes both defendants liable; and in this respect is incorrect.

Now as to defendant No. 1, who admittedly struck the last balance but says that the accounts were never explained to him and that the plaintiff wrote what he liked in the accounts. The first Court has gone into the accounts in some detail, pointing out that defendants' accounts are in some respect irregular, and that plaintiff has charged interest at exorbitant rates and has not allowed interest on repayments though charging full interest on all advances from date of advance to date of next balance. So the first Court held that nothing was proved to be really due on the accounts. The learned District Judge, while noting that plaintiff's accounts were certainly kept in a very peculiar manner to say the least of it, "held that as defendant had struck the balance he must abide by it." So the District Judge decreed the Rs. 700, claimed as principal, but declined to allow any interest. The defendants appeal to this Court, and the plaintiff has lodged cross-objections as regards the claim of interest, but at the commencement of the hearing of this appeal plaintiff's Counsel stated that he withdrew the cross-objections. So whatever decree is ultimately to be passed must not exceed Rs. 700 and must stand against defendant No. 1 only.

In the first place defendants' Pleader argues that the suit is time-barred. This is the first time that the plea of limitation has been raised so far as defendant No. 1 is concerned. First Counsel urges, relying on *Jas Ram v. Attar Chand* (1), that Article 85 of the Schedule to the Limitation Act applies. But the ruling cited refers to an entirely different class of dealings. In the present case plaintiff alone has been the banker making advances from time to time, and receiving payments from time to time. The balance has always been in plaintiff's favour. There is in this case no mutual account nor have there been reciprocal demands, for the debtor has never been in a position to make any demand. Clearly then Article 85 is inapplicable. Then the learned Pleader quotes Article 57, but this is not a suit merely to

recover money loan, for plaintiff's advances have been in kind (grain) as well as in cash. Failing to find any other Article of the Schedule applicable defendants' Pleader gives up the plea as to limitation.

The next plea advanced is that plaintiff cannot sue merely on a balance. The answer is simple, viz., that plaintiff is not suing on a balance, but on accounts leading up to a balance struck—the balance being merely a piece of evidence.

The next plea is a sound one, viz., that if plaintiff is suing on accounts he must prove what is due to him on those accounts. Plaintiff's Counsel frankly admits that this plea is correct. The learned District Judge has not gone into the accounts, but has held that as defendant No. 1 struck the balance he must abide by it. A ruling is referred to in the District Judge's judgment as Civil Appeal No. 24 of 1913. This ruling I have been unable to trace. Chief Court Civil Appeal No. 24 of 1913 is not the case, nor is 24 P. R. 1913. Plaintiff's Counsel too states that he is unable to trace the ruling. I am unaware of any ruling to the effect that in a suit for money due on accounts the defendant cannot go behind a balance struck by him. The striking of the balance is merely a piece of evidence, the value of which must depend on the circumstances of the case. Where such a balance is struck by an educated man of business the presumption ordinarily is that he has understood the accounts, and the evidential value of the striking of the balance is great. But where the striker is an illiterate person as in the present case, the evidential value is much less. Experience tells us that such persons often strike balance after balance, being imposed on, by a shrewd money-lender who may keep the most irregular and fallacious accounts and may make gross overcharges, piling up the interest and (to put it briefly) committing all the sins which the first Court attributes to the plaintiff in the present case. The plaintiff is entitled to what is really due on the accounts and to nothing more. This does not mean that no compound interest is allowable. When balances are struck from time to time, the ordinary practice is to add interest to principal

(1) 30 Ind. Cas. 491; 16 P. R. 1916; 118 P. W. R. 1915; 178 P. L. R. 1915.

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each time a balance is struck, and so compound interest is bound to come in. But where repayments are made between any two balances, the debtor is entitled to interest on each repayment from the date of repayment to the next balance, just in the same way as the creditor is entitled to interest on any future advance from the date of that advance till the next balance and to interest on the former balance till the date of the next balance. This, of course, necessitates a careful scrutiny of the accounts, but this is unavoidable. If necessary, a Commissioner can be appointed to go into the accounts, but the accounts must be gone through and plaintiff must be given a decree for so much as is actually due on the accounts and no more.

I accept the appeal, and reversing the decision of the lower Appellate Court, I remand the case to that Court for re-decision in accordance with what is written above. The accounts must be gone through and the plaintiff should be given a decree for whatever sum, if any, is actually due on the dealings. As already noted, the decree must not exceed Rs. 700 and the decree must stand against defendant No. 1 only, defendant No. 2 not being liable.

Stamp on appeal to this Court to be refunded, other costs in this Court to follow the event.

Appeal accepted; Case remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1970 AND 2030
OF 1915.

December 21, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Roe.

Hakim KHALIL AHMAD AND OTHERS:—

PLAINTIFFS—APPELLANTS

versus

Malik ISRAFIL AND OTHERS—DEFENDANTS—

RESPONDENTS.

Muhammadan Law—Ahmadis, whether Muhammadans—Mosque, right to hold separate congregation in.

Members of the Ahmadiya sect of Qadian, are Muhammadans. [p. 303, col. 1.]

Every mosque is open to any Muhammadan, to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Muhammadans are not entitled to pray in every mosque as a separate congregation behind an *imam* chosen by themselves. [p. 303, col. 2.]

Per Roe, J.—Semble.—Where people deliberately come late to prayers they cannot be allowed to have a second service of their own. [p. 304, col. 1.]

Second appeals against the decrees of the District Judge, Monghyr.

Mr. Zafarulla Khan (with him Mr. Khurshed Hasnain), for the Appellants.

The Hon'ble Mr. Mazharul Haq (with him Mr. Muhammad Yunus, Khan Bahadur Syed Fakhruddin, Maulvi Mustafa Khan, Maulvi Muhammad Tahir and Maulvi Nurul Hasan), for the Respondents.

JUDGMENT.

CHAMIER, C. J.—These are cross-appeals against a decree of the District Judge of Monghyr, modifying a decree of the Subordinate Judge of Monghyr which dismissed the plaintiffs' suit.

The plaintiffs are professed followers of Mirza Ghulam Ahmad of Qadian in the Punjab, who acquired considerable notoriety as a preacher about 35 years ago and attracted a considerable following in the Punjab, and elsewhere. The followers of Ghulam Ahmad are known generally as *Ahmadis* or *Qadianis*. The plaintiffs' case was that, though dissenters from what is generally regarded as the orthodox Muhammadan faith, they are true Muhammadans. They say that till December 1911 they were in the habit of offering up their prayers both individually and as a congregation in a certain mosque in *Mohalla Dilawarpur* in the town of Monghyr, but were then prevented by the defendants from doing so. They claimed a declaration of their right to offer prayers in the mosque both individually and as a congregation and also an injunction restraining the defendants from interfering with them. The defendants resisted the suit on various grounds and *inter alia* pleaded that the plaintiffs were not Muhammadans at all. The Subordinate Judge held that the plaintiffs were Muhammadans, but were not entitled to form a separate congregation for prayer in the mosque. He held that they were entitled to offer prayers individually behind the

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Hanifi imam of the mosque but as they did not desire to do that, he dismissed the suit. On appeal the District Judge agreed that the plaintiffs must be regarded as Muhammadans and that they could not be allowed to form a separate congregation for prayers in the mosque, but gave them a declaration that they were entitled to worship in the mosque behind the recognised *imam* and in the same congregation as the defendants.

In these second appeals the plaintiffs contend that their claim should have been decreed as laid and the defendants contend that the suit should be dismissed altogether.

Some attempt was made on behalf of the defendants to controvert the concurrent findings of the Courts below that the plaintiffs were Muhammadans, but it was not seriously pressed. The Courts below have given convincing reasons for holding that the plaintiffs are Muhammadans, notwithstanding their pronounced dissent from orthodox opinion on several important articles of the faith. The plaintiffs as Muhammadans appear to be entitled to enter the mosque if they please and to offer up prayers with the regular congregation behind the recognised *imam*, but as they profess to regard orthodox Muhammadans as infidels it is unlikely that they will take advantage of the decree made by the District Judge.

The important question in the case is whether the plaintiffs are entitled to pray as a separate congregation in the mosque, i. e., behind an *imam* of their own. The claim is an extravagant one and there can be little doubt that if it is allowed, there will be serious trouble in the mosque. The plaintiffs contend that every mosque is dedicated to the worship of God and is open to any Muhammadan, to whatever sect he may belong, who chooses to pray in it. The cases reported as *Queen-Empress v. Ramzan* (1), *Ata-ullah v. Azim-ullah* (2) and *Jangu v. Ahmad Ullah* (3) and other authorities on which the plaintiffs rely certainly support this con-

tention, but they lend no support to the further contention advanced by the plaintiffs, namely, that the members of any and every sect are entitled to pray in every mosque as a separate congregation behind an *imam* chosen by themselves. The mosque in question has been in existence for about 200 years and appears to have been used all along by orthodox *Sunni* Muhammadans. In all probability it was established for the benefit of *Sunni* Muhammadans, though it may be that other Muhammadans are entitled to pray in it individually or join in the congregational worship which is conducted there. No authority whatever has been cited for the proposition that half a dozen members of a new sect (it is said that there are only so many *Ahmadi* in Monghyr) are entitled to thrust themselves into a mosque which has been used by orthodox *Sunni* Muhammadans for generations, form a separate congregation there, and disturb the old standing arrangements for the conduct of worship in the mosque. It is suggested that certain times might be allotted to the plaintiffs for congregational worship with their own *imam*. Such an arrangement appears to be unknown to the Muhammadan Law. It would curtail the time available for the orthodox *Sunnis* who have used the mosque for so many years. As already stated, the plaintiffs regard orthodox *Sunnis* as infidels. The orthodox *Sunnis* in their turn regard the *Ahmadis* as infidels and have, we are told, formally denounced them as such. There would almost inevitably be serious trouble in the mosque. It appears to me that what the plaintiffs wish to do is as likely to cause acute friction (if nothing worse) as if they actually disturbed the orthodox at their prayers in the mosque. As there is no authority for the contention advanced by the plaintiffs and it is clear that the rights enjoyed by the orthodox for generations would be seriously impaired by the intrusion of the plaintiffs as a separate congregation and it is certain that the admission of their claim would result in unseemly conflicts in the mosque, I am of opinion that their claim should be rejected.

I would dismiss both appeals with costs.

(1) 7 A. 461; A. W. N. (1885) 117; 4 Ind. Dec. (N. S.) 722.

(2) 12 A. 494; A. W. N. (1890) 179; 6 Ind. Dec. (N. S.) 1059.

(3) 13 A. 419; 7 Ind. Dec. (N. S.) 268.

BALAK V. ALEY HASAN.

ROE, J.—I agree that this appeal should be dismissed. The sole object of the case is to secure a decree that the appellants are entitled to deliberately abstain from joining in the ordinary worship of the mosque and to appoint an *imam* of their own to read prayers for them after the ordinary worship has been concluded. The learned Subordinate Judge who tried this case is himself a Muhammadan gentleman and he quotes it in his judgment as a well-known rule of worship that where people deliberately come late to prayers they will not be allowed to have a second service of their own. This seems to me to be in accordance with an extract from B-7 and B-13 of Volume I of the chapter relating to *azan* of Zadul Maad which runs:—

"Even if he waits for the *imam* of his own sect, having removed himself from the midst of men of a different sect, while offering up prayers with congregation, this act of his will not be considered as his turning away from the congregation with abhorrence when it is known that he is waiting for a congregation which is most perfect."

This seems to imply that if he does turn away from the regular prayers with abhorrence he cannot be allowed to have a special *imam* of his own. In the case before us the plaintiffs state clearly that they will not, under any circumstances, worship behind an *imam* who does not recognise Mirza Ghulam Ahmad. Having made that statement of fact, it seems to me clear that they are not permitted to have subsequent services and worship under an *imam* of their own. I agree, therefore, that the appeals should be dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 36 OF 1916.

October 31, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Stuart.

BALAK AND OTHERS—DEFENDANTS—
APPELLANTS

versus

ALEY HASAN AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Practice—Finding of Judge, form of—Precision and definiteness—Civil Procedure Code (Act V of 1908), O. XX, rr. 4, 5.

The findings of a Court should be specifically and precisely stated, whatever reasons therefor may be contained in the judgment.

First appeal from an order of the Subordinate Judge, Jaunpur, dated the 20th January 1916.

Mr. Kanhaya Lal, for the Appellants.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—This case unfortunately illustrates the danger of not using precise language at some portion or other of the judgment. We strongly recommend Judges of the Courts below, when giving judgment, whatever they may say in their reasons, to conclude their findings by saying that they find as a fact certain specified things. The sole question raised in this case is whether there was mortgage or not, and inasmuch as a mortgage exists and was recorded in the *patwari's* papers, the only question is whether it can be satisfactorily proved. The first Court held against it. It is quite true that it held that the witnesses were subservient to the plaintiff and that they were tutored; but if one is to be very precise, it never found that they were not telling the truth. It is only by implication that it found that they were not to be believed. The second Court has done precisely the same thing, with the converse proposition. The second Court has agreed that they were certainly not independent but that they should have been believed, and has sent the case back to be determined upon a basis which would only be legal if it accepted the execution of the mortgage. We think that the language, although somewhat lacking in precision, can only be fairly construed as a finding of fact that the witnesses were found to be credible witnesses; in other words, that the mortgage was proved. By that finding we are bound, and we must, therefore, dismiss the appeal with costs.

Appeal dismissed.

MAHAMAD NATHU v. EMPEROR.

* BOMBAY HIGH COURT.

CRIMINAL REVISION No. 176 OF 1916.

September 7, 1916.

Present:—Mr. Justice Beaman and
Mr. Justice Heaton.MAHAMAD NATHU AND OTHERS—ACCUSED
—APPLICANTS

versus

EMPEROR—RESPONDENT.

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), s. 12—Playing cards for very insignificant stakes near a masjid—Offence, trifling—Sentence.

Accused, who were peons and mill-hands, were convicted by a Magistrate for gambling in that they played cards for very insignificant stakes on a hot afternoon under the cool shades of a masjid and were sentenced to fifteen days' imprisonment each:

Held, that the offence was very trivial and the sentence inflicted grossly disproportionate and that a warning or a small fine would have answered the ends of justice.

Criminal application for revision against conviction and sentence passed by the City Magistrate, first class, Ahmedabad.

Mr. T. R. Desai, for the Applicants.

Mr. S. S. Patkar (Government Pleader),
for the Crown.

JUDGMENT.—We think it a pity that the gambling laws, through the injudicious activity of the Police and want of discretion on the part of the Magistracy, should sometimes be worked so harshly as they have been in this case. Without going into a discussion of the points raised by the learned Counsel for the applicants, it will be sufficient to say that every feature of the case convinces us that it was of the most trifling character and one which might have been passed over by the Police with a caution or, if brought before the Magistrate, dealt with by him in a very different way from that in which he has dealt with these offenders. They are peons and mill-hands, and on a hot afternoon betook themselves to the cool shades of the Daskroi Masjid where, adopting the Magistrate's finding of fact, they were amusing themselves by playing cards for very insignificant stakes. The Police raided the place and dragged nine of these persons before the Magistrate, who convicted five of them and actually sentenced them to fifteen days' imprisonment. Such a sentence in such circumstances appears to us to be monstrous and altogether out of proportion to the criminality of the acts charged. If the Police

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had thought it worthwhile to bring such persons before a Magistrate on such charges, we should have thought that the Magistrate would have seen that this was no serious matter, and if he had felt it necessary upon the evidence to convict the accused persons at all, he would have let them go with a small fine. Unfortunately they appear to have undergone seven days' imprisonment before they were released on bail by this High Court.

We, therefore, now remit the unexpired portion of the sentence. We do not interfere with the conviction, because in the circumstances there is no occasion for us to do so.

Sentence remitted.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 117 OF 1915.

June 9, 1916.

Present:—Mr. Justice Ormond.NGA AUNG GYI AND OTHERS—APPLICANTS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction, proper Court to apply to for—Notice—Order granting sanction.

Ordinarily an application for sanction to prosecute for giving false evidence should be made to the Court in which the alleged false evidence was given. When application is made to another Court, it is incumbent on such Court to send notice to the opposite party to show cause. [p. 306, col. 1.]

An order granting sanction to prosecute should show reasons why the sanction is granted. [p. 303, col. 1.]

Mr. Lambert, for the Applicants.

ORDER.—The six petitioners apply for an order to revoke an order made by the Sessions Judge of Prome sanctioning their prosecution under section 194, Indian Penal Code, for giving false evidence before the Committing Magistrate. The case was committed by the Magistrate to the Sessions, when the Public Prosecutor asked leave to withdraw the prosecution. The Sessions Judge, after perusing the evidence taken by the Committing Magistrate, allowed the case to be withdrawn and intimated that the case appeared to be concocted and that the executive authorities would, no doubt, consider the propriety of initiating proceed-

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ings under section 194, Indian Penal Code. The Public Prosecutor then put in a petition to the Sessions Judge applying for sanction to prosecute these six petitioners, and the Sessions Judge's order is comprised in the three words "sanction is granted" written at the foot of the petition. Ordinarily an application for sanction in such a case should be made to the Court in which the alleged false evidence was given and there is no reason apparently why that should not have been done in the present case. The Sessions Judge, not having been the Court before whom the alleged false evidence was given, should have issued notice to the petitioners and have given them an opportunity of showing cause why sanction should not be granted; and the Sessions Judge should have specified his reasons for having granted the sanction. For these reasons the sanction is revoked. This order does not preclude the Public Prosecutor from applying for sanction in the proper way.

Revision accepted: Sanction revoked.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 206B of 1916.
July 21, 1916.

Present:—Mr. Justice Ormond.

NGA PO YIN AND ANOTHER—APPLICANTS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 193—Penal Code (Act XLV of 1860), s. 193—Sanction—Order granting sanction, form of.

An order granting sanction to prosecute for giving false evidence ought to specify the statement alleged to be false.

Obiter dictum.—It is no offence to make a false statement to the Police.

JUDGMENT.—The Magistrate has sanctioned the prosecution of the applicant for an offence under section 193, Indian Penal Code, of giving false evidence. He states that either their statements to the Police must have been false or their evidence in the case. Their statements to the Police if false would not constitute an offence, and he does not specify the statements made by the applicants which are alleged to be false statements

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made on oath. The order sanctioning their prosecution must be set aside.

Revision accepted; Order set aside.

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 307 of 1916.
September 7, 1916.

*Present:—Mr. Justice Beaman and
Mr. Justice Heaton.*

EMPEROR—APPELLANT

versus

BLANCHE CONSTANT CRIPPS AND

ANOTHER—ACCUSED—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 317—'Having the care of such child', meaning of—Person entrusted with custody of child for abandonment, whether 'has care' of child—Offence.

Any person receiving an infant from its mother, on the distinct understanding that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she has transferred it to the care and custody of some other person or institution. [p. 307, cols. 1 & 2; p. 308, col. 1.]

The shortness or temporary nature of the custody is immaterial and any exposure or abandonment by the person receiving the child is an offence under section 317, Indian Penal Code. [p. 307, col. 2.]

The mother is also guilty of an offence under sections 317 and 109, Indian Penal Code, if she hands over the child so that it might be abandoned. [p. 308, col. 1.]

Criminal appeal from an order of acquittal, passed by the Sessions Judge, Ahmedabad.

Mr. S. S. Patkar (Government Pleader),
for the Crown.

Mr. T. R. Desai, for the Accused.

JUDGMENT.

BEAMAN, J.—This is an appeal by the Government of Bombay against the acquittal of two women by the Sessions Judge of Ahmedabad. The offences with which they were charged were under sections 317 and 109 of the Indian Penal Code.

The facts, which are undisputed, are that the younger of the two accused persons, a girl of fourteen, became pregnant while still unmarried, and in order to conceal her shame from her parents with the connivance of the elder of the two accused, her sister, she was conveyed to the Civil Hospital of Ahmedabad where she was

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safely delivered of a child. As soon as she was sufficiently recovered, the two sisters agreed that it would be advisable to dispose of the child secretly. Accordingly, the young mother handed the child to her elder sister, who carried it by train to Mahomedabad where she left it in a second class compartment. The child was carefully wrapped up and a bottle of milk was left by its side, so that as soon as it was discovered by any one there should be means of feeding it.

These being the admitted facts, the learned Sessions Judge came to the conclusion that no offence had been committed by either of the accused persons. The mother, in his opinion, was the only one of the two who had the care of the child and she neither exposed nor left it with the intention of wholly abandoning it. Her elder sister, according to the view taken by the learned Sessions Judge—a view which had formerly been expressed in the Madras High Court—was not a person having the care of the child within the meaning of the section, because she was only entrusted with the child for the express purpose of exposing or leaving it.

A further point has been argued before us, *viz.*, that in any view, neither of the accused had the intention of wholly abandoning the child. That, we think, is unnecessary to discuss. It is perfectly clear that having regard to the true objects of sections of this kind, we should not be too nice in fitting facts literally to the words of the section but look to them as a whole, and so looking at them we should have no hesitation whatever in saying that the intention of both the sisters was to get rid of the child, as far as they were concerned, that is to say, of wholly abandoning it without at the same time providing for its immediate protection and care by other persons.

The first point, however, needs a little more consideration, although we have no doubt that the learned Judge was wrong. It is not so easy to demonstrate this by dialectical analysis. We cannot help feeling, however, that in cases of this kind, any person receiving an infant from its mother on the distinct understanding, as in this case, that the mother never desired

or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution. The difficulty arises in cases where the care or possession—whatever term be used—intended by the mother, would be in the contemplation of both the persons concerned for an extremely short time. Suppose, for example, the mother desires to abandon her child and on that distinct understanding she requests another to leave it in a lonely field some two minutes' distance away, we are still of opinion that during that space of time, the second person carrying the child with no other object than that of exposing and leaving it in the appointed place would have the care of it sufficiently within the meaning and contemplation of section 317. This can be easily exemplified by retaining all other conditions but extending that of time. Suppose a second case in which the mother makes over her child in India to a person with the intention that that second person should carry the child to South America and there abandon it. The intervening period might be several months and during the whole of that time the person in actual possession of that child would, in our opinion, have the care of that child within the meaning and contemplation of the section and we do not think that in such a case the facts would ever occasion any doubt or hesitation at all. But if we are right, mere extension of time could not affect the underlying principle, and that principle again would have to be applied in each case with reference to its facts and also with that degree of common sense which Judges of experience are supposed to exercise while administering the criminal law. It is sufficient for our purposes to look first at the real intentions of the persons and see whether they fall within the mischief which the particular section of the Indian Penal Code is designed to strike at. If we needed confirmation of this view, we might look to the English Statute, where the case with which we are dealing has been expressly foreseen and provided for. There it is enacted that a person, situated exactly as the accused No. 2 was situated in this case,

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that is to say, having the *de facto* possession of the child, has the care of the child for the purpose of the Statute.

While, therefore, we think that the learned Sessions Judge was wrong in his law, we agree with him in his estimate of the moral guilt of the accused, and the learned Government Pleader has been instructed merely to ask for an expression of the law from this Bench and not to press in any way for sentence. Being of opinion, however, that the acquittal was wrong the law compels us to convict and, therefore, to inflict some sentence.

We reverse the acquittal and convict both the accused under sections 317 and 109 of the Indian Penal Code and direct that each of them do undergo one day's simple imprisonment.

As we understand that the accused are in Bombay, the sentence will be sufficiently carried out by detaining them until the rising of the Court this evening.

HEATON, J.—I agree. I think this is a very pitiable case, one in which no possible object can be gained by imposing a substantial sentence. But I think the learned Sessions Judge was wrong in the view he took of the law. It seems to me that when the accused No. 2, the elder sister, took or received this child from its mother and conveyed it to a railway carriage and then went off with it leaving the mother behind, she became immediately responsible for the well-being of the child. It does not matter that her ultimate object was to leave the child and return without it. She was nevertheless for the time being the person who had the care of the child, I think, within the meaning and intention of these words as used in section 317 of the Indian Penal Code.

Acquittal reversed.

POUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 57 of 1916.

June 6, 1916.

Present:—Mr. Kendall, A. J. C., and

Syed Mohammad Ali, A. J. C.

UDAI BHAN PARTAB SINGH—

APPLICANT

versus

RAM SAMAJH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435, 439, 145, scope of—Revision—High Court, non-chartered, revisional powers of—Jurisdiction of Magistrate acting under s. 145—Preliminary order—Grounds not recorded, effect of.

Section 439, Criminal Procedure Code, simply sets out the revisional powers of a High Court. It does not purport to qualify, add to, or detract from, any of the provisions of section 435, Criminal Procedure Code, and has to be read along with that section in order to find whether certain proceedings are open to revision by the High Court. The words in section 439, Criminal Procedure Code, "the record of which has been called for by itself", are not used in contradistinction to "which otherwise comes to its knowledge", and these latter words cannot be read so as to have reference to a petition. [p. 309, col. 2.]

Kamul Kutty v. Udayavarma Raja Valia Raja of Chirakal, 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753, referred to.

The essential requisite to give a Magistrate jurisdiction under section 145 of the Code of Criminal Procedure is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water, or the boundaries thereof, within his jurisdiction. [p. 310, col. 2.]

There is nothing in section 435 (3), Criminal Procedure Code, to prevent a non-chartered High Court interfering in proceedings which purport to be proceedings under Chapter XII, in a case where the Magistrate has initiated those proceedings without jurisdiction to do so [p. 311, col. 1.]

The mere mention of an order as being made under section 145, Criminal Procedure Code, will not of itself make that order an order under Chapter XII, Criminal Procedure Code. [p. 310, col. 1.]

Wajid Ali Shah v. Abdul Ghafur Khan, 5 O. C. 1, referred to.

But it is to be presumed that the work of a Court is done decently and in order, and if a Magistrate has jurisdiction he can enter the ring-fence of Chapter XII, Criminal Procedure Code, and he cannot be followed nor his procedure examined. [p. 310, cols. 1 & 2.]

Jhingai Singh v. Ram Partap, 1 Ind. Cas. 762; 31 A. 160; 6 A. L. J. 113; 9 Cr. L. J. 382 and *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal*, 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753, referred to.

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Hence, a non-chartered High Court (which cannot avail of the general powers of superintendence conferred by section 15 of the Indian High Courts Act) cannot entertain an application for revision of proceedings purporting to be under Chapter XII, Criminal Procedure Code, unless such High Court can ascertain without calling for the record of the lower Court, e. g., by copies of the proceedings or by the affidavit of the applicant, that the lower Court initiated those proceedings without jurisdiction to do so, that is to say, that the Magistrate in question was not such as could have exercised jurisdiction in the matter or that there was no information upon which the proceedings could be started. [p. 310, col. 2; p. 311, col. 1.]

Wajid Ali Shah v. Abdul Ghafur Khan, 5 O. C. 1, referred to and explained.

An omission to record grounds in the preliminary order made by a Magistrate under section 145, Criminal Procedure Code, does not affect his jurisdiction. [p. 310, col. 2.]

Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal, 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753, followed.

Application against the order of the Magistrate, 1st class, Fyzabad, dated the 26th April 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Applicant.

Syed Ali Mohammad, for the Opposite party.

JUDGMENT.—This is an application under section 439 of the Code of Criminal Procedure that this Court should call for and set aside proceedings under section 145 of the Code. This application was filed before the learned Judicial Commissioner, who has recorded an order expressing his doubts as to whether this Court has any power to send for the record. In view, however, of the ruling of a Bench of this Court in *Wajid Ali Shah v. Abdul Ghafur Khan* (1), which would seem to justify the admission of this application, the learned Judicial Commissioner has referred the application for admission to this Bench. The applicant and the opposite party have both been heard.

It is first worthy of notice that the application is termed an application under section 439. The provisions of section 435, sub-section 3, are very clear. Proceedings under Chapter XII are not proceedings within the meaning of section 435. They are not, therefore, proceedings in which the

High Court may call for and examine the record of any inferior Court within the local limits of its jurisdiction. It is no doubt to anticipate this objection that this application is termed an application under section 439. Section 439 sets out the powers of revision which a High Court has in the case of any proceeding, the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge. This section must be read along with section 435. It does not purport to qualify, add to, or detract from any of the provisions of the latter section. We have no doubt that the language in section 439, "the record of which has been called for by itself", is not used in contradistinction to "which otherwise comes to its knowledge," and consider that there is no room for the reading of these words, "which otherwise comes to its knowledge", as having reference to a petition. Section 439 does not confer upon any High Court any power to take proceedings. It only sets out the powers of revision that the High Court possesses in cases which have come before it. This question has been discussed at some length in *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (2), where it is noted that it could hardly have been the intention of the Legislature that the ordinary channel by which proceedings are examined be blocked up by the Legislature with respect to the proceedings contemplated in section 435 (3), but that Courts should exercise the power of revision, if the record came before them in some other manner not explained. The present application in fact must be treated as an application asking this Court to take action under section 435 of the Code of Criminal Procedure.

In *Wajid Ali Shah v. Abdul Ghafur Khan* (1) it is laid down by a Bench of this Court that—

"the mere circumstance that an order, which it is sought to have revised under the High Court's powers of revision under the Code of Criminal Procedure, purports

(1) 5 O. C. 1.

(2) 17 Ind. Cas. 65; 36 M. 275; 23 M. L. J. 499; 12 M. L. T. 49; (1912) M. W. N. 1154; 13 Cr. L. J. 753.

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to have been made under section 145 of the Code, does not debar that Court from the exercise of those powers, and that it can interfere with the order, if it is really not an order under that section, but is passed without jurisdiction."

It is suggested, however, that this ruling is incorrect, inasmuch as this Court is unable to send for the record, and so is unable to determine whether the order was or was not passed with jurisdiction. Records under Chapter XII of the Code have been frequently sent for by High Courts and on several occasions by this Court and orders passed by Magistrates have been interfered with and set aside. It is argued that High Courts have been enabled to send for records because of their powers of superintendence under section 15 of the Indian High Courts Act, but that this Court has no such extraordinary powers. There can be no doubt, as was laid down in *Wajid Ali Shah v. Abdul Ghafur Khan* (1) and as has been ruled elsewhere, that the mere mention of an order as being made under section 145 of the Code of Criminal Procedure will not of itself make that order an order under Chapter XII; but it is argued for the opposite party, who opposes the admission of this application, that even remembering this latter principle, this Court is entirely debarred from interfering with an order which purports to have been passed under Chapter XII, however scandalous the results may be, because it cannot send for the record. That such should be the intention of the Legislature would appear improbable and an argument leading to such a result calls for careful scrutiny.

It is to be presumed that the work of a Court is done decently and in order. Where a proceeding, therefore, purports to be a proceeding under Chapter XII, this Court will presume that it is such a proceeding; and where it cannot be ascertained without calling for the record, whether the Court below has acted without jurisdiction, section 435 (3) will stand in the way of any proceeding in revision. The doubt which has arisen as to the soundness of the ruling reported in *Wajid Ali Shah v. Abdul Ghafur Khan* (1) has been caused, we think, by the fact that in some reported cases Courts have been found to interfere with orders passed in

the course of properly initiated proceedings, orders which could be considered only on examination of the record. But it appears to us, and we have the authority of both the Allahabad High Court [*Jhingai Singh v. Ram Partap* (3)] and the Madras High Court [*Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (2)] in our support, that if a Magistrate has jurisdiction he can enter the ring-fence of Chapter XII; and he cannot be followed nor his procedure examined. It is in fact the initial jurisdiction only of the Magistrate which can be looked to: and that this Court will be able to do without calling for the record. It is, of course, nonetheless the duty of all Magistrates, as the Madras High Court rightly remarks, to comply strictly and fully with all the provisions of Chapter XII, and of District Magistrates, where necessary, to draw the attention of Subordinate Magistrates to this point.

The essential requisite to give a Magistrate jurisdiction under section 145 of the Code of Criminal Procedure is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water, or the boundaries thereof, within his jurisdiction. The fact, that there being information the Magistrate was satisfied by that information that a dispute of the above nature existed, will be evidenced, in our opinion, by the fact that he has proceeded to take action upon that information. The preliminary order in writing which the Magistrate, becoming properly seized of the case, makes under section 145 is in fact but the first step of his procedure under that chapter; and we agree with the Madras High Court that if there be an omission to record grounds in this preliminary order such omission does not affect his jurisdiction. That preliminary order remains in such a case an order passed under Chapter XII the correctness, legality or propriety of which cannot be brought in question.

If an applicant can show to the Court, therefore, by copies of the proceedings, or perhaps by affidavit, that the Magistrate

(3) 1 Ind. Cns. 762; 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382.

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in question was not a first class Magistrate, nor a Sub-Divisional Magistrate exercising jurisdiction in the sub-division where the proceedings have arisen, or that there was no information that a dispute existed likely to cause breach of the peace concerning any land or water or the boundaries thereof, then he will have shown *prima facie* to the Court that the proceedings in question are not proceedings under Chapter XII at all, whether or not the Magistrate may have been pleased to call them so; and in that case this Court would have power under section 435, clause 1, of the Code of Criminal Procedure to call for the record and satisfy itself as to the correctness, legality or propriety of any order passed and as to the regularity of the proceedings. We think, therefore, that the ruling of *Wajid Ali Shah v. Abdul Ghafur Khan* (1), while correctly laying down the law, is likely to be misleading: and we prefer to say that there is nothing in section 435 (3), Criminal Procedure Code, to prevent a non-chartered High Court interfering in proceedings which purport to be proceedings under Chapter XII, in a case where the Magistrate has initiated those proceedings without jurisdiction to do so.

We now proceed to apply these principles to the present application. We find from a copy of his order that the Magistrate was led to take action by reason of a report which was submitted to him dated 16th January 1916 by Jagannath, Sub-Inspector, which contained information that a dispute existed likely to cause a breach of the peace. It is not denied that the Magistrate who held these proceedings was empowered as a first class Magistrate to do so. We, therefore, find that he had jurisdiction.

In the application it is urged that the Magistrate did not set out in the preliminary order that he was satisfied that a dispute existed. His omission to record grounds, if there was such omission, does not affect his jurisdiction, this preliminary order being the first step of his procedure, after he had become properly seized of the case. The Magistrate, therefore, having jurisdiction by virtue of which he initiated the proceedings, no revision can lie. The application is rejected.

Application rejected.

LOWER BURMA CHIEF COURT

CRIMINAL REVISION No. 287/292

OF 1916.

November 20, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge.
A. THUMBUSWAMY PILLAY—PETITIONER

versus

MA LONE AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 488, 489—Maintenance—Arrears, execution of order for—Alteration of amount.

In an application for execution of an order for maintenance for wife and son, a Magistrate can under section 489, Criminal Procedure Code, go into the question whether the son has become able to maintain himself subsequently to the order under section 488 and whether the son was in fact able to maintain himself during the period for which arrears of maintenance are applied for. [p. 312, col. 1.]

Krishnasamy Iyer v. Chandraradhana, 20 Ind. Cas. 1005; 25 M. L. J. 349; (1913) M. W. N. 695; 14 M. L. T. 224; 14 Cr. L. J. 525, referred to.

Where the original order made no specific allotment for the wife separately, it is not competent for a Magistrate to do so in enforcement of an order under section 489. [p. 312, col. 1.]

Review of the order of the Eastern Sub-Divisional Magistrate, Rangoon, dated the 10th August 1916, passed in Criminal Miscellaneous No. 44 of 1916.

JUDGMENT.—The respondent, Ma Lone, applied to the Magistrate to enforce an order made under section 488 of the Code of Criminal Procedure by one of his predecessors. That order was that the petitioner, A. T. Pillay, should make a monthly allowance of Rs. 42 for the maintenance of Ma Lone and her son by him, Devadson. Nothing was said as to what portion was to be for the wife and what portion was to be for the son.

Ma Lone's application was for seven months' arrears at the above rate less what had been paid.

At the time she applied the son was over 19 years of age, and had been in employment and earning sufficient for him to live on. He had, however, been out of work during the seven months for which the allowance was claimed. A. T. Pillay in objecting to enforcement of the order relied on no allowance being claimable on account of the son in consequence of the son being no longer "a child unable to maintain itself".

The Magistrate considered that he could not go into this objection, because no application had been made to revise or set aside

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his predecessor's order, and consequently he was bound to enforce that order so far as concerned the past. He, however, altered the monthly allowance payable for the future, and made it Rs. 25 for the maintenance of the wife only. She objects that the amount is insufficient.

The Magistrate's view, that he could not enter into the question of whether the order should not be enforced in consequence of the son not having been for the period in question a child unable to maintain itself, appears to me to have been wrong.

If a husband can in objecting to the enforcement of an order rely on his having divorced his wife, as was held in *Shah Abu Ilyas v. Ufat Bibi* (1), there appears to be no reason why a father should not be entitled to raise objection that the child for whose maintenance he was ordered to make an allowance has become able to maintain itself.

It appears to me to be unnecessary to deal with the question of whether the son ceased to be a child within the purview of the section after he reached the age of 18 years. I hesitate to adopt the view of Sankaran Nair, J., in *Krishnasamy Iyer v. Chandra-dhana* (2) without further argument, for it appears to me that the Legislature may have intended to make a father liable for the maintenance of his child throughout its life if owing to some mental or corporal defect it is unable to maintain itself.

In the present case there can be no question as to the son being able to maintain himself if he obtains employment.

The foundation of the order was taken away when he became able to maintain himself, and so far as he was concerned the order became spent, and was unenforceable.

Then arises the question whether it could be enforced in part for the benefit of the wife. The Magistrate who made the order not having allotted any particular portion for the wife, I do not think it was open to the Magistrate who was asked to enforce the order to do this either as regards arrears or future maintenance. In my opinion the order

of the Magistrate was unjustified both as regards the order for payment of arrears, and as regards the payment of allowance for the future. It is set aside. The order of the 23rd September 1909 must be regarded as no longer in force.

Ma Lone should make another application under section 488 for an allowance for herself alone, and at the hearing of that application the question of what will be a proper amount can be fully gone into having regard to the circumstances of her husband, and what a husband of his means should allow his wife for her maintenance.

Petition dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 72 OF 1916.

May 18, 1916.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Sheepshanks.

ETIM HAJI—COMPLAINANT—PETITIONER

versus

HAMID—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 247, whether applies, when complainant is absent from Court to which his case is transferred.

Section 247 of the Criminal Procedure Code does not apply where the complainant is present in Court with his witnesses on the date fixed for trial, but being unaware that his case has been transferred to another Court fails to appear in that Court when the case is called on for hearing later on in the day. [p. 313, col. 1.]

Criminal Reference by the Additional District Magistrate, Dacca, dated the 9th May 1916, against an order of a Bench of Honorary Magistrates, Dacca, dated the 7th March 1916.

JUDGMENT.—This is a reference by the Additional District Magistrate of Dacca, under section 488, Criminal Procedure Code. The petitioner Etim Haji lodged a complaint against one Hamid and others under sections 426 and 447, Indian Penal Code. After a preliminary enquiry an order was passed on 10th February 1916 summoning the accused Hamid for trial of an offence under section 426, Indian Penal Code. The case was fixed to be heard on the 7th March 1916 in the Court of Mr. D. M. Sen, Deputy

(1) 19 A. F. O. A. W. N. (1896) 177; 10 Ind. Dec. (N. S.) 33.

(2) 10 Ind. Cas. 1005; 25 M. L. J. 249; (1913) M. W. N. 65; 14 M. L. T. 224; 14 Cr. L. J. 525.

BALDEO PRASADA v. EMPEROR.

Magistrate, Dacca. On that date, both the complainant and the accused appeared before Mr. Sen with their respective witnesses. The Deputy Magistrate thereafter recorded the following order in the order sheet: "Five witnesses for prosecution and five witnesses for defence. To Sadar Bench for favour of disposal." The case was taken up later on in the day by Mr. R. N. Das and Mr. K. Azimullah, who formed the Bench of Magistrates to whom the case had been transferred. The complainant and his *muktears* were called for several times, but were not found. The Magistrates accordingly recorded the following order: "accused present; complainant absent; accused acquitted under section 247, Criminal Procedure Code." Shortly after this the complainant, it is said, appeared before the Magistrates and prayed that the case might be revived, as he was not aware of the order of transfer and was waiting with his witnesses in the Court of Mr. Sen in the belief that his case would be tried there. The Magistrates stated that as an order under section 247 had already been recorded, the case could not be revived by them. The complainant then applied to the District Magistrate, who has referred the matter to this Court with the recommendation that the case should be revived. We are of opinion that his recommendation should be accepted. We agree with him that section 247 has not been rightly applied to this case, as the complainant was present in Court with his witnesses on the date fixed for trial and was not aware that the case had been transferred to other Magistrates. This view is supported by the decision in *Romanath Bal v. Behari Bag Bagai* (1). In fact in the case before us, the order of transfer showed on the face of it that the complainant was present with his witnesses. This was possibly overlooked by the Magistrates, when they made the order under section 247. We, accordingly, set aside the order under section 247 and direct that the trial do proceed in accordance with law.

(1) 13 C. L. R. 303.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 234 OF 1916.

September 11, 1916.

Present:—Mr. Kendall, A. J. C.

BALDEO PRASADA—ACCUSED—APPELLANT
versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 256, applicability of, to inquiries into cases triable by Sessions Court—Accused, right of, to cross-examine prosecution witnesses after framing of charge.

Section 256 of the Criminal Procedure Code provides, in the trial of warrant cases, for the re-call of witnesses for the prosecution for cross-examination, after the charge has been framed. The section does not apply to enquiries into cases triable by the Sessions Court. In such cases the evidence of each witness will ordinarily be concluded as each witness is examined and the accused has no right to have his cross-examination conducted after the charge has been framed.

Appeal against the order of the Sessions Judge, Sitapur, dated the 8th August 1916.

JUDGMENT.—This is a clear case, and the appellant has escaped with a light sentence. The evidence is amply sufficient to prove the offence charged.

There are two points which call for remark. The charge-sheet, which was drawn up in a very slipshod and untidy manner, contains at the foot the note "pleads not guilty: no cross-examination wanted." The Magistrate had in his mind, it would appear, section 253 of the Criminal Procedure Code. That section, the provisions of which are too often misunderstood, provides, in the trial of warrant cases, for the re-call (not re-summoning) of witnesses for the prosecution for cross-examination, after the charge has been framed. The chapter in which this section occurs has no reference to the enquiry into cases triable by the Sessions Court. In cases which are being committed to Sessions, the evidence of each witness will ordinarily be concluded as each witness is examined; and the accused has no right to have his cross-examination conducted after the charge has been framed.

The 2nd point is the record of the examination of the Medical Officer. That evidence was recorded formally in English, and a certificate was appended that that evidence might be used at the Sessions.

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trial. But it is recorded in a most untidy, slipshod and illegible fashion.

With the above remarks the appeal is dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1153
OF 1916

September 6, 1916.

Present:—Mr. Justice Shah Din.

NATHU KHAN—COMPLAINANT—
PETITIONER

versus

MUHAMMAD BAKHSH—ACCUSED—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 197—Sanction to prosecute—Public servant, member of notified area Committee, whether is—Penal Code (Act XLV of 1860), ss. 323, 504.

All members of notified area Committees are not public servants within the meaning of section 197 of the Criminal Procedure Code.

Petition, under section 439 of the Criminal Procedure Code, 1898, for revision of the order of the Sessions Judge, Jullundur, dated the 19th May 1916, affirming that of the Magistrate, 3rd class, Jullundur, dated the 25th April 1916, discharging the accused.

Mr. Nihal Chand Mehra, for Bakhshi Sohan Lal, for the Petitioner.

Mr. Badar ul-Din Kureshi, for the Respondent.

JUDGMENT.—(1) The facts are given in the order of the learned Sessions Judge, in which he has held that the respondent could not be prosecuted in respect of the alleged offences under sections 323, 504, Indian Penal Code, without the sanction of the Local Government as provided by section 197, Criminal Procedure Code. I have referred to the record, and there is nothing on it to show that the respondent is "a public servant not removeable from his office without the sanction of the Local Government". It is said that he is a member of the Committee of the notified area of Alawalpur, but of this there is no proof on the record; and even if he were a member of the Alawalpur Committee, it would not follow that he is a

public servant who is not removeable from his office without the sanction of the Local Government. The lower Courts have simply assumed that he is not so removeable from his office and have applied section 197, Criminal Procedure Code, to this case upon that assumption.

(2) I accept this revision, set aside the orders of the lower Courts and send the case back with a direction to the Magistrate to proceed according to law. I note that the objection as to want of jurisdiction by reason of the alleged applicability of section 197, Criminal Procedure Code, was not taken by the respondent until after the whole of the evidence for the prosecution had been recorded and he was called upon to enter upon his defence.

Revision accepted.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEALS Nos. 825, 826 AND 827 OF
1916.

November 17, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge.
ZETA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 24, 25, 26, 27—Criminal Procedure Code (Act V of 1898), s. 162 Incriminating statements to Police officers and Headman, admissibility of—Statement of one accused against another.

Incriminating statements made to a Police officer while in custody are inadmissible in evidence. [p. 314, col. 2.]

Sections 25 and 26 of the Evidence Act preclude admission of a statement by one accused against another and also of a confirming statement by another accused in reply to questions put by Police Constables in the Headman's presence. [p. 315, col. 1.]

An incriminating statement by an accused to a Headman, in consequence of the latter telling him it was better he spoke the truth because if the other side called witnesses, the truth against him would come out, is inadmissible under section 24. [p. 315, col. 1.]

Appeals from the order of the Sessions Judge, Hanthawaddy, dated the 7th August 1916, passed in Sessions Trial No. 32 of 1916.

JUDGMENT.—Incriminating statements made by the accused to Police officers and to Headmen, whilst two of them were in custody of the Police, have been wrongly admitted in evidence in this case.

BAYAN ALI v. EMPEROR.

Zeta and On Nyun were arrested on the night of the 20th March. Head Constable Ba Lat questioned them in the presence of Headman Maung Ba. Zeta according to these witnesses said he had given two currency notes of Rs. 100 each to the accused Po Tin. This was obviously an admission that Zeta had given part of the money taken in the robbery to Po Tin. Sections 25 and 26 of the Evidence Act precluded the admission of this statement of Zeta, and of the confirming statement of On Nyun. Section 27 could not apply to such statements.

Inspector Ba On questioned Po Tin and recorded his statement. The record was inadmissible in evidence, but the Inspector was allowed to state what Po Tin had said. In the course of his statement he said he had left some money with Po Chi and that two of the Rs. 100 currency notes in this money had been received by him from Zeta.

Rs. 590 were subsequently obtained by the Police from Po Chi and Rs. 100 from his son-in-law Po Hman. The part of the statement as to his having left money with Po Chi may be possibly said to have been information which led to the finding of the money with Po Chi, but the part of it in which Po Tin stated that he had received the money from Zeta was excluded from evidence by the words of the latter part of section 27.

Head Constable Ba Lat deposed to similar statements made to him, and also said that Po Tin pointed out the two hundred rupee notes and he said he had received from Zeta. This also was clearly inadmissible in evidence.

Headman Maung The deposed to what led up to Po Tin making his first incriminating statement. He admitted having told him he had better tell the truth because if the other accused called witnesses, the case against him would come out. Section 24 would apply if this was the case. This witness represents that it was he who questioned Po Tin on the following day, but the Inspector was present. It is of no consequence who put the questions: the Inspector was taking a statement under section 622 of the Criminal Procedure Code and what Po Tin stated on the occasion

must be taken to be a statement to a Police officer

Headman Tun Baw deposed to Po Tin having said in Po Chi's house that two of the notes were those he had got from Zeta, but this was in the presence of Head Constable Ba Lat and must also be regarded as a confession to a Police officer, although Po Tin had not been formally arrested at the time.

Leaving out of consideration the evidence wrongly admitted, there remains ample evidence to support the convictions of Zeta and On Nyun

Po Saw's identification of On Nyun may be weak, but there is no reason to doubt the identifications of him by Maung Zeya and Abdul Majid.

The appeals of Zeta and On Nyun are dismissed. Very little remains, however, against Po Tin. The fact that he was seen in company of Zeta and On Nyun on the day previous to the robbery as deposed to by Law Paw is not sufficient to support his conviction.

Rs. 690 was, no doubt, obtained in consequence of Po Tin's information, but the evidence as to his having stated that he got two of the currency notes from Zeta being inadmissible, there is nothing to connect these notes with the robbery.

Po Tin's appeal is allowed. His conviction and the sentence on him are set aside, and he is acquitted.

Appeal allowed.

PATNA HIGH COURT.
CRIMINAL REVISION PETITION No. 119 of 1916.
June 2, 1916.

Present:— Mr. Justice Roe and
Mr. Justice Jwala Prasad.

BAYAN ALI AND OTHERS—ACCUSED—
PETITIONERS
versus

EMPEROR OPPOSITE PARTY.
*Criminal Procedure Code (Act V of 1898), ss. 248,
345—Withdrawal of complaint, petition of—Compromise
—Warrant case—Penal Code (Act XLV of 1860), s. 342
—Wrongful confinement.*

BAYAN ALI v. EMPEROR.

The Police submitted a charge-sheet against the accused under section 342, Indian Penal Code. On the day fixed for the hearing of the case the complainant filed a petition in the following terms:

"This case by the intervention of arbitrators has been compromised. Hence the petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed and it is prayed that the case may be struck off without hearing". The Magistrate examined the complainant and found that there had been no compromise:

Held, (1) that it was the duty of the Magistrate to examine the complainant in order to satisfy himself that the petition was really one of compromise. [p. 317, col. 2.]

(2) That the petition was one of withdrawal under section 248, and not one of compromise under section 345, Criminal Procedure Code, and, therefore, the trial did not come to an end on its presentation. [p. 317, cols. 1 & 2.]

Murray v. Queen-Empress, 21 C. 103, 10 Ind. Dec. (N. s.) 701; *Abdool Biswas v. Khater Mondal*, 3 C. W. N. 332, *Ganesh, Narayan Sathe, In re*, 13 B. 600; 7 Ind. Dec. (N. s.) 397, referred to.

Revision against the order of the Sessions Judge, Mozufferpore, dated the 18th April 1916.

Mr. R. A. Baxter (with him Messrs. Sarat Kumar Banerjee and Bankim Chunder Dey), for the Petitioners.

Mr. Fakhr-ud Din, for the Crown.

JUDGMENT.—The facts of this case are as follows:—

On the 30th of January 1916 at 6 A. M. the complainant Raghunaek Misser reported at the Bagaha Police Station that one hour before sunset on the previous day his brother Makut Nath Misser had been wrongfully confined by the accused Bayan Ali, a Sazawal of the Bettiah Raj, with the help of the *patwari* and the peons of that Raj.

The Police investigated this information and submitted a charge-sheet against the accused, fixing the 10th of February 1916 for trial and recording that they had directed the complainant and his witnesses to appear at the Bettiah Court on that day.

On the 10th of February 1916 the prosecution witnesses and the accused appeared before the Sub-Divisional Officer and a petition was filed by the complainant Raghunaek Misser which has been translated thus: "As this case is between the *amlas* of the Raj on one side and your petitioner the *ryot* of the Raj on the other, therefore, by the intervention of arbitrators it has been compromised. Hence the petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed

and it is prayed that the case may be struck-off without hearing."

Upon this the Sub-Divisional Magistrate wrote: "This may be forwarded to Superintendent of Police. Complainant states to me that his case is true but he wishes to withdraw it because he is a Raj *asami* and accused are Raj servants. This, however, scarcely seems sufficient reason".

Upon this the Court Sub-Inspector wrote to the Superintendent of Police:—"I humbly beg to state that in the marginally noted case the complainant has filed a petition of withdrawal which has been forwarded by the Sub-Divisional Officer to your honour. I, therefore, beg to send herewith the judicial record of the case along with case diaries and the petition of withdrawal filed by the complainant for your honour's perusal and orders. The next day fixed for this case is 17th February 1916".

Upon this the Superintendent of Police wrote: "I am not willing to withdraw the case but have no objection to the case being compromised."

On the 17th of February the prosecution witnesses were examined and the accused examined and a charge framed and the case was adjourned to the 28th for cross-examination.

On the 28th of February the *mukhtear* appearing for the accused applied for an adjournment in order that the accused might obtain the assistance of the Raj in his defence, and the case was thereon adjourned to the 13th of March. There is on the record a letter which runs, "correspondence between the Collector and the Estate to defend the case at Raj expense is going on but no sanction has yet been received". There is also on the file a letter from Mr. Hudson, Assistant Manager of the Raj, saying that the Pleader engaged in the case on behalf of the Raj was unable to appear and asking for an adjournment. The case was continued and ended in the conviction of the accused and upon appeal to the District Judge the findings of facts of the Sub-Divisional Court were confirmed and the sentences confirmed.

The applicant comes before us in revision on two grounds: *Firstly*, that the petition of the 10th of February was in fact a petition of compromise and *secondly*, the sentence of three months' imprisonment is excessive.

RAYAN ALI V. EMPEROR.

The first point for consideration in this case is—Was the petition of the 10th of February clearly a petition of compromise? The Sub-Divisional Magistrate and the Superintendent of Police did not regard it as such. The actual words used are "*sulah ho gaya*". No mention is made of the section under which the petition was filed. The first half of it might be taken as a petition of compromise; the second half of it as a petition of withdrawal. The words which have been translated "without hearing" are "*bila tajwiz file buktan se kharij farmaya jawe*". "Compromise" is a word which in itself contemplates an arrangement to which there are two parties. "Withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under section 248 without the consent of the accused. It was clearly open to the Sub-Divisional Magistrate to satisfy himself under what section this petition was before him. In order to satisfy himself it was open to him to question the complainant. The answers of the complainant clearly indicate that the case had not been compromised but was being withdrawn without the consent of the accused. The subsequent action of the accused shows clearly that he had never consented to the compromise of the case. The fact that the European Officers of the Raj were personally interesting themselves in the matter, indicates that through them the accused must have been aware that the Police were willing that the case should be compromised, and unwilling that it should be withdrawn. If in fact the case had been compromised, there was no reason why the accused should not have drawn the attention of the Magistrate to the fact. Not only did he not do so in the Sub-Divisional Court, but nowhere in his grounds of appeal or in the argument in appeal has he suggested to the Sessions Judge that the case had with his consent been compromised.

On behalf of the Crown our attention has been drawn to the decision in *Murray v. Queen-Empress* (1) and on behalf of the appellant to the case of *Abdool Biswas v. Khater Mondal* (2). That case is authority

only for the proposition that where a Magistrate has satisfied himself that the complainant understood his petition and really desired to compound the case, the case must be compromised. Even this decision contemplates a questioning of the complainant in order that the Magistrate may be satisfied that the application is in fact one for composition and not for withdrawal.

On this point Mr. Baxter further urges that inasmuch as the case was a warrant case it could not be withdrawn and, therefore, the petition could not have been one under section 248. In this connection we may refer to the case of *Ganesh, Narayan Sathe, In re* (3): "The Magistrate had no authority to allow the complaint to be withdrawn and he ought to have informed the complainant thereof". It appears to us that this is precisely the course which the Magistrate took. He was willing that the Police should enter a *nolle prosequi* but he was not willing that the complainant should withdraw the case and informed him that he would not allow him to do so.

The Superintendent of Police went further and said, "apart from the provisions of section 345 the complaint shall not be withdrawn". We are of opinion that the trial did not come to an end upon the petition of the 10th of February 1916, that that petition was not a petition made under section 345 and that the subsequent proceedings were in order and that no error of law exists upon which we can interfere under section 439.

With regard to the sentence of three months' imprisonment, we are in agreement with the remarks of the learned Sessions Judge and of the Sub-Divisional Magistrate in respect to the serious nature of the applicant's interference with the liberty of Makut. At the same time it is difficult to lose sight of the remarks made by the Sub-Divisional Magistrate in the course of his judgment "that the occurrence could not be considered by the submissive and backward people living to the north of this sub-division a very abnormal one or one that they should get wildly excited about. The surprising thing is that it has come to Court at all."

The actual facts of the case are that

(1) 21 C. 103; 10 Ind. Dec. (N. S.) 701.

(2) 3 C. W. N. 332.

(3) 13 B. 600; 7 Ind. Dec. (N. S.) 397.

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Makut Nath was tied to a post by a grass rope and was given a shawl in which to wrap himself, and on his release was so little indignant at the treatment he had received that he sat down cheerfully and listened to the recitation of psalms in the house in which he had been tied up. It is clear that the people were unconscious of any offence involving grave criminality and that the applicant did not realise that he was doing anything heinous. The applicant has been only three days in jail but has been taken to jail twice, once upon the completion of the trial in the Sub-Divisional Court and once on his surrendering to his bail on the 9th of May. He was released by the Sessions Judge on the day after his conviction and by ourselves one day after his surrender. Nevertheless we think that the punishment inflicted is sufficiently deterrent to his offending in this manner again, and justice does not require that we should send him back to jail. We do not propose to increase the fine imposed upon him, for the reason that although the Raj has done all it could in giving him the best legal advice available, it will not overlook such unwarrantable abuse of power. We direct that the sentence of imprisonment be remitted. The applicant is released from his bail.

With the conviction and the sentence of fine imposed upon him and his co-accused, the peons Seopujan Singh, Sarup Rai and Timal Mian, we do not see any reason to interfere.

There is no finding of fact that the *patwari* Jaleswar Lal did anything to facilitate the commission of this offence. The conviction of, and sentence upon, Jaleswar Lal are set aside.

Revision accepted in part.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 2 OF 1916.

November 1, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

EMPEROR—APPLICANT

versus

SUBA SINGH AND OTHERS—

ACCUSED.

Penal Code (Act XLV of 1860), s. 143—Unlawful

assembly—Crowd in threatening attitude—Disturbance of religious function.

Where a large crowd of Hindus appeared in a village and threatened to take away the cows of the Muhammadans which they had collected for sacrifice on the occasion of *Bakr-id*:

Held, that an offence under section 143, Indian Penal Code, had been committed. [p. 319, col. 1.]

Criminal Reference made by the Sessions Judge, Patna.

The Deputy Government Advocate, for the Crown

Mr. S. Sinha (with him Mr. Nirsu Narayan Sinha), for the Accused.

JUDGMENT.—Suba Singh and twelve others were committed to the Court of Session to be tried on charges framed under sections 399 and 144 of the Indian Penal Code. The Jury unanimously acquitted all the accused of the charges under sections 399 and 144, Indian Penal Code. The Sessions Judge in his charge to the Jury pointed out that though the evidence might not justify a conviction under section 144 of the Indian Penal Code, still the Jury might convict the accused of an offence under section 143 of the Indian Penal Code, that is, they might find that they were members of an unlawful assembly. The Jury, however declined to convict the accused under section 143 and the learned Sessions Judge, being of opinion that the verdict of the Jury as regards the offence under section 143 was perverse, has referred the case to this Court with the recommendation that the accused should be convicted under section 143.

The facts of the case are that in a village called Kanchanpur in the Patna District there are 25 to 30 houses of Muhammadans and a rather larger number of houses of Hindus. According to the evidence the relations between the Hindus and the Muhammadans were satisfactory up to 1915. It is said that the Muhammadans sacrificed cows at *Bakr-id* in their houses without interference on the part of the Hindus. However that may be, it is certain that till October 1915 there was no serious trouble between the Hindus and the Muhammadans regarding the sacrifice of cows at *Bakr-id*. The evidence shows that on October 18th, 1915, that is two days before the *Bakr-id*, a large crowd of Hindus appeared in the village and

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threatened to take away the cows of the Muhammadans. Four of the latter made a report to the Police and the Sub-Inspector went to the village. As it appeared to him that a breach of the peace was imminent, he telegraphed to the Sub-Divisional Magistrate and the District Magistrate and on the following day these two officers and also the Superintendent of Police went to the village. The Sub-Divisional Magistrate appears to have arrived first. Upon the evidence of the Magistrates and the Superintendent of Police there can be no room for doubt that the Hindu party constituted an unlawful assembly, their avowed intention, as expressed by one of their leaders, Suba Singh, who is one of the present accused, being to compel the Muhammadans to give up their cows; and when ordered to desist they adopted a threatening attitude even in the presence of the Police. There is little doubt that if the Magistrates and Police had not gone to the village there would have been a serious riot. It is unnecessary to labour this point, for even the learned Counsel for the accused admitted that technically the Hindus constituted an unlawful assembly, but he urged, *firstly*, that the Hindus acted under extreme provocation and, *secondly*, that the Jury were justified in acquitting the accused because at the instance of the Magistrates a compromise was arrived at between the Hindus and the Muhammadans, and the present case was started not so much with the object of securing the punishment of the Hindus as to establish the right of the Muhammadans to sacrifice cows in the village at the *Bakr id*. There is some evidence that a man named Chandoo Mian shortly before the occurrence in question appeared in the village and boasted that the Muhammadans would not only sacrifice cows at the *Bakr id* but that they would hawk the flesh of the cows round the village. We are not prepared to find it proved that such a threat was actually expressed by Chandoo Mian, but it is certain that something occurred shortly before October 18th which disturbed the theretofore friendly relations between the Hindus and the Muhammadans. Assuming, however, that some provocation was

offered by the Muhammadans or one of them, the Hindus were not justified in acting as they did. We can only consider the question of provocation in the matter of sentence.

The compromise was effected at the instance of the Magistrates and the Police Officers. It is unnecessary to discuss the question whether the Muhammadans were or were not free agents when they agreed to the compromise. Upon this point there is a conflict of testimony. It is sufficient to say that they yielded to the representations made by the Magistrates. But soon after the *Bakr id* they realised that they had weakened their position and it appears, as the learned Counsel for the accused has said, that this case was started for the purpose of establishing the right of the Muhammadans to sacrifice cows at *Bakr id*. The complainant himself in his cross-examination admitted this. This also we may properly take into consideration in the matter of sentence.

In our opinion the verdict of the Jury was perverse. The evidence proves beyond a shadow of doubt that the Hindus constituted an unlawful assembly. The Jury should have returned a verdict of guilty under section 143 of the Indian Penal Code and left the Sessions Judge to deal with the question of sentence. They evidently took the law into their own hands, because they thought that under the circumstances the Hindus should not be convicted. We were invited by the learned Counsel for the accused to hold that even if the other accused are guilty under section 143 of the Indian Penal Code, Suba Singh is not guilty because one of the witnesses says that Suba Singh took a prominent part in bringing about the compromise and that he entreated the Muhammadans with folded hands to give up their cows and sacrifice goats instead. It appears to be the fact that after the Magistrates and the Superintendent of Police arrived in the village, Suba Singh assisted them to bring about the compromise; but he was one of the leaders of the Hindu party, he does not live in Kanchanpur and appears to have thrust himself into a quarrel which did not concern him directly and done

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all in his power to compel the Muhammadans to give up their cows. It appears to us that the guilt of Suba Singh is greater than that of the other accused. He is a man of affairs, was one of the leaders of the Hindus on that day and must have been largely responsible for the collection of so large a crowd at Kanchanpur. For this reason we set aside the verdict of the Jury and convict all thirteen accused under section 143 of the Indian Penal Code. Taking into consideration the circumstances mentioned above as also the fact that almost a year has elapsed since the occurrence in question, we have come to the conclusion that it is unnecessary to send any of the accused persons to jail.

We sentence Suba Singh to pay a fine of Rs. 100 or in default to undergo rigorous imprisonment for six weeks. We sentence each of the other accused to pay a fine of Rs. 20 or in default to undergo rigorous imprisonment for three weeks.

As it is quite clear to us that the Hindus assembled armed with *lathis* and *garasas* for the purpose of committing a breach of the peace, we direct that Suba Singh do execute a bond for keeping the peace for one year in the sum of Rs. 2,000 with two sureties in Rs. 1,000 each, to be approved by the District Magistrate. We direct that each of the other accused do execute a bond for keeping the peace for one year in the sum of Rs. 100 each with two sureties in Rs. 50 each, to be approved by the District Magistrate.

Accused convicted.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 902
of 1916.

September 20, 1916.

Present:—Mr. Justice Chevis.

MUHAMMAD AND OTHERS—CONVICTS—
PETITIONERS

versus

EMPEROR—PROSECUTOR—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 233—Penal Code (Act XLV of 1860), ss. 457, 411—Joint trial—Conviction of some accused under s. 457 and of others under 411, legality of.

In one and the same trial there cannot be convictions against some accused under section 457

and against others under section 411 of the Penal Code.

Sahib Singh v. Emperor, 38 P. R. 1905 Cr.; 115 P. L. R. 1905; 52 P. W. R. 1905 Cr.; 2 Cr. L. J. 694; *Jagga v. Emperor*, 51 P. R. 1905 Cr.; 62 P. W. R. 1905 Cr.; 165 P. L. R. 1905; 3 Cr. L. J. 76, followed.

Petition, under section 439 of the order of the Sessions Judge, Jhelum, dated the 29th April 1916, varying (as regards charge only) that of the Magistrate, 1st class, Pind Dadan Khan, District Jhelum, dated the 30th March 1916, convicting the petitioners.

Mr *Jai Gopal Sethi*, for the Petitioners.

Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—(1) This order will cover the connected revisions Nos. 903, 952 and 953 of 1916.

(2) Eight persons were convicted by the Magistrate in this case under section 457. They all appealed to the Sessions Judge, who upheld the conviction of two under section 457, Indian Penal Code, but altered the conviction to one under section 411 in the case of the remaining six. These six now apply to this Court for revision, and the first point taken is that in one and the same trial there cannot be convictions against some accused under section 457 and against others under section 411. This plea is quite correct, see *Sahib Singh v. Emperor* (1) and *Jagga v. Emperor* (2).

(3). I set aside conviction and sentence in the case of the six petitioners, *viz.*, Muhammad, Waris, Mawaz, Lahu, Nura and Muhammad Din and order them to be re-tried. Taking the case as one falling under section 411, it is quite possible that each of the petitioners (assuming for the moment that they are guilty, though, of course, I pass no opinion as to the merits) committed an offence separately from the others, so I direct that each one of the petitioners be tried separately. In case of a conviction the period already spent in confinement should be taken into consideration. The petitioners should be at once relegated to the judicial lock-up as under-trial prisoners. This order is not to be taken as preventing the District Magistrate or the Magistrate trying the case from admitting them to bail, should he think fit to do so.

Revision allowed; Re-trial ordered.

(1) 38 P. R. 1905 Cr.; 52 P. W. R. 1905 Cr.; 115 P. L. R. 1905; 2 Cr. L. J. 694.

(2) 51 P. R. 1905 Cr.; 62 P. W. R. 1905 Cr.; 165 P. L. R. 1905; 3 Cr. L. J. 76.

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PRIVY COUNCIL.

APPEAL FROM THE COURT OF JUDICIAL
COMMISSIONER, CENTRAL PROVINCES.

May 19, 1916.

Present:—Lord Shaw, Lord Sumner,

Sir John Edge and Mr. Ameer Ali.

Musammat GIRJA BAI—

APPELLANT

versus

SADASHIV DHUNDIRAJ AND OTHERS—

RESPONDENTS.

Hindu Law—Mitakshara—Joint family estate—Partition—Intention of one member to separate, whether sufficient.

Under the Mitakshara Law a definite and unambiguous indication by one member of a joint undivided family of his intention to separate himself and to enjoy his share in severalty will amount to partition, if the intention is unequivocal and clearly expressed; and it must depend upon the facts of each case whether partition is effected thereby. [p. 340, col. 2.]

Suraj Narain v. Iqbal Narain, 18 Ind. Cas. 30; 40 I. A. 40; 13 M. L. T. 194; 17 C. W. N. 333; (1913) M. W. N. 183; 11 A. L. J. 172; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129, followed.

The intention to separate may be evinced either by explicit declaration or by conduct, and if it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. [p. 342, col. 2.]

Appovier v. Rama Subba Aiyar, 11 M. L. A. 75; 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30, explained.

Joy Narain Giri v. Grish Chunder Myti, 4 C. 434 at p. 437; 5 I. A. 228; 3 Sar. P. C. J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (n. s.) 276; *Madho Parshad v. Mehrban Singh*, 17 I. A. 194; 18 C. 157; 5 Sar. P. C. J. 586; *Rafique and Jackson's P. C. No. 121*; 9 Ind. Dec. (n. s.) 105 and *Musammat Deo Bunssee Kooer v. Dwarkanath*, 10 W. R. 273; 4 B. L. R. 363 note, referred to.

Musammat Vato Koer v. Rowshun Singh, 8 W. R. 82, approved.

A separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status: whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or, on failure of that, by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither can the co-sharers question it nor

can the Court examine his conscience to find out whether his reasons for separation are well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others. [p. 341, col. 2.]

It is a mistake to suppose that severance of status can take place only by agreement. The agreement only recognises existing rights in each individual member which he is entitled to assert at any time he likes. [p. 342, col. 2.]

Appellant's husband served a registered notice on the manager of the Mitakshara joint family of which he was a member, saying in explicit terms that his desire was to get his share partitioned and asking the manager to partition the joint estate without delay. A few days after he instituted the suit for partition but died during the pendency of the suit:

Held, that nothing could be more unequivocal or more clearly expressed than the conduct of the appellant's husband in indicating his intention to separate himself and enjoy his share in severalty by the said notice coupled with the suit; that these acts amounted to a separation with all its legal consequences; and that on the death of the appellant's husband during the pendency of the suit the appellant inherited his share and was entitled to continue the suit. [p. 340, col. 2.]

Appeal from two judgments and decrees of the Court of the Judicial Commissioner, Central Provinces, dated the 25th July 1912, reversing a judgment and decree of the District Judge, Nagpur, dated the 8th April 1911.

FACTS.—On the 1st October 1908, the appellant's husband Harihar sent a registered letter to Dhundiraj, the manager of the joint and undivided family of which he was a member. The family was governed by the Mitakshara Law of the Benares School. The said letter was in the following terms:—

"You Nilkanth Rao and I, till this day, have managed the business of the joint shops at Parsooni, Nagpur and Sindi. Now my desire is to get partitioned the one-third share which I have at present in the joint estate; and I am ready to have it partitioned privately. This is proper, according to usage and law. You should, therefore, collect papers and documents, prepare three lists, and give me mine; for it is becoming and proper to do this thing privately, while to do it otherwise is not so. You are wise and expert in managing the joint estate, and are conversant with the ways of the world. Being well aware of this, I write this private letter to you as my junior. I am ready to hand over, at the time of partition, the papers and documents relating to the shops in my

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possession. If you should take offence at this, that will not be consonant with worldly wisdom: for we should adjust our private affairs, without letting others know of them. It is not necessary to say this to a wise man like yourself. My desire, then, is that soon after the receipt of this letter, you should take this matter in hand, and make a disposition of the joint estate. I send this letter in the belief that you will do so. I depend upon you. And it is the duty of a younger to fulfil the desire of an elder. I have entrusted this duty to you in order that you may be encouraged and carry it out willingly, and without letting others know about it. But do not delay partition. I request you to send an early reply to this letter, and hope that you will not fail to do so. My blessings on you."

To that letter Dhundiraj's Vakil on his behalf sent the following reply, dated the 18th October 1908:—

"1. The registered letter, dated the 1st October 1908, addressed by you to Dhundirajpant Talatuley, reached him on 13th October 1908. He has sent that letter on to me, instructing me to give a reply thereto as follows:—

(1) The estate of your family has been joint for the last four generations, and no partition has taken place till this day. It is, therefore, desirable that as far as practicable, there should be no occasion for partition, and that no partition should be effected. You are the senior and Dhundirajpant is willing to accept any proper arrangement that you may be pleased to make as to the management of the entire estate, without dividing it. If you signify your consent to this, the resulting arrangement will be promptly made.

(2) If you nevertheless intend to have a partition made, it is better that you should yourself make it, since you are senior. For the purposes of this partition, a general inventory of the whole estate will have to be made; and it will be necessary to appoint two clerks, one on behalf of yourself, and the other on behalf of Dhundirajpant. This matter will take at

least two months. After this general inventory has been prepared, arrangements will be made to have three lists drawn up in accordance with what may be settled between you and him concerning the partition. In the event of a difference between you two, that difference will be settled by a third person, and partition effected according to the lists.

2. You are requested to give your best consideration to the suggestions made above, and to kindly let me know what is to be done. In my opinion, it is advantageous to both of you to settle the dispute amicably, and make a just disposition of the entire property smoothly without causing any loss or giving publicity to the matter. Dhundirajpant is willing to settle the dispute amicably. It is, therefore, hoped that you will effect a private settlement, without filing a suit. If you wish to see me personally and speak to me about the matter, you may write to me, and I will act accordingly. An early reply is solicited."

On the 21st October 1908, Harihar brought the suit giving rise to this appeal against Dhundiraj and other members of the joint family for a decree for partition and possession of his one-third share in the joint family properties. While the suit was pending Harihar died on the 17th June 1909, and his widow the appellant applied for substitution of her name as plaintiff in place of that of her deceased husband. This application was opposed by the defendants, on the ground that the deceased at the time of his death was joint with them and consequently the suit abated on his death. The District Judge found on the facts, which are fully set out in their Lordships' judgment, that Harihar had declared his intention to separate from the family and given effect to that intention by serving the registered notice of the 1st October 1908 demanding partition and after rejecting the defendants' proposal for a private settlement by filing the suit. He was of opinion that these facts together with the defendants' admission of Harihar's right to one-third share of the joint family property and the proceeding in the suit prior to his death brought the case within the principles

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laid down in *Appovier v. Rama Subba Aiyar* (1). He, therefore, held that Harihar at the time of his death "must be considered as being separated in estate," and his widow the appellant was "therefore entitled to inherit his share" and continue the action. He stated his reasons as follows:—

"Under the Mitakshara Law partition must take place by the desire of a single member even though the others are unwilling, for a son may force even a father, however reluctant, to divide the ancestral property [Mitakshara Chapter I, section 5, paragraph 11, and observations of Justice Dwarkanath Mitter in the case of *Musammam Deo Bunsee Koor v. Dwarkanath* (2)].

9. Mr. R. C. Mitra in his treatise on the Law of Joint Property and Partition (Tagore Law Lectures of 1895), Edition of 1897, after elaborately discussing the case-law on the subject as to what constitutes partition summarises the decisions as follows at page 308:—"In those cases where a co-parcener can at any moment demand a partition, a co-parcener has merely to signify to the other co-parceners his present intention to separate, and from the time when such intention is made known to the other sharers, the co-parcener may be considered separate from the others both in family and property. A long time may elapse before any separation into distinct portions can be actually effected, or even before the extent of such co-parcener's share in the *corpus* can be determined, but the joint interest of the separating co-parcener ceases and his individual interest begins from when he makes the demand."

10. In Golapchandra Shastri's treatise on Hindu Law, 4th Edition of 1910, at pages 259 and 260, the law on the subject has been stated thus:—

"When partition may take place at the instance of a co-sharer, whether the other members assent to it or not, it would appear that the declaration and communication, by a member of a joint family, of his desire for separation to the other members accompanied and followed by unequivocal conduct and acts, showing that so far as lay in his power he did give effect to his desire and showing that there was a fixed and determined intention

and not a passing whim for separation, is legally sufficient to change his status, to sever his interests and to constitute him a tenant-in-common, and separate so as to defeat the mutual right of survivorship so far as that member is concerned, i.e., between him on one hand and the rest of the members on the other . . . hence when a member expresses his desire to become separate, as he is legally entitled to become whenever he chooses, whether the other members wish or not, there arises a corresponding duty on the part of the other members to give effect to his desire immediately, and as no physical act is absolutely necessary or a legal severance of interest, the mutual agreement of the co-tenants being sufficient for that purpose, and as the other members are legally bound to agree to the desired partition and as equity presumes that to be done which ought to have been done, it appears to follow as a necessary direct logical consequence that a member's desire for partition is sufficient in law to constitute him separate so as to put an end to his joint tenancy and the operation of survivorship."

The learned author has then quoted the case-law in support of his view and at pages 262, 263 and 264 he has given further reasonings in support of the above view.

11. Mr. Mayne in his Hindu Law has also said that intention is essential for effecting a separation in title (see page 671 and 672 of his Hindu Law, 7th Edition).

12. In the Vyavahara Mayukha it is said:—"Even when there is a total absence of common property, a partition is effected by the mere declaration "I am separate from thee;" for partition is but a particular condition of the mind, and this declaration is indicative of the same." (See Translation of Vyavahara Mayukha by V. N. Mandlik, Part II, Hindu Law of Mayukha, Edition of 1880, page 31).

13. The following judicial decisions also support the view that the communication of the determined intention by a member to become separate to his co-parceners followed by acts to give effect to that intention is sufficient to change his status from that of being a member of the joint family to that of a separated member, *Bulakee Lal v. Musammam Indurputtee Kowar* (3), *Musammam Vato Koer v. Rowshun Singh* (4), *Debee Pershad*

(1) 11 M. L. A. 75; 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

(2) 10 W. R. 273 at p. 274; 8 B. L. R. 363 note.

(3) 3 W. R. 41 at p. 42.

(4) 8 W. R. 82.

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v. *Phool Koores* (5), *Ram Dhyun Koonwar v. Musammat Phoolbas Kooer* (6), *Joy Narain Giri v. Goluck Chunder Mytee* (7), *Joy Narain Giri v. Girish Chunder Myti* (8), *Raghubanund Doss v. Sadhu Churn Doss* (9) and *Radha Churn Dass v. Kripa Sindhu Dass* (10).

14. In the case reported as *Musammat Vato Koer v. Rowshun Singh* (4), the learned Judges of the Calcutta High Court after referring to the decision of their Lordships in the leading case of *Appovier v. Rama Subba Aiyar* (1) observed: 'Taking, then, the admitted facts of the case before us, we find that Shun Singh did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Shun Singh, showing an unmistakeable intention to hold and enjoy his own estate separately and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition.'

15. The above view has also been laid down by Markby, J., in the case reported as *Ram Dhyun Koonwar v. Musammat Phoolbas Kooer* (6). At pages 345 and 346 he says: 'It appears to me that when once you have arrived at the point of holding that a mere signification of intention is sufficient to constitute a separation without an actual partition by metes and bounds and you couple that with the acknowledged principle that any one member has a right to insist on a separation, it follows, almost as a direct logical consequence, that an unequivocal signification of intention to that effect on the part of one member constitutes him a separate owner of his share.'

16. Similarly in the case reported as *Radha Churn Dass v. Kripa Sindhu Dass* (10), (see pages 473-477) Chief Justice Garth observes: 'One can very well understand that as regards separation, any member or members of a family might separate from the rest at their option: a mere declaration

by one member *that he was separate* from the others would seem to be sufficient to effect the separation.'

17. In the present case the deceased plaintiff, Harihar not only declared his intention to separate from the family but gave effect to that intention by serving the defendants with a written notice demanding partition and after rejecting their proposals for a private settlement by filing the suit in Court. These facts as also the admission in the suit by the defendants of the plaintiff's right to 1/3rd share of the family property, coupled with their willingness to divide the property and their prayer to the Court for permitting them to make a private partition together with the Court's order granting this prayer and adjourning the case for enabling them to carry out the partition, brings this case within the principles laid down by their Lordships of the Privy Council in *Appovier's* case (1). It is quite clear from the facts proved in the case that Harihar did everything that lay in his power to obtain separate possession of his share and had it not been for the obstacles which the defendants put in his way, he would have got his share separated long before his death. The defendants cannot, therefore, be allowed to benefit by their own wrong [*Joy Narain Giri v. Goluck Chunder Mytee* (7), see observations at page 356, column 2].

18. I have already said in paragraph 4 that on 9th March 1909 the case had reached the stage when a preliminary decree for partition could have been passed but that my predecessor adjourned the case till 4th May 1909 as he wanted to ascertain from the parties personally how the partition was to be effected. The maxim '*actus curiæ nemini gravabit*', therefore, applies. In Broom's Legal Maxims, Seventh Edition, page 97,* it has been observed that 'if one party to an action die during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, and, therefore, neither party should suffer for it.' In Order XXII, rule 6, of the Civil Procedure Code it is laid down that 'notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of

(5) 12 W. R. 510.

(6) 14 W. R. 339 at pp. 345, 346.

(7) 25 W. R. 355 at p. 356.

(8) 4 C. 434 at p. 437; 5 I. A. 228; 3 Sar. P. C. J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 276.

(9) 4 C. 425 at p. 430; 3 C. L. R. 534; 2 Shom. L. R. 113; 2 Ind. Dec. (N. S.) 270.

(10) 5 C. 474 at pp. 476, 477; 4 C. L. R. 428; 2 Ind. Dec. (N. S.) 911.

*See 8th Edition p. 100—Ed.

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either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such cases be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.' On behalf of the non-applicants it was urged that the above rule should not be considered to abrogate the provisions of Hindu Law and that it is applicable to those cases only to which no personal law applies, but I do not think that such a limited construction can be placed because 'the words whether the cause of action survives or not' are of general application and are wide enough to include cases to which the rule of survivorship under the Hindu Law applies.

19. It was next contended on behalf of the non-applicants that in order to effect a division of right among the members of a joint family there must be either an agreement by all the members, or a decree of Court by which the shares of all must be ascertained, and in support of this contention I was referred chiefly to the rulings reported as *Mooktakshree Debee v. Oomabutti* (11); *Bulakee Lall v. Musammatt Indurputtes Kovar* (3); *Upendra Narain Myti v. Gopee Nath Bera* (12); *Ram Pershad Singh v. Lakhpati Koer* (13); *Balabux v. Rukhmabai* (14); *Balkishen Das v. Ram Narain Sahu* (15); *Sudarshanam Maistri v. Narasimhulu Maistri* (16) and *Parbati v. Naunihal Singh* (17). In my opinion none of these cases goes the length of laying it down that if a member of a joint family has determined to separate and has communicated to the other members his unequivocal intention to that effect and if the other members do not agree and put obstacles in his way, he must obtain the decree of the Court before he can be considered to be separate in estate from the rest of the family. In the case of *Upendra Narain Myti v. Gopee*

Nath Bera (12), Prinsep, J., was merely considering the effect of the separation of one member on the status of the family and in that reported as *Sudarshanam Maistri v. Narasimhulu Maistri* (16), the observations of Bhashyam Ayyangar, J., at page 156 are *obiter dicta*.

20. On a consideration of the facts of the case and the law applicable to them I am of opinion that the deceased Harihar must be considered as being separated in estate. His widow, the present applicant, Girjabai, is, therefore, entitled to inherit his share and I order that her name be substituted in place of her deceased husband as the plaintiff in this suit."

The suit then proceeded and a preliminary decree for partition was given to the appellant.

The defendants appealed to the Court of the Judicial Commissioner against the order for substitution as well as against the preliminary decree. Both these appeals were allowed and the suit dismissed. The Judicial Commissioners held that no member of a joint and undivided family can separate himself from the joint family without an agreement between all the members thereof or an order, decree or declaration by the Court, and in the absence of such an agreement or order, decree or declaration Harihar must be held to have been joint at the time of his death, and that the suit, therefore, abated. The material part of their judgment was as follows:—

"Thus, the conclusion to which we have come is that if there ever was any severance of interest between Harihar and the defendants in respect of their joint family property, it was not effected either by agreement between the parties or by any act, order, decree or declaration by the Court.

It remains, therefore, to decide, whether, as claimed by the plaintiff, Harihar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy-in-common, so as to destroy the defendants' right of survivorship therein; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the plaintiff must succeed. If, on

(1) 14 W. R. 31; 8 B. L. R. 396 note.

(12) 9 C. 817; 12 C. L. R. 356; 4 Ind Dec. (N. S.) 1193.

(13) 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103; 30 I. A. 1; 8 Sar. P. C. J. 380.

(14) 30 C. 725; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130; 8 Sar. P. C. J. 470.

(15) 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 30 I. A. 139; 8 Sar. P. C. J. 489.

(16) 25 M. 149 at p. 156; 11 M. L. J. 353.

(17) 3 Ind. Cas. 195; 31 A. 412; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 983; 10 C. L. J. 121 (P. C.); 11 Bom. L. R. 878; 19 M. L. J. 517.

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the other hand, agreement between all the co-parceners, in pursuance of an intention to divide, was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail.

Very learned arguments were urged before us, and we have had the advantage of hearing two eminent exponents of the Hindu Law in controversy on the above question. We shall endeavour to reproduce those arguments briefly and to consider the numerous authorities by which they were supported.

It is an admitted fact that the parties are governed by the Mitakshara, as interpreted by the Benares School. On behalf of the plaintiff the contentions urged before us were that, in a Mitakshara joint family, the relation of members of the co-parcenary to the joint family and to one another is a metaphysical element, and, therefore, any change in that relation can be effected by a metaphysical operation or mental process only, accompanied by an expression of it by some physical act. It was then said that the following propositions of Mitakshara Law are settled by authority:—

1. That the right, title or interest of each and every member of a Mitakshara joint family to or in the joint family property, accrues to the *whole* of the property: and not to a fractional portion thereof as under the Dayabhaga.

[Mitakshara I. i-4; Viramitrodaya i-4 and i, 55-57; Dayabhaga i, 7, 8 and 9.]

2. That so long as the family is joint no individual member thereof can predicate that he has any definite share in joint family property.

[Appovier v. Rama Subba Aiyar (1).]

3. That partition is the adjustment of divers rights regarding the whole by distributing them in definite shares of the aggregate.

[Mitakshara I. i-4; Viramitrodaya i-4.]

4. That partition may be of *title* or of *property* the subject of that title, or of both.

[Appovier v. Rama Subba Aiyar (1).]

5. That a single member may compel partition, so far as he himself is concerned, and his co-parceners must submit to it even though opposed to it,

[Viramitrodaya ii, 123; Raja Ram Tewary v. Luchmun Persad (18), Musammat Deo Bunsee Koer v. Dwarkanath (2), Jogul Kishore v. Shib Sakai (19), Pirthi Pal v. Jowahir Singh (20), Bulkishen Das v. Ram Narain Sahu (15).]

Upon the basis of these propositions it was urged as a logical consequence that, when a member of a Mitakshara joint family feels a desire to separate from his co-parceners and communicates that desire to them, he becomes immediately separate in status and his share becomes capable of definition: if he demands his share and the other members assent to its separation there is a division of title—a cessation of jointness which defeats the operation of the law of survivorship. Thus, it was said, the conversion of a title of joint tenancy into a title of tenant-in-common is a metaphysical idea, depending on intention; a Mitakshara co-parcener, once he becomes *sui juris*, is at liberty to follow his own wish whether he will continue to hold his property jointly or in common with other members of his family, and if his desire is to separate his interest only he can give effect thereto by communicating to the other members his desire to live with them as a tenant-in-common. It was claimed that *Appovier's* case (1) is an authority for this proposition.

A passage was quoted from the Vyavahara Mayukha, section 3, paragraph 2, which had been translated thus:—

'Even when there is no joint property, partition may certainly take place also by the mere declaration, "I am divided from thee." Since partition is really nothing, but a kind of idea only; of that very idea (or state of mind) declaration is the manifestation.'

It was claimed that the word 'even' with which the passage begins implies that the rule applies *a fortiori* when there is joint property. We are not prepared to draw this inference, for reasons to be given hereafter.

Reference was then made to the following passage from the Sarasvati Vilasa, paragraph 28:—

'From this it is known that without any formality, partition can be effected (18) 8 W. R. 15 at p. 20.

(19) 5 A. 430 at p. 434; A. W. N. (1883) 102; 3 Ind. Dec. (N. S.) 364.

(20) 14 C. 493 at p. 505; 14 I. A. 37; 11 Ind. Jur. 232; 4 Sar. P. C. J. 758; Rafique and Jackson's P. C. No. 97; 7 Ind. Dec. (N. S.) 327,

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by mere intention, just as the making of an appointed daughter can be effected by mere intention without any formality.'

The soundness of this commentary may be accepted, but it obviously does not afford authority for the proposition that the intention of one only of the persons concerned shall be sufficient.

The learned Counsel for the plaintiff-respondent then cited and examined various judicial decisions in support of his interpretation of the Hindu Law, and with these we shall deal in due course. He asserted that the decisions are not uniform, but claimed that the Judicial Committee would appear to have finally decided that partition of title is a matter of intention only.

The argument on behalf of the defendants-appellants, though put forward in great detail and supported by numerous authorities, may be briefly summarised. Its substance is that while in the case of a Hindu joint family composed of a father and his sons the father alone may break up the co-parcenary, as laid down in the Mitakshara, Chapter I, section 2, and held in *Kandasami v Doraisami Ayyar* (21), in all cases of collateral co-parcenary governed by the Mitakshara, the severance of title going to convert a joint estate into a tenancy-in-common requires an agreement by all the co-parceners, or failing that, a decree for partition passed by a competent Court. It was urged that in the present case there had neither been agreement nor decree during the lifetime of Harihar, whereby his joint interest in the family property had been defined and severed; and that, therefore, the suit abated on his death.

For the purposes of this appeal we do not consider it necessary to refer to certain authorities and decisions on English Law quoted before us by way of analogy. The question to be decided is purely one of Hindu Law, and we are of opinion that analogies drawn from the English Law or any other system of jurisprudence can afford little assistance and may be misleading. We can start from the principle laid down in *Appovier v. Rama Subba Aiyar* (1), and repeatedly affirmed in subsequent cases by the Judicial Committee of the Privy Council, namely, that actual division by metes and

bounds is not necessary to complete the dissolution of the joint tenancy of a Hindu family, because by an agreement between the co-parceners there may be an operative division of title which will convert the joint tenancy into a tenancy-in common, without there being a corresponding division of the subject-matter to which the title relates. Therefore, the question before us narrows itself down to this:—

In a Mitakshara family composed of co-parceners who are collateral in relation to one another, is the mere communication of an intention to divide, made by one co-parcener to the other or others, sufficient to effect a severance of his interest in the joint estate, so as to make him, as it were, a tenant-in-common of a defined share, which, upon his death, will devolve by inheritance as his severalty?

We will now examine the material authorities cited before us, in order to see how far, if at all, they justify the affirmative answer which has been given to the above question by the lower Court, and which the plaintiff-respondent seeks to have repeated by this Court.

The only Sanskrit authorities which are said to deal expressly with the matter are the Mayukha and the Sarasvati Vilasa, the relevant passages wherefrom, upon which reliance is placed for the plaintiff-respondent, have already been set out above. As regards the Mayukha, in the first place it is not a recognised authority in the school of law which governs this case. But, leaving that aside, the passage expressly refers to the case of a separation where no property is involved. In such a case separation is a matter of sentiment only, and a member who severs himself from his brethren does not invade or affect any legal right of his co-parceners. But where there is property, the severance of the interest of even a single member involves an alteration in the legal rights of his co-parceners, and, in particular, a dissolution of their birthright in a portion of the joint property. It seems to be not only Hindu Law, but equity and commonsense, to hold that where a disposition of property jointly owned by two persons would, if made, affect the rights of them both, they should both have a voice in the making of such a disposition. As remarked by Garth, C. J., in *Radha Churn Dass v. Kripa Sindhu Dass* (10):—

(21) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

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'One can very well understand that as regards separation, any member or members of a family might separate from the rest at their option; a mere declaration by one member that he was separate from the others would seem to be sufficient to effect the separation. But *partition* of the property is a different thing, because, in order to effect a just partition, it is necessary, of course, to ascertain the share to which each and every member of the family is entitled.'

This passage has been clearly misunderstood by the learned Counsel for the plaintiff-respondent, who has relied on it in support of his argument. It was also apparently misunderstood by Bhashyam Ayyangar, J., in *Sudarsanam Maistri v. Narasimuhulu Maistri* (16), and by De Gruyther, K. C., in *Kedar Nath v. Ratan Singh* (22), where that learned Counsel quoted it as an authority for the very proposition contended for on behalf of the plaintiff in the present case. It seems clear from the passage itself that Garth, C. J., used the word 'separation' to denote something which was not a severance of joint interest in family property. We are not prepared to accept the inference drawn by the learned Counsel for the respondent before us that the Mayukha rule as to the requisites for a separation where there is no family property applies *a fortiori* to a severance of title to joint property.

As regards the passage from the *Sarasvati Vilasa*, as already stated, it does not carry the case beyond the rule recognised in *Appovier's* case (1) and constantly re-affirmed since that decision was published.

It was said that the above Sanskrit commentaries expressly set forth what is implied in all the others. We have not been able to find in the text books anything more than this that partition is a consequence of intention and agreement. There is certainly no passage in the *Mitakshara* raising an implication that the wish of one co-parcener communicated to the other or others is of itself sufficient to dissolve the joint tenancy.

Turning now to the case-law we think the most convenient way will be to examine first

therelevant decisions of the Supreme Tribunal, and then those of the several High Courts.

In *Char'otte Abraham v. Francis Abraham* (23); the Judicial Committee were dealing with a family which, though purely Hindu in origin, had been for several generations converted to Christianity. Their Lordships laid down, more or less as an *obiter dictum*, that the status of a member of an undivided Hindu family was altered by his conversion to Christianity, since such conversion amounted, under Hindu Law, to a severance of parcenership. This decision does not assist the plaintiff in any way. By conversion to another religion the undivided Hindu becomes an outcaste. Under Hindu Law that fact deprives him of his status in the joint family, and would also result in forfeiture of his estate if the Statute Law did not intervene. But Act XXI of 1850 interferes to prevent such forfeiture. The only way of giving effect to this Statute is by dividing off the share of the apostate from the joint estate which he is no longer qualified to hold in a state of jointness, and to treat it as his severalty. Such a partition is one made by Statute, and not by virtue of any authority conferred on the severing parcener by Hindu Law. It is a special case offering no analogy in support of the contention advanced in this case on behalf of the plaintiff-respondent.

The next case is *Appovier v. Rama Subba Aiyar* (1), as to which it is only necessary to say that it is the leading authority on the subject of partition of title unaccompanied by partition of the subject-matter of such title. It was generally urged before us that it supports the case of the plaintiff; but upon a careful perusal of the judgment of their Lordships, we are unable to find a single passage or phrase which is compatible with the view that a partition of title out of Court may be effected without an agreement among all the co-parceners.

In *Rajah Suraneni Venkata Gopala Narasimha Row v. Rajah Suraneni Lakshma Venkama Row* (24), there was a formal agreement as in *Appovier's* case (1), and their Lordships again held that the agreement to divide dissolved the joint estate. They

(22) 7 Ind. Cas. 648; 12 Bom. L. R. 656 (P. C.); 14 C. W. N. 985; 8 M. L. T. 193; 12 C. L. J. 225; 32 A. 415; 20 M. L. J. 500; (1910) M. W. N. 311; 13 O. C. 332; 37 I. A. 61.

(23) 9 M. I. A. 195 at p. 199; 1 W. R. 1 (P. C.); 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

(24) 13 M. I. A. 113; 12 W. R. (P. C.) 40; 3 B. L. R. 41; 2 Suth. P. C. J. 265; 2 Sar. P. C. J. 496; 20 E. R. 494.

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made no remark suggesting that if in place of the agreement between two brothers there had been only a demand, communicated by one to the other, the conclusion would have been the same.

Sri Gajapathi Radhika v. Sri Gajapathi Nilamani (25) was another case of a formal agreement to divide between two joint Hindu brothers, and the rule in *Appovier's* case (1) was re-affirmed. Here again the case of the plaintiff finds no foothold.

In *Doorga Pershad v. Musammat Kundun Koowar* (26), the Judicial Committee laid down that inasmuch as there may be a division of a joint Hindu family and its property, which, though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, *i.e.*, (as stated in the judgment of their Lordships) 'whether the intention of the parties to be inferred from the instruments which they have executed, and the acts they have done, was to effect such a division.' If anything, this is an authority against the plaintiff, because it suggests that the intention of all the co-parceners, expressed by agreement, is necessary to dissolve the joint estate. In any view the case affords no assistance to the plaintiff.

Maharajah Ram Kissen Singh v. Rajah Sheonundun Singh (27) lays down that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest and extinguishes the rights springing from united family ownership. Here again we have the same foundation of a *family agreement* for the conclusion of the Court.

In *Pirithi Pal v. Jowahir Singh* (20), one of the ruling principles laid down was that a member of a joint Hindu family cannot sue for a share of the profits of a joint family estate because he has no definite share until partition; and the plaintiff was required to sue for partition. This suggests that the plaintiff was not entitled to have his

(25) 13 M. I. A. 497; 14 W. R. (P. C.) 33; 6 B. L. R. 202; 2 Suth. P. C. J. 365; 2 Sar. P. C. J. 601; 20 E. R. 637.

(26) 21 W. R. 214; 13 B. L. R. 235; 1 I. A. 55; 3 Sar. P. C. J. 341.

(27) 23 W. R. 412; 3 Sar. P. C. J. 498.

share treated as separate merely because he himself so treated it, and claimed profits in respect of it.

In *Madho Parshad v. Melurban Singh* (28), the Judicial Committee said:

'Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. . . . Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient.'

In *Parbati v. Naunihal Singh* (17), which was against a case of mutual agreement among co-parceners, their Lordships of the Privy Council, reversing the judgment of the Court of the Judicial Commissioner of Oudh, insisted that the principle laid down in *Appovier's* case (1) should be followed.

In *Kedar Nath v. Ratan Singh* (22), it was contended on behalf of the appellants before the Judicial Committee that the mere fact of one co-parcener having filed a suit for partition amounted, in law, to a partition of title. Thereupon Mr. Ameer Ali, one of the presiding Judges, referred to *Debee Pershad v. Phool Koorree* (5), where it was held that a suit by one member of a Hindu family for a declaration of his right in the joint family property was not a sufficient indication on the part of the family of their intention to separate. In the same case another member of the tribunal, Sir Arthur Wilson, asked, "Is there a case where one co-parcener declared that he was separate, and it was held that such a declaration constituted partition?" De Gruyther, K.C., cited *Radha Ohurn Dass Kripa Sindhu Dass* (10) as an authority in support of that proposition: but, as already pointed out, the learned Counsel clearly misunderstood the true significance of the words 'separation' as used by Garth, C. J., in that case.

We turn now to the decisions of some of Indian High Courts. The judgment in

(28) 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 586; Rafique and Jackson's P. C. No. 121; 9, Ind. Dec. (N. S.) 105.

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Bulakee Lall v. Musammat Indurputtee Kowar (3) contains the following passage:—

'The parties are not in a position substantially different from that of a joint Hindu family. In such cases a separation may, at any time, take place at the will of any member of the joint family, and any act or declaration showing an unequivocal intention on the part of any share-holder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition. In the *Vyavahara Mayukha*, translated by Borradaile, page 52, it is said that, even when there is no property a partition may be made by a mere declaration—"I am separate from thee."

There are several reasons why we cannot accept this dictum as an authority for guidance in the present case. In the first place, it is *obiter*. Next, it does not state the particular school of Hindu Law to which it refers. Finally, it depends upon a passage of the *Mayukha* which we have already held to be inapplicable to a partition of joint family property governed by the *Mitakshara* as interpreted by the Benares School.

The case of *Badamoo Koer v. Wazeer Singh* (29), cited on behalf of the appellant, need not be considered, because it is one of a class of cases which was overruled by *Appovier's* case (1) as pointed out by Jackson, J., in *Joy Narain Giri v. Goluck Chunder Mytee* (7).

The case of *Raja Ram Tewary v. Luchmun Persad* (18) contains a learned dissertation by Sir Barnes Peacock, C.J., on the *Mitakshara* Law of partition, and affirms the now well-established proposition that the son acquires by birth an interest in ancestral property and can compel partition of that interest in the lifetime of his father: but the judgment offers no further guidance towards decision of the particular point now before us.

However, in *Musammat Vato Koer v. Rowshun Singh* (4), the case of the plaintiff-respondent before us finds foothold. After pointing out the rule in *Appovier's* case (1) the judgment contains the following passages:—

'Taking, then the admitted facts of the case before us we find that Sohun Singh did publicly and unequivocally by petition

presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakeable intention to hold and enjoy his own estate separately and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition. The community of interest and unity of possession which are the very essence of a joint Hindu family no longer existed. Further, the parties, it is admitted, have separated in food and residence. Sohun Singh in his lifetime dealt with his share in a manner inconsistent with the theory of a joint interest and liability and his separate enjoyment was not merely a matter of arrangement for the private convenience of the family.

* * * *

'The consent of the other members of the family was not necessary, for a son may force even a father, however reluctant, to divide the ancestral estate.'

In our opinion, neither the case of *Appovier* (1) nor any other published decision of the Privy Council lends support to the proposition set out above: nor is any other authority quoted by the learned Judges (Kemp and Glover, J.J.) responsible for the dictum above set out. With due respect we are unable to think that, because one member can compel partition of his share, he can, therefore, carry out partition single-handed without consulting his co-parceners. A creditor can compel payment by his debtor, but unless the debtor voluntarily gives effect to his demand the creditor cannot compel payment without the aid of the Court. In *Kulponath Doss v. Mewah Lall* (30), the same learned Judges were on firmer ground in applying the doctrine of *Appovier's* case (1) because they had before them a written agreement by all the co-parceners to separate.

In *Musammat Deo Bunsee Koer v. Dwarka-nath* (2), it was held that every member of a joint Hindu family has an indefeasible right to demand a partition of his own share, and the other members of the

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family must submit to it whether they like it or not. This is a settled doctrine that no one will dispute, but as we have already endeavoured to show a demand for a share is not the same thing as a severance of that share from the joint *corpus*.

We are unable to find anything helpful to the case of either side in *Gopee Lall v. Mohunt Bhugvan Das* (31), and only mention the ruling as it was cited before us.

In *Mooktakeshee Debee v. Oomabutty* (11), it was held that the principle laid down in *Appovier's* case (1) does not apply where there is no deed or agreement between the parties contemplating the subject of separation. So far as it goes this is an authority against the contention on behalf of the plaintiff-respondent.

However, considerable stress is laid on the observation of Markby, J., in *Ram Dhyam Koonwar v. Musammam Phoolbas Kooer* (6) where the learned Judge said:—

'It appears to me that when once you have arrived at the point of holding that a mere signification of intention is sufficient to constitute a separation without an actual partition by metes and bounds, and you couple that with the acknowledged principle that any one member has a right to insist on a separation, it follows, almost as a direct logical consequence, that an unequivocal signification of intention to that effect on the part of one member constitutes him a separate owner of his share.'

A perusal of the whole judgment discloses that the above remark was purely *obiter*, and that the learned Judge put it forward to show what, in his opinion, would be the consequence of applying principles in which he did not concur, but which he felt himself bound to adopt in consequence of the Full Bench decision in *Sadaburt Prasad Sahu v. Foolbush Koer* (32). The head-note expressly states it to be a point undecided whether a mere signification of intention on the part of a member of a joint Hindu family is sufficient to constitute a separation.

In *Musammam Phoolbas Kooer v. Lalla Juggesur Sahoy* (33), Markby, J., being asked to review the above reasoning adhered to his opinion; but, on appeal to the Privy Council—*Phoolbas Koonwar v. Lalla Jogeshur Sahoy* (34)—his decision was upset. It seems to us, with all due respect, that the reasoning is obviously fallacious. A signification of intention to separate made by all the members of a joint family is tantamount to an agreement to partition, and that dissolves the joint tenancy. A signification of intention to separate made by one member only is merely a demand for that to which he is entitled; but demand is one thing and receipt is another. The reasoning of Markby, J., appears to us to confuse the one with the other. At all events it is purely *obiter* and its value must be discounted accordingly.

In *Bhoobun Mohinee Debee v. Poorna Chunder Banerjee* (35), the essence of the decision in *Appovier's* case (1) was interpreted to be this: that the members of the coparcenary had entered into an express agreement among themselves whereby a distinct intention to separate their interests in the joint estate was declared: and, therefore, the Calcutta Court decided in the above case that a mere description by co-parceners of their interests in the family property, unaccompanied by any declaration of an intention to separate, was insufficient to sever the titles. This was also the view in *Musammam Phoolijhuree Kooer v. Ram Pershun Singh* (36) and we concur in it. It is perfectly intelligible that, without any present intention to divide, the members of a joint Hindu family may settle by agreement the share to which each will be entitled whenever division does take place.

In *Joy Narain Giri v. Goluck Chunder Mylee* (7), the surviving sharer in an estate sought to be put in possession of his co-sharer's portion, as manager on behalf of the latter's widow, on the ground that, though the deceased co-sharer had made efforts to reduce his share to distinct possession, those efforts had not been completely successful when he died and

(33) 18 W. R. 48.

(34) 1 G. 226; 25 W. R. 285; 3 I. A. 7; 3 Sar. P. C. J. 573; 3 Suth. P. C. J. 236; 1 Ind. Dec. (N. S.) 144.

(35) 17 W. R. 99.

(36) 8 B. L. R. 385; 17 W. R. 102.

(31) 12 W. R. 7.

(32) 12 W. R. (F. B.) 1; 3 B. L. R. 31 (F. B.).

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he could not, therefore, be said to have had separate enjoyment of the said share. The Calcutta High Court held that as the deceased co-sharer had done everything possible to obtain separate possession, and it was only the opposition of the plaintiff that had obstructed him, it would be allowing the plaintiff to benefit by his own wrong to give him possession, and that the share of the deceased co-parcener must devolve by inheritance as his severalty. The particular passage of the judgment relied on for the respondent reads thus:—

'In *Sheo Dyal Tewaree v. Judoonath Tewaree* (37), it was held, no doubt, by the late Mitter, J., that the Court would not consider there had been a separation unless there had been enjoyment of the several shares. But that was a very different case from the present and we may be quite sure that acute and able Judge would never have allowed the plaintiff to profit by such a plea when the deceased co-owner had not merely declared his intention but done everything that lay in him to carry it out and when the failure to do so was entirely the result of the plaintiff's own determined opposition.'

Read as a general proposition, severed from the particular facts of the case in which they were made, the above remarks appear to support the contention that a mere demand for a share, the physical severance whereof in satisfaction of that demand before the death of the claimant is only prevented by the opposition of his co-parceners, divides such share from the joint estate: but a glance at the facts of the case before the Calcutta Judges makes such a conclusion impossible. These facts were that the deceased co-sharer had separated himself in mess and residence, and had brought a suit for possession of his share, in which he was successful, though the opposing co-parcener carried the case up to the Privy Council. He had applied to execute the decree, and during the pendency of that proceeding had died. In the present case if Harihar had obtained a preliminary decree for partition before he died, the right of the plaintiff to continue the suit would have been undeniable. But as that stage was never reached by Harihar, the

ruling last above referred to lends no assistance to the plaintiff's case. It is noteworthy that though the decree in this Calcutta case was affirmed by the Privy Council—*Joy Narain Giri v. Girish Chandra Myti* (8)—the reasoning of the Supreme Tribunal was somewhat different from that of the Calcutta Judges. Their Lordships treated the conduct of the separating co-parcener 'as indicating, at all events, that he himself considered that a separation had taken place.' But they did not rule that his conduct alone had effected the separation. They decided that the decree obtained by him was such as to 'effect a partition, at all events, of rights,' which was effectual to destroy the joint estate under the doctrine laid down in *Appovier's* case (1).

An authority pressed before us on behalf of the plaintiff-respondent is *Raghubanund Doss v. Sadhu Churn Doss* (9). At page 430 appears the following dictum of Markby, J.:—

'As I understand the Hindu Law, no right vested in the plaintiff's father to any specific share. No right vests in any member of the family to a specific share until some act has been done which has the effect of turning the joint ownership into several ownership. This may be done by a mere signification of intention, and when a signification of intention has once taken place which has this effect, the share of each member becomes at the same moment both several and defined. It is, as I understand the law, this signification of intention, producing concurrently these two results, which enables a member of a joint Hindu family to dispose of his share by sale whilst the family still remains joint, which he can do certainly in some districts of India, possibly in all. The change which thus takes place is that which Lord Westbury in *Appovier's* case (1) likens to the change of joint tenancy to tenancy-in-common under the English Law. It has its origin in the power of each member of a family to demand a partition at any moment, and the inability of the family to retain any member in joint ownership longer than he may desire.'

The learned Judge does not make it clear whose is the declaration of intention which effects the severance of title, whether of all or one only of the co-parceners. If of all

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then the *dictum* is perfectly correct; if of one only then it is an echo of an opinion of this learned Judge in an earlier case which we have already discussed. As to the power of alienating an undivided share recognised by some High Courts, we shall hereafter show that it has no bearing on the point in issue before us, because it is not a creation of Hindu Law but of case-law.

We have already pointed out that in *Radha Churn Dass v. Kripa Sindhu Dass* (10), the observation of Garth, C. J., at page 477, as to separation by the mere declaration of one member, is no authority for holding that partition of joint property can be effected by such a declaration, and we need not further refer to this case.

The case of *Tej Pratap Singh v. Champa Kalee Koer* (38) was one of an agreement in writing between two brothers, and the principle laid down in *Appovier's* case (1) was followed.

The latest Calcutta cases to which our attention has been drawn, namely, *Jogendra Nath Rai v. Baldeo Dass* (39) and *Satya Kumar Banerjee v. Satya Kripal Banerjee* (40) (already cited in connection with another point) do not carry the matter now under discussion any further. They merely reiterate the doctrine laid down in *Appovier's* case (1).

We next direct our attention to some of the Madras case-law. In *Kandasami v. Doraisami Ayyar* (21), it was laid down that a partition made by the father is binding on the sons, not only in respect of the father's share, but also of their own shares, provided that it is made subject to the restrictions mentioned in Hindu Law. It becomes obligatory by the will of the father as regulated and restrained by law, irrespective of the consent of the sons. Such a power is expressly given to the father by the Mitakshara, and by necessary implication it is not given to any other member of the Hindu joint family. Every other such member may demand and by agreement with his co-parceners or failing that, by process of Court may obtain a partition of his share. But the

father alone may himself make such a partition single-handed.

In *Subburaya Mudali v. Manika Mudali* (41), it was held that where the plaintiff in a partition suit died subsequent to a decree for partition, but pending an appeal against such decree, the right to sue survived to the personal heir of the deceased plaintiff, the decree having defeated the right of survivorship: and there was an *obiter dictum* to the effect that if the plaintiff had died before any decree for partition had been made, the suit would have abated by operation of the law of survivorship.

In *Sudarsanan Maistri v. Narasimkulu Maistri* (16), the origin and nature of the Mitakshara doctrine of joint family property was discussed by Bhashyam Ayyangar, J., and, as already pointed out, he dissented from what he believed to be the erroneous *dictum* of Garth, C. J., in *Radha Churn Dass v. Kripa Sindhu Dass* (10). It seems clear that if the decision of this learned exponent of Hindu Law had been sought in the present case, it would have been given against the plaintiff-respondent.

In *Thandayuthapani Kangiar v. Ragunath Kangiar* (42), it was argued for the appellants in that case that the institution of a suit for partition does not, by itself, put an end to the joint status of a Hindu family: that co-parcenary cannot be determined by the will of a single co-parcener: that it can be ended,

(1) By agreement of parties;

(2) By action of the Court;

(3) By creditors who seize and sell a share of a co-parcener;

and it was urged that in a partition suit, on the death of a plaintiff after decree, but pending an appeal against that decree, no legal representative can continue the suit. This contention failed, and the Court held that partition of title can be effected, among other ways—

(1) By agreement of parties;

(2) By a decree of the original Court to that effect.

(38) 12 C. 96; 6 Ind. Dec. (N. S.) 65.

(39) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

(40) 2 Ind. Cas. 247; 10 C. L. J. 503.

(41) 19 M. 345; 6 Ind. Dec. (N. S.) 946.

(42) 10 Ind. Cas. 660; 21 M. L. J. 240; (1911) 1 M. W. N. 223; 9 M. L. T. 421; 35 M. 130.

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The plaintiff-respondent before us can get no help from this or any other of the Madras decisions.

We now take up the Bombay cases. In *Babaji Parashram v. Kashibai* (43), it was ruled that where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary estate of an undivided family, an agreement to divide, without more, is not of itself sufficient to effect a partition. It seems to us that it would be difficult to reconcile this *dictum* with the rule laid down in *Appovier's* case (1) and repeatedly re-affirmed by the Supreme Tribunal in subsequent cases. The Bombay Court further held, in the same case, that a direction to divide made in a decree is nothing more than an inchoate partition, insufficient to change the character of the property, which continues a joint estate until there has been an actual partition thereof by metes and bounds. This proposition is clearly unsustainable at the present day, in view of what has been laid down by the Privy Council. We cannot find that this Bombay judgment has been expressly dissented from in any subsequent case; but it seems to us, with due respect, to be obsolete and, in the main, unsound.

In *Sakharam Mahadev Dange v. Hari Krishna Dange* (44), there is an *obiter dictum* that a decree for partition does not operate as a severance so long as it remains under appeal—a view directly in conflict with that propounded in the case of *Thandayuthapani Kangiar v. Ragunath Kangiar* (42) above cited. It is not necessary that we should enter upon any discussion of this conflict of authority as the point is not in issue before us.

In *Ashabai v. Haji Tyeb Haji Rahimtulla* (45), it was held that to effect a partition of ancestral property under the Mitakshara, there must be, in the absence of division by metes and bounds, at any rate an agreement that each party interested shall henceforth enjoy the produce of a certain definite share of the joint property. We cannot find that the Bombay Tribunal has departed from

this view in any subsequent case, and it seems, therefore, that the High Court of the Presidency wherein the Mayukha (upon the text of which reliance is placed for the plaintiff-respondent) is a paramount authority, interprets the Hindu Law of partition in the way claimed as correct by the defendants-appellants.

We next examine some cases of the Allahabad High Court to which our attention was drawn. In *Bilaso v. Dina Nath* (46), we are unable to find anything which assists, even by analogy, our decision on the point now before us.

In *Jogul Kishore v. Shil Sahai* (19), the decision was that in a joint Hindu family governed by Mitakshara a grandson has by birth a vested interest in ancestral property, which entitles him to enforce partition in the lifetime of his father and grandfather. It was further held that such interest could be attached and sold in execution of a decree. But we can find here no authority for the view that the grandson could effect a severance of his interest by merely communicating to his father and grandfather his intention to separate.

No decision of this Court, reported or unreported, has been found to sustain directly the view of the law which has been accepted and adopted by the lower Court. But there is a current of rulings of this Tribunal as to the power of an undivided co-parcener to alienate his share of the family property: and from these it was sought, in argument before us, to draw an analogy in favour of the plaintiff-respondent. In *Diwaker Janardhan v. Janardhan Chimnaji* (47) and *Bina Pujari Brahmin v. Biraj Mohan Baboo* (48), Crosthwaite, J. C., following earlier decisions, held that under the general principles of Hindu Law one co-sharer can dispose of his own share of ancestral undivided property for value. In *Ramprasad v. Deokaran Bhagwandas* (49), where one of two brothers holding joint estate had mortgaged his undivided interest and died before any proceedings were taken

(43) 4 B. 157; 4 Ind. Jur. 637; 2 Ind. Dec. (N. S.) 613.

(44) 6 B. 113; 3 Ind. Dec. (N. S.) 533.

(45) 9 B. 115; 5 Ind. Dec. (N. S.) 77.

(46) 3 A. 88; 5 Ind. Jur. 489; 2 Ind. Dec. (N. S.) 61.

(47) 3 C. P. L. R. 64.

(48) 3 C. P. L. R. 126.

(49) 6 C. P. L. R. 60.

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by the mortgagee to attach or partition the share, it was held by Stevens, J. C., that the mortgage could not be defeated by operation of the law of survivorship. In *Abdul Aziz v. Ajudhia* (50), it was decided by Ismay, J. C., that the purchaser of an undivided share of one member of the Hindu family in specific family property can only obtain separate possession of that share by enforcing a partition of the whole property, as by that means alone could the property sold to him be legally defined and ascertained. In *Mukund Ram Sukal v. Ram Ratan* (51), it was pointed out by one of us that though there is diversity of opinion in the four Chartered High Courts in India as to the right of a Hindu co-parcener to make a voluntary alienation of his undivided interest in joint family property, the view in favour of that right, propounded by the Madras and Bombay Courts 'has for many years been tacitly accepted in the Central Provinces,' and found expression in the cases above cited.

It was argued for the plaintiff-respondent that since a co-parcener, by making a voluntary alienation, can cause a severance of his share irrespective of the wishes of his co-parceners, it follows that he must have power, independently of them, to sever his share by his own act and declaration. This argument, though plausible is, in our opinion, unsound. It assumes that alienation of an undivided share, converts that share from joint estate into an estate in common. But that is not the case. The alienation effects no severance of the alienor's undivided interest. It merely transfers to the alienee the transferor's right to demand a partition; but the alienee can only obtain that partition in the same way as the alienor could have obtained it. The only difference is that by a rule of equity, applied by the Courts entirely for the benefit of the purchaser for value, this right to partition in the hands of the transferee is not subject to the law of survivorship which governed it while in the hands of the transferor. In *Diwaker Janardhan v. Janardhan Ohimnaji* (47), the learned Judicial Commissioner wrote:—

'The view of the law taken by the Madras and Bombay High Courts has been followed for many years in these Provinces. It has been held that as a co-parcener can claim partition of his share he should, if he alienates his share, exercise his power so as to be in a position to place the transferee in possession of the share. Therefore it is held that on equitable grounds, the transfer by a co-parcener of his share in a joint undivided estate can be enforced.'

This rule of equity is extrinsic of the Hindu Law, and, so far as it defeats the operation of the law of survivorship, is in opposition to it. It is only the transfer for value that is recognised, the payment of consideration giving rise to the equity in favour of the purchaser. This was pointed out by the Judicial Committee in *Suraj Bansi Koer v. Sheo Persad Singh* (52), as being the rule in Bombay. Their Lordships added that the Madras Court had gone to the extent of recognising alienation by gift. But since the publication of the case last cited, this position has been abandoned by the Madras Tribunal which has now placed itself in alignment with the Bombay Court: cf., *Baba v. Timma* (53) and *Ponnusami v. Thatha* (54). In *Suraj Bansi Koer's* case (52), their Lordships further said:—

'There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition.'

In the same case their Lordships also pointed out that it is a vexed question whether the alienation would be defeated by the death of the transferor before partition of the transferred share has been effected, and at page 174 they abstained from deciding that question, and noted that it had been left open in former decisions of the Privy Council.

(52) 5 C. 148 at p. 166; 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(53) 7 M. 357; 8 Ind. Jur. 183; 2 Ind. Dec. (N. S.) 833.

(54) 9 M. 273; 3 Ind. Dec. (N. S.) 587.

(50) 15 C. P. L. R. 156.

(51) 2 N. L. R. 52.

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In *Krishnasami Ayyangar v. Rajagopala Ayyangar* (55), the facts were that the undivided share of a Hindu co-parcener had been sold in execution of a decree by his creditor. The proceeds of the sale having proved more than sufficient to satisfy the decree, the surplus was used to purchase certain lands. It was held that the parcel of the judgment-debtor's undivided share, now represented by the said lands, had never been divested of its character of co-parcenary property and, consequently, that the lands were joint family property, and not the severalty of the judgment-debtor. This is consistent with the view that, on alienating his share, an undivided co-parcener does not, *ipso facto*, effect an immediate severance of his interest in the joint family estate.

Though, as shown above, the matter is *res integra* in the Privy Council, it appears to be well established in India that if a purchaser for value buys the interest of an undivided co-parcener who dies before partition has taken place, the contract nevertheless takes effect, and the purchaser may obtain partition: *Gurlingapa Satwirapa Gidwir v. Nandapa Chanbasapa Solapuri* (56); *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (57). But it does not seem to follow from this that the act of alienation is itself sufficient to effect a severance of interest under Hindu Law, so as to make the purchaser a tenant-in-common with the co-parceners of his alienor. If, instead of proceeding to partition, the purchaser made a re-conveyance to his vendor, or the alienation of the undivided share were otherwise cancelled, then, it seems to us, the interest of the vendor would continue to be a part of the joint family property in the same way as if it had never been subject to a contract of alienation. Under such an alienation the vendee gets a vested interest by virtue of the transfer, and equity will not permit any subsequent act or default of the vendor alone to defeat the transfer. But the whole scheme of partition of an alienated share rests on the alienor's right to demand a partition, supplemented, when

necessary, by an equity in favour of the transferee. There is no room for an inference that because a parcener can alienate, therefore, he can also partition, without the co-operation of his co-parceners, the title to his undivided share in the joint estate.

In his work on *The Law of Joint Property and Partition* (Tagore Law Lectures, 1895) Mr. R. C. Mitra remarks, at page 298: "What really amounts to partition under the Mitakshara is a question of some nicety." Then, after considering some of the decided cases, the learned author at page 308 sets out a summary of the case-law, and draws therefrom, *inter alia*, the following inference:—

"In those cases where a co-parcener can at any moment demand a partition, a co-parcener has merely to signify to the other co-parceners his present intention to separate, and from the time when such intention is made known to the other sharers, the co-parcener may be considered separate from the others both in family and property. A long time may elapse before any separation into distinct portions can be actually effected, or even before the extent of such co-parcener's share in the *corpus* can be determined, but the joint interest of the separating co-parceners ceases and his individual interest begins from when he makes his demand."

With due respect, we do not think that the above inference is correctly drawn from the case-law. It is an inference unsupported by anything except the *obiter dicta* of three learned Judges of the Calcutta High Court, which we have already discussed.

Upon the best consideration that we have been able to give the matter, we are of opinion that, except in the special case of a father severing from his sons, partition of property, unaided by the Court, among the members of a joint Hindu family governed by the Mitakshara, can only be effected by an agreement among all the co-parceners concerned, whereby, at least, they declare their intention to separate. We hold that declaration of such intention by any fraction of the co-parcenary body, or the mere demand by any member for partition of his share,

(55) 18 M. 73; 4 M. L. J. 212; 6 Ind. Dec. (N. S.) 400.

(56) 21 B. 797; 11 Ind. Dec. (N. S.) 536.

(57) 25 M. 690.

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does not of itself disrupt the family estate or destroy the right of survivorship.

For the above reasons this appeal and First Appeal No. 16 of 1911 are allowed, and the decree and order from which they are respectively made are set aside. We declare that on the death of Harihar the suit for partition instituted by him, out of which these appeals have arisen, abated, and that by operation of the Mitakshara Law of survivorship, his undivided interest which he sought to have partitioned has lapsed to the defendants. Under the circumstances of the case we order that each party do bear his and her own costs in this Court, and that the costs of the suit in the lower Court be borne by the joint estate."

The appellant thereupon appealed to His Majesty in Council.

Sir Robert Finlay, K. C., M. P., and Mr. Dunne, for the Appellant.—It is a settled principle of the Hindu Law that where a member of the joint family had a right to demand partition, a separation was effected by a declaration of his intention followed by its communication to other members of the family. Their consent was immaterial as it was equivalent to actual division of the joint property. This principle was laid down in the recognised books on Hindu Law as well as in a course of judicial interpretation. The plaintiff had expressed his desire to separate, to which other members raised no objection. Partition was complete before the suit was brought and was certainly so as soon as the pleadings were closed.

Reference was made to *Kedar Nath v. Ratan Singh* (22); *The Law of Joint Property and Partition* by R. C. Mitra (Tagore Law Lectures, 1895), page 298; West and Bahler (3rd Edition), Volume II, page 840; Mandlik's Hindu Law, Part II; Mayukha, section 4, page 47.

Messrs. DeGruyther, K. C., and Parikh, for the Respondents.—The appellant had failed to discharge the onus on her to prove that her husband was separate in estate at the time of his death. In a joint family consisting of collaterals a partition could only be effected by an agreement amongst them declaring their intention to separate in estate or by a decree for partition—circumstances wholly

wanting in the present case. Plaintiff could not, by mere declaration of intention to separate followed by a demand for partition, convert joint interest into a tenancy-in-common so as to destroy rights of survivorship.

[LORD SUMNER.—What does he go to Court for? He goes there to ask that his will should be carried out. If he says that he wants the order of the Court for the rest of the property only, then it rests in his will and not in Court where you go to have disputed rights ascertained.]

There was no decided case in India which laid down the rule that mere expression of intention amounted to partition.

[LORD SUMNER.—I always understood that the judgment of the Judicial Committee was followed in all cases where the judgment was arguable].

[LORD SHAW referred to *Suraj Narain v. Iqbal Narain* (58). The special points raised in this case would not have varied the decision in *Suraj Narain v. Iqbal Narain* (58)].

Reference was made to Mayne's Hindu Law, pages 334-335; *Appvier's case* (1); *Pirithi Pal v. Jowahir Singh* (20).

Sir Robert Finlay, in reply.

JUDGMENT.

MR. AMEER ALI.—This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain a declaration of his right to a one-third share in certain moveable and immoveable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from

(58) 18 Ind. Cas. 30; 13 M. L. T. 194; 17 C. W. N. 333; (1913) M. W. N. 183; 11 A. L. J. 172; 17 C. L. J. 288; 24 M. L. J. 345. 35 A. 83; 15 B. N. L. 453; 16 O. C. 129; 40 I. A. 40.

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the joint family. If he was, his share would be inherited by his widow Girja Bai, the appellant; if not, the defendants-respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the plaintiff in this suit; two, Damoodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj, the first defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are defendants in this action. Jageswar, another brother, died in 1906 without leaving any male issue. Thus, on the 21st October 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parseoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bahi khatas* (account-books) were opened in their respective names. The plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint family; that he had communicated his intention to the defendants; and had, on the 1st October 1908, served a registered notice on the first defendant, "the manager of the joint family," and "as the defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October 1908, when he demanded partition and his one-third share.

The defendant admitted the plaintiff's claim, and added that in answer to the registered notice, the first defendant had stated that he had no objection to a division of the estate which "should be made by

private persons without going to Courts." They further urged that as they were willing to divide the estate the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the defendants and the filing of their written statement appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say:—

"The defendants entered appearance on the 15th February 1909, and on the 9th March 1909, it was admitted on their behalf that the plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain moveables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May 1909. On that date the case was put off to the 10th May 1909, at the instance of the defendants, who sought a compromise. Then there was a further adjournment to the 20th June 1909, upon the ground that the illness of defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June 1909, his widow, Girja Bai, the present appellant, applied for substitution as the heir and legal representative of her deceased husband; and then the contest began. The defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the appellant. The case then proceeded to trial, and on the 8th April 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The defendants appealed to the Judicial Commissioner's Court both from the order of the 23rd January 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate

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and learned judgment have upheld the defendants' contentions; in substance the conclusion at which they have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:

"The defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a co-parcenary interest is not the same thing as even a passive consent to the severance of that interest; much less is it tantamount to an agreement to divide. The defendants never denied the title of Harihar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circumstances, the only compromise (once the share of Harihar and the estate to be divided had been admitted), which defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Harihar had finally decided to sever his estate and had demanded that this should be done."

And again:—

"It remains, therefore, to decide, whether, as claimed by the plaintiff, Harihar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy-in-common, so as to destroy the defendants' right of survivorship therein; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the plaintiff must succeed. If,

on the other hand, agreement between all the co-parceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgment.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated, Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 4th February 1902, Harihar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the joint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first defendant's separate names.

Jageswar died in 1906, and on the 1st October 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the 19th October the defendant sends a reply through a Pleader; he first tries to persuade Harihar to abandon his intention of getting the joint estate divided, and then goes on to say: "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply,

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brought his suit three days after the defendant's letter. Written statements were filed on the 15th February 1909, and on the 9th March following the District Judge recorded the following additional statement, as he calls it, by the defendants' Pleader: "The defendants do not deny the plaintiff's right to claim one-third share in the joint family, both moveable and immovable. The plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the plaintiff's right to claim partition nor the extent of his share is denied, he says: "Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March 1908, the parties were of one mind on the question of partition. The plaintiff demanded a division of the joint family property. The defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the plaintiff's demand on the part of the defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows:—

"Rao Bahadur Bapurao Dada, a well-known Pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October 1908; that he persisted in his demand for a share; and that, his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation; but finding him disinclined to do so, because he was engaged in mediating to bring

about a compromise, Harihar had the plaint presented by another legal adviser, leaving Mr. Bapurao Dada to appear for the defendants."

And they go on to say:—

"Upon these facts we have no hesitation in coming to the conclusions:—

"1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain v. Iqbal Narain* (58), the rule of law applicable to cases of separation from the joint undivided family, was laid down by their Lordships in the following terms:—

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy-in-common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj Narain v. Iqbal Narain* (58).

In the Hindu Law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord

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Westbury in *Appocier's* case (1), both "division of title and division of property." In the *Mitakshara*, Vijnaneswara defines the word *vibhaga*, which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viramitrodaya* the meaning of this passage: he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's translation, Chapter I, section 36): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." The *Viramitrodaya* is a commentary on the *Mitakshara*, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the *Mitakshara* is it stated that agreement between all the co-parceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negated in the *Viramitrodaya* (Chapter II, section xxiii). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha, the author of the *Vyavahara Mayukha* (Chapter IV, section 3, Mandlik's translation, page 38), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same." The *Sarusvati Vilasa* gives expression to the same view. After quoting the definitions of various earlier writers, it says: "from

this it is known that without any formally partition can be effected by mere intention." (Sutlur's Translation of Hindu Law Books on Inheritance, page 122). Their Lordships are aware that the *Vyavahara Mayukha* is not recognised as an authority in the Benares School; they refer, however, to the dictum of Nilkantha as showing the general conception of Hindu legists on the subject of severance from jointness. But the following gloss in the *Viramitrodaya* appears to their Lordships conclusive on the rule of law under the *Mitakshara*: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see section 23A), "whether in the lifetime of the father or after his demise, may take place by the choice of a single co-parcener, since there is no distinction" (Chapter II, section xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status: whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others,

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In *Madho Parshad v. Mehrban Singh* (28), Lord Watson, delivering the judgment of this Board, declared in explicit terms the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of several members of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer to the language used by that distinguished Hindu Judge, Mr. Justice Dwarkanath Mitter, in *Musammal Deo Bunssee Koer v. Dwarkanath* (2), a *Mitakshara* case:—

"Now, it is a settled doctrine of the Hindu Law," said that learned Judge, "that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, *viz.*, the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods: by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Appovier v. Rama Subba Aiyar* (1), this Board had to deal with an argument based on a similar notion that "a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divid-

ed property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu Law," he proceeds thus:

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

And in another place, he adds: "It is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in this joint property did not spring from the deed or the agreement of the parties to which it gave expression; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri v. Girish Chunder Myti* (8), their Lordships regarded the conduct of one of the two co-sharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality

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as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a Will, as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who it was alleged had separated himself, and not from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the Judicial Committee in *Appovier's* case (1), Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Musammatt Vato Koer v. Rowshun Singh* (4), a case governed by the law of the Mitakshara, expressed himself thus on this question of separation:—

"Taking then the admitted facts of the case before us, we find that Sohun Singh did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships' judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his co-parceners.

Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The respondents must pay the costs of this appeal and of the appeals in the Judicial

Commissioner's Court. And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitor for the Appellant: Mr. E. Dalgado.

Solicitors for the Respondents: Messrs. Downer and Johnson.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 36 OF 1915.

June 27, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

BABU LAL—DEFENDANT—APPELLANT
versus

JALAKIA—PLAINTIFF—RESPONDENT.

Mortgage—Prior and puisne encumbrancers, decrees obtained by—Sale in execution of both decrees—Purchase by first mortgagee with symbolical possession—Actual possession by purchaser at second mortgagee's sale—Conflict of titles—Right of first mortgagee purchaser—Suit for recovery of mortgage amount—Nature of claim—Position of parties—Equities—Relief—Transfer of Property Act (IV of 1882), ss. 74, 75—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 11, 12—Appeal, second—Limitation, plea of, whether can be raised for first time in second appeal.

It is necessary, in a suit to enforce a mortgage security, that all necessary parties, including puisne and prior encumbrancers, should be impleaded. [p. 346, col. 2; p. 347, col. 2.]

Where, however, the rule is departed from and both prior and puisne mortgagees institute suits on their respective mortgages without impleading each other and obtain decrees, and in execution of such decrees the property is purchased by different persons; in a suit to establish the priority of claim as between such purchasers in which the decree-holders and judgment-debtors are also impleaded, it is the duty of the Court to look to the real position of the parties and in awarding relief, work out the equities between them [p. 346, col. 2.]

On 16th October 1893, M mortgaged a house to plaintiff's predecessor. In 1907, M effected a second mortgage of the same house to K. On 19th August 1910, the plaintiff sued on his mortgage without impleading K and obtained a decree after contest, in which the mortgagor was allowed the usual six months' time to redeem. The decree was made absolute in due course and the house was brought to sale and purchased by plaintiff on 30th July 1912. On 20th June 1911, K filed a suit on his mortgage without impleading the plaintiff. A consent decree was passed on 18th August 1911, in which the mortgagor was allowed only fifteen days to redeem. The house was sold again on 27th February 1912 and was purchased by B. Plaintiff was given formal possession and B got actual possession. Plaintiff brought the present suit against B and K for recovery of the amount due on his mortgage of 1893 and for possession of the house on default of payment:

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Held, (1) that the suit was neither one for sale on plaintiff's mortgage nor a suit to foreclose that mortgage, but was based on plaintiff's failure to obtain actual possession of the property which he had purchased at the sale in execution of his decree; [p. 346, col. 1.]

(2) that B was entitled to nothing more than an opportunity of paying off the prior mortgage, and that on his declining to do so, he should surrender possession; [p. 346, col. 2; p. 348, col. 1.]

(3) that, as the right of sale possessed by each of the mortgagees had been exercised by them and exhausted, there was no need to put up the property again to sale or bring a second suit for sale and that what remained to be determined was the respective rights and liabilities of the rival auction-purchasers; [p. 346, col. 2; p. 347, cols. 1 & 2.]

(4) that limitation for the suit commenced to run from the date of plaintiff's purchase. [p. 348, col. 2.]

Mulla Veetil Seethi Kutti v. Korumbath Paruthooli Achuthan Nair, 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431, *Ram Prasad v. Bhikari Das*, 26 A. 464 at p. 466; A. W. N. (1904) 108; *Hargu Lal Singh v. Gobind Rai*, 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (n. s.) 350, *Madan Lal v. Bhagwan Das*, 21 A. 235; A. W. N. (1899) 41; 9 Ind. Dec. (n. s.) 859, *Har Pershad Lal v. Dalmardan Singh*, 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371, referred to.

Nanack Chand v. Teluckdye Koer, 5 C. 265; 5 Ind. Jur. 81; 4 C. L. R. 358; 2 Ind. Dec. (n. s.) 779, *Dhorgopal Lal v. Bolakee*, 5 C. 265; 5 Ind. Jur. 82; 2 Ind. Dec. (n. s.) 782, distinguished.

Per *Piggott, J.*—It would be contrary to sound principles to allow a defendant to raise for the first time in second appeal a plea, even one of limitation, which could not be determined without the taking of fresh evidence upon a question of fact not at all raised in the Courts below. [p. 347, col. 1.]

Per *Lindsay, J.*—The title of either party is immediately traceable to his purchase in execution and reference to their rights under the mortgages is only necessary for the purpose of ascertaining the equities existing between them. Each has an imperfect title acquired by purchase and the point for determination is which has the stronger equity in his favour. The plaintiff's omission to implead the puisne mortgagee rendered her title defective only to the extent that her title as owner is qualified by a right of redemption which was vested in the second mortgagee and which passed to the purchaser under the decree obtained on the second mortgage. The purchaser has no superior title merely on the ground that he purchased first and his title could only become absolute by a discharge of the prior encumbrance. [p. 347, col. 2; p. 348, col. 1.]

Second appeal from a decree of the District Judge, Agra.

Mr. Pearcey Lal Banerji (for Mr. Shyam Krishna Dar), for the Appellant.

Messrs. P. N. Banerji (for Mr. Lalit Mohan Banerji), for the Respondent.

JUDGMENT.

PIGGOTT, J.—This second appeal arises out of the following facts;—

On October 16th, 1893, *Musammāt Durga* mortgaged a certain house to the predecessors-in-title of *Musammāt Jalakia*, the present plaintiff-respondent.

Sometime in the year 1907, *Musammāt Durga* again mortgaged the same house to the defendant-respondent *Kedar Nath*.

On August 19th, 1910, the plaintiff sued on her mortgage, without impleading *Kedar Nath*. She obtained a preliminary decree for sale on April 21st, 1911, the defendant mortgagor being allowed the usual period of six months in which to redeem. The decree was made absolute in due course, the house was brought to sale and purchased by the plaintiff herself on July 30th, 1912.

In the meantime *Kedar Nath* filed a suit on his mortgage, without impleading the prior mortgagee. The suit was filed on June 20th, 1911, and decreed on August 13th, 1911, only fifteen days being allowed to the mortgagor in which to redeem. The house was brought to sale under this decree on February 27th, 1912, (there seems to be a clerical error in the plaint as to the date of this sale) and was bought by the defendant-appellant, *Babu Lal*. The plaintiff was given formal possession on her auction-purchase, but found *Babu Lal* in actual possession and failed to dispossess him. Hence the present suit, brought against *Babu Lal* and *Kedar Nath*. The main relief claimed is that the defendants be ordered to pay to the plaintiff the sum of Rs. 627 due on the mortgage of 1893, with costs and future interest, and that in case of default the plaintiff may be put in possession of the disputed house, and all the rights of the defendants may be extinguished. There is an alternative prayer for any other relief which the Court may consider proper and it is more particularly suggested that the plaintiff might be given a decree for possession by redemption of *Kedar Nath's* mortgage.

The Court of first instance, the Munsif of Agra, dismissed the suit, but the District Judge of Agra, on appeal, has given the plaintiff a decree for the first relief sought, only awarding a slightly lesser amount than that claimed. *Babu Lal*, the auction-purchaser, has alone appealed, but *Kedar Nath* has appeared to support the

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appeal, and has further taken a verbal plea to the effect that he ought to be exempted from costs throughout.

The following further facts appear to be found by the lower Appellate Court. The plaintiff's allegation that she did not in fact know of the existence of Kedar Nath's mortgage when she filed her suit of August 19th, 1910, would seem to be accepted as true. Her decree was obtained after contest, and in the teeth of a plea that the mortgage of October 16th, 1893, had been completely paid off. The decree in favour of Kedar Nath was a consent decree. The learned District Judge infers from this fact, from the circumstances under which the suit was instituted and from the narrow period allowed for redemption that the parties to this suit were acting in collusion, that they were both aware, not only of the existence of the plaintiff's mortgage, but of the suit brought and the preliminary decree obtained on the same and that they acted with the deliberate purpose of embarrassing the present plaintiff by bringing about a sale under the second mortgage before the sale on the first mortgage could be effected. He also finds that the auction-purchaser Babu Lal, if not a mere *benamidar* for Kedar Nath, was acting in collusion with him and had knowledge of the prior mortgage and of the litigation thereon.

These findings are not traversed in Babu Lal's petition of appeal to this Court.

The first point argued on his behalf was that due execution and attestation of the mortgage of October 16th, 1893, was not proved in the present case. The marginal witnesses are dead. The plaintiff produced a witness named Kallu Ram. He deposes that he was present when the deed was executed, that the executant put her mark on the deed in his presence and in that of the marginal witnesses and that the said marginal witnesses then signed the deed in his presence. It is contended that the lower Appellate Court could not legally accept Kallu Ram's evidence as proving execution and attestation because Kallu Ram is illiterate. There is no question as to the identity of the document, because it was read over to Kallu

Ram and he purported to remember its terms. In my opinion an illiterate witness is just as much entitled to depose that the, to him, illegible black marks on the paper are the signatures of the marginal witnesses which they affixed in his presence as he is to depose that he recognized the mark on the paper which represents the execution of the deed by the illiterate mortgagor. We are precluded in second appeal from discussing the credibility of Kallu Ram's evidence. I hold that it is sufficient, if believed, to prove both execution and attestation according to law.

The next question to be considered is whether, on the facts found, the plaintiff is entitled to any, and if so to what, relief. The case for the appellant may fairly be stated thus:—

The suit as brought is virtually one for foreclosure, and the plaintiff has no right to foreclose the auction-purchaser at the sale held under the second mortgage. A puisne mortgagee has not only the right to redeem the prior mortgage, he has also a right in law to bring the property to sale subject to the prior mortgage. If he had been impleaded, as he ought to have been, in the suit brought under the prior mortgage and had refused to exercise his right of redemption he would not have been foreclosed; the mortgaged property would have been put to sale, and he would have had the first claim on the surplus sale price, in the event of this exceeding the amount due to the prior mortgagee. From this it is contended that the only remedy open to the present plaintiff would be by way of a second suit for sale on her mortgage and that such a suit would now be barred by limitation. It is further contended that the present suit as brought is in substance one for foreclosure on the mortgage of October 16th, 1893, and that this is also barred by limitation. A further point, which I do not think was clearly taken on behalf of the appellant, but which may have perhaps required consideration, is whether Babu Lal would be entitled to plead that the plaintiff's suit as brought on August 19th, 1910, was even then barred by limitation and what would be the effect of such a plea, if raised.

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The legal questions involved are of some complexity and have given rise to differences of opinion in various High Courts. Probably the best discussion of the entire question is to be found in the case of *Mulla Veetil Seethi Kutti v. Korambath Paruthooli Achuthan Nair* (1); but it is more immediately in point to consider the published decisions of our own Court. The case most nearly in point is that of *Ram Prasad v. Bhikari Das* (2), which applies and expounds the principles laid down in two older rulings, *Hargu Lal Singh v. Gobind Rai* (3) and *Madan Lal v. Bhagwan Das* (4). I feel little doubt that whoever was responsible for the drafting of the plaint in the present suit had the decision in *Ram Prasad v. Bhikari Das* (2) before him and was confident that he had brought the plaintiff's claim within the scope of the principles there laid down. It is true that the facts in the two cases are not quite the same, in that the defendant in *Ram Prasad v. Bhikari Das* (2) had purchased at auction sale held in execution of a simple money-decree, and had done so before any suit was instituted on the original mortgage. It seems to me, however, that these differences of fact only tend to make the present plaintiff's case a stronger one; and I observe that the principles laid down in *Ram Prasad v. Bhikari Das* (2) have been approved, and applied to a state of facts practically identical with those now before us, by a majority of the learned Judges who decided the case of *Har Pershad Lal v. Dalmardan Singh* (5).

It seems clear to me, therefore, that the present suit is neither a suit for sale on the mortgage of October 16th, 1893, nor a suit to foreclose that mortgage: it is not a suit on that mortgage at all. It is a suit brought after that mortgage had been extinguished upon a different cause of action, namely, the plaintiff's failure to obtain actual possession of the property purchased at the sale of July 30th, 1912. The plaintiff-respondent and the defendant-appellant Babu Lal both claim to have bought the

very same property. Babu Lal's purchase was first in point of time; but he purchased at a sale held on a decree obtained by a puisne mortgagee in a suit in which the prior mortgagee was not impleaded. What was put up for sale and purchased by Babu Lal was the equity of redemption, subject to the rights of the prior mortgagee. Babu Lal has a clear right to redeem the mortgage; and this right is not affected by anything which took place in the course of or in consequence of the plaintiff's suit on her mortgage to which the puisne mortgagee was no party.

We are dealing with a case in which legal complications have arisen in consequence of an initial departure from the plain course prescribed by the law. The plaintiff was bound by law to implead the puisne mortgagee in the suit instituted on August 19th, 1910. The failure to do this has led to the present litigation; but the necessary parties are now before the Court, and the duty of the Court is simply to work out the equities between them. On the facts found, I hold that the appellant Babu Lal is entitled to nothing more than is given him by the decree of the Court below, namely, an opportunity of paying off the prior mortgage. If he declines this opportunity he certainly has no right to hold the property in suit clear of that encumbrance. There seems to me no valid basis for an order putting up the property to sale again: the right of sale possessed by each of the mortgagees has been exercised by them, and exhausted. All that remains to be determined is the question of the respective rights and liabilities of the rival auction-purchasers.

In arriving at this conclusion I have disposed of the plea of limitation in the only form in which it has ever been taken by the appellant himself. The present suit is not brought on the mortgage of October 16th, 1893, but upon a cause of action long subsequent, and is well within limitation in respect of the said cause of action. I have felt some little difficulty about a point which was suggested for the first time in the course of arguments before us; could Babu Lal be permitted to plead that the prior mortgagee's suit was barred by limitation on the date on which

(1) 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431.

(2) 26 A. 464 at p. 466; A. W. N. (1904) 108.

(3) 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 350.

(4) 21 A. 235; A. W. N. (1890) 41; 9 Ind. Dec. (N. S.) 859.

(5) 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371.

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it was instituted, viz., on the 19th of August 1910? If Kedar Nath had been a defendant in that suit he could presumably have taken the point; there seems some plausibility about the suggestion that it is open to Babu Lal to do so.

One answer is, however, sufficiently obvious. The plea, if raised, would depend for its determination upon a question of fact, namely, the truth or otherwise of the plaintiff's assertion that there had been payments on account of interest for a number of years subsequently to the date of the mortgage. It would be contrary to sound principles to allow a defendant to raise for the first time in second appeal a plea, even one of limitation, which could not be determined without the taking of fresh evidence upon a question of fact not raised at all in the Courts below.

Apart from this, I incline to the opinion that Babu Lal, holding under a transfer effected while the suit instituted on August 19th, 1910, was pending, cannot be permitted to call in question the result of that suit so as to affect the rights acquired by the plaintiff as a result of that suit. A plea which might have been open to Kedar Nath, if there had been no transfer *pendente lite*, is not necessarily open to Babu Lal.

I would, therefore, dismiss this appeal with costs.

LINDSAY, J.—I agree with my learned colleague in holding that this appeal should fail. I have nothing to add to what he has said regarding the question of proof of the plaintiff's mortgage but I desire to offer a few remarks with respect to the other question for decision, namely, the nature of the relief, if any, which can be granted to the plaintiff.

The case for the appellant is that she is entitled to no relief at all, the argument being that her only remedy was a second suit for sale on her mortgage, a remedy which she has now lost owing to the operation of the law of limitation.

On the facts the present case is in all respects similar to that of *Har Pershad Lal v. Dalmandan Singh* (5), and I agree entirely with the opinion of Mitra, J., that in the circumstances there was no necessity for the plaintiff here to bring another suit for sale.

We are dealing here with a conflict of title between two parties and the question is, which of the two titles is to carry with it the right to possession and upon what terms should that right be awarded to the party entitled.

It seems clear to me that the rights of the parties are not to be determined solely upon a consideration of the rights which accrued to the first and second mortgagees under their respective mortgages. In each case there has been a decree on the mortgage followed by a sale of the property and in each case the parties have by virtue of their respective purchases obtained qualified titles to the property, the nature of which must be examined for the purpose of awarding possession. It is, I think, impossible to ignore the fact that these sales have taken place and to deal with the matter in issue as if they had not in fact occurred. The title of either party is immediately traceable to his purchase in execution and reference to the rights under the mortgages is only necessary for the purpose of ascertaining the equities existing between them; each has an imperfect title acquired by purchase and we have to determine which has the stronger equity in his favour. As for the title of the plaintiff it cannot, I think, be argued that she acquired nothing under her purchase. It will not, I imagine, be denied that had she joined the subsequent mortgagee as a defendant in her suit, she would by her purchase have acquired an absolute title to the property including the right to possession. To what extent then is her title defective by reason of her omission to implead the puisne mortgagee? Only to the extent that her title as owner is qualified by a right of redemption which was vested in the second mortgagee and which has now passed to the appellant as purchaser under the decree obtained on the second mortgage.

That is the only right which the second mortgagee could have enforced against her as prior incumbrancer, for the right of the subsequent mortgagee to bring the equity of redemption to sale to satisfy his claim is a right which is exercised against the mortgagor only. The right of the first mortgagee to have the property sold is in no way affected by the second mortgagee's right of sale. As between the first and second mortgagees (or their representatives), the

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only right of the latter is one of redemption.

As for the title of the auction-purchaser under the second mortgage, that too is circumscribed by the liability to redeem the earlier mortgage. The title could only become absolute by a discharge of the prior incumbrance.

It is true that this title was in point of time acquired prior to the title obtained by the first mortgagee under her purchase. It is also true that it has been laid down in a number of cases, beginning with *Nanack Chand v. Teluckdye Koer* (6) and *Durgopal Lal v. Bolakee* (7), that the title which is prior in point of time must prevail. But as was pointed out both by Brett, J., and Mitra, J., in *Har Pershad Lal v. Dalmardan Singh* (5), those cases were pure cases in ejectment to which the provisions of section 85 of the Transfer of Property Act did not apply. There were no prayers in those suits for redemption or for the re-opening of the sales held under the first mortgages: the plaintiffs asked for possession and no more. It cannot, therefore, be held in the present case that the purchaser under the second mortgage has a superior title merely on the ground that he purchased first.

We have it then that the purchaser under the second mortgage has acquired the property subject to the first mortgage, and it is difficult to see on what ground of equity he can be permitted to say that he is now entitled to hold the property discharged from that liability, for that is in effect what is now claimed on his behalf. Is it not more proper to say that the title of the plaintiff in this case is the stronger one and that she is entitled to enforce it and to ask for possession, provided she gives the auction-purchaser under the second mortgage the opportunity to redeem, which the second mortgagee would have had if he had been joined as a defendant in the suit on the first mortgage?

This way of dealing with the case, as remarked by Mitra, J., in the judgment above cited does full justice to the respective claims of the parties. The defendant, if he desires to continue in possession, is bound

(6) 5 C. 265; 5 Ind. Jur. 81; 4 C. L. R. 358; 2 Ind. Dec. (N. S.) 779.

(7) 5 C. 269; 5 Ind. Jur. 82; 2 Ind. Dec. (N. S.) 782.

to satisfy the mortgage-debt which was imposed on the property before any right accrued in his favour, and the second mortgagee who is now represented by the auction-purchaser could not have had any greater benefit from a decree for sale made in his favour. I hold, therefore, that there was no need for the plaintiff to bring a second suit for sale and that no question of limitation arises as the qualified title, which the plaintiff is entitled to enforce upon the condition of allowing an opportunity to redeem to the purchaser under the second mortgage, only came into existence on the date of her purchase in execution. I would dismiss the appeal.

By THE COURT.—Order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 171
OF 1915.

CIVIL REVISION PETITIONS NOS. 577 AND
700 OF 1915.

August 24, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

PONNURANGAM PILLAI AND OTHERS—
PETITIONERS—APPELLANTS IN C. M. A.
No. 171 AND PETITIONERS IN C. R. P. No. 577
OF 1915

versus

LAL KHAN SAHIB AND ANOTHER—
COUNTER-PETITIONERS—RESPONDENTS IN C.
M. A. No. 171 AND PETITIONERS IN C. R. P.
No. 577 OF 1915

AND

CHAKRAPANI AIYAR—PETITIONER IN
C. R. P. No. 700 OF 1915

versus

LAL KHAN SAHIB—RESPONDENT IN
C. R. P. No. 700 OF 1915.

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, rr. 58, 63, O. XLIII—Madras Civil Rules of Practice, rr. 134, 179—Application under r. 179 for payment of moneys standing to credit of different suits—Objection by decree-holder in latter suit—Order upholding objection, nature of—Remedy of party aggrieved—Appeal—Revision.

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C filed a suit on a mortgage against *A* and obtained a decree for sale of the mortgaged property. *B*, who held a decree against *A* in another suit, attached the profits of the mortgaged property deposited in Court to the credit of *C*'s suit by a Receiver, and applied under rule 179 of the Civil Rules of Practice, Madras, for the issue of a cheque for a sufficient part of the attached money. *C* objected claiming a charge on the amount for any balance that might be due to him after sale of the property. *C*'s objection was upheld by Court and *B*'s petition dismissed. *B* filed a petition in the High Court to revise the said order:

Held, (1) that *B*'s petition should have been for the transfer of moneys to the credit of *B*'s suit; [p. 350, col. 2.]

(2) that the dispute was not covered by section 47, Civil Procedure Code, and the order was not appealable as one passed under section 47, Civil Procedure Code; [p. 350, col. 1.]

(3) that the order should be treated as one falling under Order XXI, rule 58, Civil Procedure Code, on *C*'s claim and was not subject to appeal or revision, whether it was passed under rule 179 of the Civil Rules of Practice in *C*'s suit or under rule 137 of the Civil Rules of Practice in *B*'s suit or under Order XXI, rule 60, in *B*'s suit; [p. 351, col. 1.]

(4) that *B*'s remedy was to proceed by way of a suit under the provisions of Order XXI, rule 63, Civil Procedure Code. [p. 351, col. 1.]

Per *Oldfield, J.*—The words "proceed as if the attaching decree-holder was the assignee of the judgment-debtor to the extent of the amount due to the latter" in rule 179 of the Madras Civil Rules of Practice are intended merely to make provision for the method by which the attaching creditor is to obtain the benefit of his attachment; it invests him with no legal character and does not expressly or impliedly justify the application of section 47 of the Code of Civil Procedure to the determination of his rights. [p. 349, col. 2; p. 350, col. 1.]

Attachment no more creates or transfers a right of ownership in a fund in Court than in any other description of property. [p. 350, col. 1.]

It may not be safe to hold generally that where the remedy by suit is open, interference by way of revision is unjustifiable, but where the Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. [p. 350, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, Trichinopoly, in Civil Miscellaneous Petition No. 430 of 1915, in Original Suit No. 34 of 1911 (Original Suit No. 123 of 1912), on the file of the Court of the Temporary Subordinate Judge, Trichinopoly, and Petitions, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Trichinopoly, in Civil Miscellaneous

Petitions Nos. 430 of 1915 and 455 of 1914, in Original Suit No. 34 of 1911.

Messrs. *T. V. Muthukrishna Aiyar* and *G. S. Ramachandra Aiyar*, for the Appellants.

Mr. C. V. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The petitioners in these civil revision petitions, one of whom has also filed an appeal, hold decrees against the defendants in Original Suit No. 34 of 1911, persons who in one way or other are interested in the estate of one *T. Krishnier*. During the pendency of Original Suit No. 34 of 1911, the plaintiff, here respondent, obtained the appointment of a Receiver of the properties comprised in that estate, who has paid certain profits into Court. Petitioners have attached those profits and have asked for cheques for the amount of their claims from the fund under attachment. The lower Court in the orders before us refused to issue cheques, on the ground that petitioners could not have recourse to this fund until the sale of the property which has been ordered in the decree in Original Suit No. 34 of 1911, one on a mortgage, has taken place, and it has been ascertained whether the fund will be required to make good any deficiency in the amount of that decree. It is argued before us that, apart from the merits of the lower Court's order, no appeal lies against it and that we should not interfere in revision, because the petitioners have another remedy by suit.

It is not alleged that any appeal is provided against an order of this description in Order XLIII of the Code of Civil Procedure, the suggestion is only that the order is one passed under section 47 of the Civil Procedure Code, because petitioners are representatives of the judgment-debtor. This is supported by reference to rule 179 of the Madras Civil Rules of Practice, which no doubt has the force of law and in which the Court is directed to "proceed as if the attaching decree-holder was the assignee of the judgment-debtor to the extent of the amount due to the former". But this merely makes provision for the method by which the attaching creditor is to obtain the benefit of his attachment. It invests him with no new

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legal character and does not expressly or impliedly justify the application of section 47 of the Civil Procedure Code to the determination of his rights. On general principles, moreover, it is clear that no such application can be justified.

For as the rateable distribution procedure indicates, attachment no more creates or transfers a right of ownership in a fund in Court than in any other description of property. The lower Court's order, therefore, is not appealable as passed under section 47 of the Civil Procedure Code. As regards the revision, there is no doubt no explicit provision in the Code and so far as we have been shown, no authority for petitioners' right to sue. But their right is not negatived by that fact, and we have not been shown that a future suit by them will be barred by the decisions in the present proceedings. The reason why it will not be is, not that the lower Court postponed adjudication on their right and gave no final decision on it, but that, as the dispute was not covered by section 47 of the Civil Procedure Code, it was not entitled to adjudicate on it at all except in a properly constituted suit. It may not be safe to hold generally that where the remedy by suit is open, interference by way of revision is unjustifiable; but the fact that petitioners can sue, affords good ground for refusal to interfere in revision in this case, since it is not shown how they will be unfairly prejudiced by being made to take that course. Some suggestion has been made that a refusal by the lower Court to exercise jurisdiction under section 115 (b), not a material irregularity or an illegality under section 115 (c) of the Civil Procedure Code, is in question. But the lower Court's order is based on a consideration of the merits of the case and was an exercise, though possibly a wrong one, of the jurisdiction which it assumed that it had. In these circumstances cause has not been shown for interference by way of revision.

The appeal against order and the Civil Revision Petitions are, therefore, dismissed with costs which will, however, be allowed only in the latter.

† SADASIVA Aiyar, J.—The legal questions to be decided have arisen out of facts

and considerations which may (for the purposes of this decision) be stated with sufficient accuracy as follows:—The decree-holder (B) in one suit (which may be called the first suit) attached moneys of his judgment-debtor (A), which were deposited in Court to the credit of another suit (which may be called the second suit) and which suit was filed by C against the same debtor (A) for sale of mortgaged properties and for the recovery of the balance, if any, after such sale from A personally. The attaching creditor B then made an application in the second suit under rule 179 of the Madras Civil Rules of Practice. The prayer of an application under rule 179 ought to be only that a "sufficient part" of the attached money should be transferred to the credit of the first suit. B, however, seems to have prayed in his said application for the issue of a cheque for a sufficient part of the attached money. I think the Court ought to have asked B to amend his petition by praying only for such transfer of moneys to the credit of the first suit from the second suit. It was only after the Court passed such an order of transfer in the second suit that B should have put in his application for cheque in his own first suit under rule 137 of the Madras Civil Rules of Practice for the amount so transferred. I shall, however, treat B's application under rule 179 of the Madras Civil Rules of Practice for a cheque in the second suit as consisting of two applications, one in the second suit for the transfer of sufficient money to the first suit and another application in the first suit for cheque for the money so transferred. Now the second application for cheque was clearly premature and ought to be dismissed. As regards the first application, the mortgagee decree-holder C was properly treated therein as a counter-petitioner. He objected to the transfer of a sufficient portion to the credit of the first suit, on the ground that he had a first charge on the whole amount for any sum which might in the future be ascertained as the balance due to him by A after the sale of the mortgaged properties and that till that sum was so ascertained in the future, no portion of the money could be transferred to the credit of the first suit or be paid out to B. This

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objection of *C* was allowed and *B*'s application under rule 179 of the Madras Civil Rules of Practice was dismissed as premature.

I think that *C*'s objection to *B*'s application in the second suit under rule 179 of the Madras Civil Rules of Practice was in substance a petition under Order XXI, rule 58, of the Civil Procedure Code, advancing a claim to the moneys attached by *B* and that such a petition must be treated as made in the first suit of *B*. It follows that the order of the Subordinate Judge allowing *C*'s objection is an order on *C*'s claim petition and was passed in the first suit. That order is final, subject to the result of any suit brought by *B* under Order XXI, rule 63, of the Civil Procedure Code, within one year of that order. It is that remedy by suit which *B* ought to have pursued, and he had no right of appeal or revision to this Court against the Subordinate Judge's order, whether it was passed under rule 179 of the Madras Civil Rules of Practice (in the second suit), whether it was passed under rule 137 of the Madras Civil Rules of Practice (in the first suit) or whether it was passed under Order XXI, rule 60 (in the first suit). Having regard to the complications which are likely to arise (as shown above) in similar cases, I would suggest that rule 179 of the Madras Civil Rules of Practice should be supplemented by rules providing that where an objection to an application under rule 179 of the Civil Rules of Practice be made, it should be treated as a claim petition in the suit of the applicant and an order should be passed thereon and that after the passing of such an order, the application under rule 179 should be disposed of in accordance with such an order. Forms for applications under rule 179 might also be prescribed. I am also not sure whether the limit of six months mentioned in rule 179 should not be removed. I agree in the result that the appeal and the Civil Revision Petitions should be dismissed and the latter with costs.

Appeal and Petitions dismissed.

V. R. P.

MAHARAJA'S COURT.

SECOND CIVIL APPEAL No. 48 of 1915.

March 15, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.
LACHHMAN PRASAD—DEFENDANT—

APPELLANT

versus

RAMPHAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 95—Simple money, claim for—Usufructuary mortgagee, suit by—Fraud of mortgagor.

A usufructuary mortgage was executed in 1907, but possession was not delivered to the mortgagee. In 1912 it was ascertained that the mortgagor had no power to mortgage the property and had fraudulently concealed the fact from the mortgagee. In 1914 the mortgagee sued for recovery of money due to him with interest thereon by way of damages:

Held, that the suit was governed by Article 95, Schedule I, of the Limitation Act and was not barred by time. [p. 352, col. 1.]

Udit Narain Singh v. Sahib Ali, 6 Ind. Cas. 1013; 13 O. C. 143, referred to.

Appeal from the decree of the Officiating Subordinate Judge, Gonda, dated the 12th November 1914, reversing the order of the Munsif, Tarabganj, dated the 23rd August 1914.

Mr. St. C. Thompson, for the Appellant.

Mr. S. N. Roy, for the Respondent.

JUDGMENT.—The defendant executed a deed of mortgage for Rs. 72 in favour of the plaintiff on the 22nd September 1907 and agreed to deliver possession over the mortgaged plots. He did not, however, deliver possession and went to Rangoon sometime in March 1908. On his return from that place in May 1912 the plaintiff pressed him to deliver possession, but found that he was unable to do so, as it was then ascertained on enquiry that only one of the plots mortgaged belonged to him and that he had no power to mortgage the remainder. On that allegation the plaintiff sued for the recovery of the money due to him with interest thereon by way of damages or in the alternative for possession of the plots mortgaged with mesne profits.

The Court of first instance granted a decree for possession in regard to the plot which belonged to the plaintiff and dismissed the rest of the claim. The lower Appellate Court, however, granted a

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simple money-decree for the amount lent to the defendant with interest thereon by way of damages at 6 per cent. per annum for the three years preceding the suit. The latter decree is impugned on appeal on the ground that the claim was barred by limitation. The finding of the lower Appellate Court that the mortgagor had concealed from the plaintiff the material fact that he was not the owner of the plots mortgaged other than plot No. 3625 *khassra* and that the plaintiff came to know of that fraud in May 1912 is anyhow conclusive, and reading that finding with the decision of this Court in *Udit Narain Singh v. Sahib Ali* (1), the claim is obviously one governed by Article 95 of the Indian Limitation Act and is not barred by time.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 6 Ind. Cas. 1013; 13 O. C. 148.

PATNA HIGH COURT.

CIVIL REVISION No. 164 of 1916.

November 22, 1916.

Present:—Mr. Justice Roe and

Mr. Justice Jwala Prasad.

NANOO THAKUR—PETITIONER

versus

KULDIP THAKUR AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151—Decree, amendment of—Power of Court.

In a partition suit a preliminary decree was made and a commissioner was appointed to make an allotment. While the case was before the commissioner one K, whose name was not in the decree, applied for amendment of the decree so as to include his name in it and also asked for the allotment of a separate share to him. The Court made the amendment and ordered the case to proceed *de novo*:

Held, that the Court had no power under section 151 of the Civil Procedure Code to make such order. Under that section it had power only to amend the decree so as to bring it into conformity with the pleadings and should have acted accordingly.

Appeal against the order of the Sub-Judge, 1st Court, Mozuffarpur, dated the 29th August 1916.

Mr. *Baidya Nath Narain Singh*, for the Appellant.

Messrs. *Ganesh Dutta Singh* and *Siv Nandan Rai*, for the Opposite Party.

JUDGMENT.—In this case the lower Court had made a preliminary decree for partition without contest among the parties. An order was issued to a commissioner to make an allotment and while the case was before the commissioner, one Kirtan Thakur discovered that his name was not in the decree although he was a co-sharer in the property. He, therefore, went to the learned Subordinate Judge and asked that the decree be amended so as to include his name as a co-sharer. He also asked for an allotment of a separate share. The learned Subordinate Judge thereupon, under what he described as his inherent power under section 151, set aside the preliminary decree and directed that the whole case be tried *de novo*. This the learned Sub-Judge had no power whatever to do. Under section 151 he had power to amend the decree so as to bring it into conformity with the pleadings and this is the course which he should have adopted.

We, therefore, set aside the order made and direct that the learned Subordinate Judge do now take up the petition of Kirtan Thakur and proceed to bring the preliminary decree into conformity with the pleadings. He will then take up the commissioner's final report and consider that report in the light of the amendment made in the decree, and if without prejudice to the interests of the other parties concerned in the case Kirtan Thakur can at this stage be given a separate allotment, there will be no objection to that course being taken.

We make no order as to costs.

Let the record be sent down at once.

Order set aside.

MAHTAB KHAN v. SHEOBARAT TELI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 37 OF 1916.

November 1, 1916.

Present:—Mr. Justice Chapman.

MAHTAB KHAN—DEFENDANT—

APPELLANT

versus

SHEOBARAT TELI—PLAINTIFF—

RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1855), s. 103B, scope of—Record of Rights, entry in, history of proceedings as to, relevancy of—Burden of proof, objection as to, in appeal after evidence fully recorded.

The statutory provision in section 103, Bengal Tenancy Act, says nothing as to the value to be attached to an entry in the Record of Rights; it only says that the entry must stand and be presumed to be correct until it is proved by evidence to be incorrect.

It is open to a Court to consider the history of the proceedings which have resulted in a particular entry in a Record of Rights.

The question of the burden of proof is only a question of procedure and where the evidence has been fully recorded on both sides and the Court has only to adjudicate upon it, no such question arises.

Second appeal from the decision of the Sub-Judge, Arrah, dated the 21st August 1915, setting aside the decree of the Munsif, Sasseram, dated the 29th May 1914.

Mr. Chandar Sekhar Prasad Singh, for the Appellant.

Mr. Bimla Charan Singh, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for a declaration of title and for recovery of possession of an agricultural holding.

The plaintiff did not obtain the actual admission of any document in support of his case. He produced the evidence of certain witnesses. The defendant relied upon an entry in the Record of Rights and also produced certain witnesses. The Original Court, relying upon the entry in the Record of Rights, dismissed the plaintiff's suit. The Court of First Appeal reversed this order and decreed the suit. Against the decree a second appeal has been made to this Court, and, in support of the appeal, it has been said that the First Court of Appeal wrongly placed the burden of proof upon the defendant, and that it did not give effect to the presumption provided for in section 103B of the Bengal Tenancy Act, which is to the effect that an entry in the Record of Rights must be presumed to be correct until the contrary is proved by evidence. The

third contention is that the learned Judge, in estimating the value of the entry in the Record of Rights, went into the history of the proceedings which resulted in that entry, and that he was not entitled to do this. So far as the question of the burden of proof is concerned, the Courts have had recently the assistance of the labours of specialists in the history of the law of evidence, and now the question of the burden of proof remains only a question of procedure. The plaintiff had to begin his case and to produce evidence and clearly the burden of proof was laid upon him. In determining the case subsequently upon the evidence on both sides it is not possible to say that any question of the burden of proof arose.

In regard to the presumption in favour of the Record of Rights, the contention fails upon a similar ground. There was evidence to rebut the presumption and that evidence was believed by the learned Subordinate Judge in a very carefully considered judgment.

In regard to the third point, it is not possible to say that it is not open to the Court to consider the history of the proceedings which have resulted in a particular entry in a Record of Rights. On the contrary it is often of the greatest value to very carefully consider the history of those proceedings, for the history is frequently of the greatest assistance in enabling the Court to estimate the value which should be attached to an entry in the Record of Rights. The statutory provision in section 103B of the Bengal Act says nothing as to the value to be attached to an entry in the Record of Rights; it only says that that entry must stand and be presumed to be correct until it is proved by evidence to be incorrect. It says nothing as to the strength or value of the evidence necessary to rebut the presumption.

The appeal is dismissed with costs.

Appeal dismissed.

PODURU LAKSHMI NARAYANA v. PONNADA PALLAMRAJU.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 187 OF 1913.

July 17, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

PODURU LAKSHMI NARAYANA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PONNADA PALLAMRAJU AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Execution proceedings—Connected suits for partition, decrees in—Identity of subject-matter and parties—Execution application, dismissal of, on ground that relief was granted on previous application in connected suit—Subsequent application for division of specific omitted properties—Patent mistake of Court, effect of—Res judicata.

Two suits were filed for partition (Original Suit No. 1 of 1889 and Original Suit No. 1 of 1899) in which the parties were the same, though differently arrayed, and the properties in dispute were identical. The Court decreed in Original Suit No. 1 of 1899 that the properties be divided into equal parts and that the plaintiffs should be put in possession of one of them. Plaintiffs in the said suit made an application for execution of the decree, but it was dismissed on the ground that the properties had already been divided in a prior execution of the decree in the other suit, Original Suit No. 1 of 1889, and that the matter could not be re-opened. It was pointed out that 3 acres and 72 cents were left undivided in the previous execution proceedings, but the Subordinate Judge took no notice of it and his order of dismissal was affirmed on appeal by the High Court. The plaintiffs put in the present application for division of the 3 acres and 72 cents. The records disclosed that the Subordinate Judge made a patent mistake when he said that all the properties including the said 3 and odd acres were divided. It was contended that the application was barred as *res judicata*:

Held, that the real question in the previous application and in the appeal to the High Court was whether the previous partition was liable to be re-opened at all, and not as to the particular items of property which had or had not been divided and that the present petition was not affected by the rule of *res judicata*. [p. 357, col. 1.]

Nityananda Gantayet v. Gajapati Vasudeva Devu, 24 M. 681; 4 M. L. J. 313, referred to.

Appeal under clause 15 of the Letters Patent, against the judgment of Mr. Justice Sadasiva Aiyar, in Appeal against Order No. 245 of 1912, preferred against the order of the Court of the Subordinate Judge, Kistna at Ellore, in Execution Petition No. 126 of 1911, in Original Suit No. 1 of 1899, on the file of the District Judge, Godavari.

FACTS are clear from the following judgment, dated the 29th October 1913, by

SADASIVA AIYAR, J.—The plaintiffs, the decree-holders, are the appellants in this execution appeal from the order of the Subordinate Judge of Kistna at Ellore. The decree in execution directed, among other things, the division into two equal parts of certain immoveable properties and that the plaintiffs should be put in possession of one such part. When the plaintiffs put in a former Execution Petition No. 46 of 1906 for such division into two equal parts of all the immoveable properties in accordance with the decree in Original Suit No. 1 of 1899 obtained by the plaintiffs, the Subordinate Judge decided that they could not have such a partition of the said immoveable properties because they (plaintiffs) were bound by a partition already effected of the same properties in Original Suit No. 1 of 1889 and he held that the plaintiffs could in execution of their decree in Original Suit No. 1 of 1899 obtain only the one-half share other than the half delivered to the defendants Nos. 9, 10 and 11 in execution of the latter's decree in Original Suit No. 1 of 1889. That order of the Subordinate Judge was made on the 21st November 1906. It begins by saying that the property involved in Original Suit No. 1 of 1899 itself had been made into two shares in execution of the decree in Original Suit No. 1 of 1889. It makes no reservation and it does not say that the property involved in Original Suit No. 1 of 1899 except 3 acres 72 cents had been made into two shares in execution of the decree in Original Suit No. 1 of 1889. Against this order of the Subordinate Judge the plaintiffs in Original Suit No. 1 of 1899 appealed to the High Court. One of the grounds of appeal (6th ground) was that the lower Court had failed to notice that out of 54 acres 89 cents of land directed to be divided 3 acres 72 cents had not been divided in Original Suit No. 1 of 1889 and that the same was in possession of defendants Nos. 7 and 8 and that the plaintiffs were entitled to a division of these lands. Now there can be no question that when the Subordinate Judge said in his order in Execution Petition No. 46 of 1906 that the property involved in Original Suit

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No. 1 of 1899, *i.e.*, the whole property, had been divided into two shares in Execution Petition No. 14 of 1903 in Original Suit No. 1 of 1889, he made a mistake as it appears from the records that the entire extent of 54 acres 89 cents had not been so divided (though the defendants Nos. 9 to 11 had prayed in their execution petition for the entire lands to be so divided), and that 3 acres 72 cents were left undivided. It is this mistake of the Subordinate Judge which was pointed out by the plaintiffs in Original Suit No. 1 of 1899 in their Appeal against Order No. 52 of 1907 to the High Court in their 6th ground of appeal. But notwithstanding this contention in the appeal memorandum the learned Judges who decided this case in the High Court dismissed the Appeal against Order No. 52 of 1907 wholly. It seems to me that the result of the Subordinate Judge's decision was that the only relief which the plaintiffs could obtain in respect of possession of immoveable property in execution of the decree in Original Suit No. 1 of 1899 was to obtain possession of the half share of the properties divided in execution of the decree in Original Suit No. 1 of 1889, left after delivering one half share to the defendants Nos. 9, 10 and 11, who are the decree-holders in the said Original Suit No. 1 of 1889, and that even as regards that 3 acres 72 cents, which the Subordinate Judge by mistake thought had been included in the division made in execution of the decree in Original Suit No. 1 of 1889, the plaintiffs could not obtain any relief in their Execution Petition No. 46 of 1906. Now the present Execution Petition No. 126 of 1911 was filed by plaintiffs for the partition of 3 acres 72 cents and for delivery of one-half share therein. In this petition the parties impleaded are the very same as those who were impleaded in the previous Execution Petition No. 46 of 1906 or their representatives (13th defendant being the legal representative of the 7th defendant). It seems to me that this petition is clearly barred as *res judicata* as held by the Subordinate Judge and that this appeal from the order of the Subordinate Judge ought to be dismissed. That the principle of *res judicata* may apply to execution petitions also has been held in numerous cases. It is, however, contended by the appellants' learned Vakil (Mr. G. Venkataramiah) that

the order of the Subordinate Judge in Execution Petition No. 46 of 1906 and the order of the High Court in Appeal against Order No. 52 of 1907 should be held not to have dealt with the right of the plaintiffs to partition of this 3 acres 72 cents at all and that, therefore, those orders are not *res judicata* so far as this acres 3.72 cents are concerned. He relies for this contention on the case in *Nityananda Gantayet v. Gajapati Vasudeva Devu* (1). The facts of that case were rather peculiar and under the particular circumstances of that case, it could be fairly argued that the executing Court by its order did not intend to pass a complete order on the first execution petition. That petition prayed for the recovery of the decreed lands and for mesne profits, but the order passed on that petition directed delivery of the possession of the lands and was silent as to mesne profits. It was held that under those circumstances, the Munsif could not be deemed to have refused execution as regards the mesne profits.

But in the present case the Subordinate Judge's order seems to me to show clearly that he intended to refuse all the reliefs in respect of the lands sought to be divided and delivered to the plaintiffs, except the relief of possession of that moiety of the land which was divided in execution of the decree in Original Suit No. 101 of 1889 entered in the list prepared by the *amin* of properties allotted to the share other than that delivered to the defendants Nos. 9, 10 and 11. No doubt the Subordinate Judge omitted to order the division of 3 acres 72 cents left wholly undivided in the partition proceedings in the other suit, owing to his having been under the mistaken impression that this land also had been divided in those proceedings. But his omission under a mistaken impression to order partition of this 3 acres 72 cents cannot be held to be an order not refusing the division of 3 acres 72 cents. Even if my interpretation of the order of the Subordinate Judge in Execution Petition No. 46 of 1906 is wrong on this point, I cannot see my way to this that when the High Court dismissed the Appeal against Order No. 52 of 1907, notwithstanding the sixth ground in the appeal memorandum before them, they intended to keep alive the right

(1) 24 M. 681; 11 M. L. J. 313.

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of and not to refuse to plaintiffs that portion of the reliefs claimed by them in execution which relates to the partition of those 3 acres 72 cents. It seems to me, therefore, as I said in the beginning, that this present petition, Execution Petition No. 126 of 1911, was rightly dismissed by the Subordinate Judge as barred by *res judicata*. Two of the statements of the Subordinate Judge in his order seem to be wrong, namely, that "there is nothing to support the petitioner's allegation that 3 acres 72 cents of land have been omitted in the division in execution of the decree in Original Suit No. 1 of 1889", and that "on the contrary it appears from the records that the land of 3 acres 72 cents was shown in one of the lists as delivered to defendants Nos. 9, 10 and 11 in execution of that decree". But these misstatements by the Subordinate Judge do not affect the question of *res judicata*. I would, therefore, dismiss the appeal but as the contesting respondents are not shown to have any interest in opposing this appeal there will be no order as to costs.

SPENCER, J.—The Subordinate Judge is mistaken in saying that the land measuring 3 acres 72 cents was delivered to the counter-petitioners in Execution Petition No. 14 of 1903. The High Court, in appeal from the District Judge's decree in Original Suit No. 1 of 1899, gave the petitioners a decree for a moiety of the immoveable properties described in Schedule A attached thereto. One of these properties No. 11 in the list is re-survey No. 723 measuring 7 acres 4 cents corresponding to old survey No. 448.

Of this number the plaintiffs in Original Suit No. 1 of 1889, who were defendants Nos. 9 to 11 in the petitioners' suit, got 1 acre 99 cents forming sub-divisions I (a) and I (c) in the execution of their decree. It is noted in the remarks column of the partition list dated the 1st March 1903 that acres 372 cents of this No. 723 are in the possession of defendants Nos. 20 and 21, who are defendant Nos. 8 and 13 in Original Suit No. 1 of 1899. This supports the petitioners' allegation that 3 acres 72 cents have been omitted in the division. The Subordinate Judge is, therefore, wrong when he says that there is nothing to support it. He is also wrong in stating that the former Subordinate Judge, who passed the order dated the 21st November

1906 in Execution Petition No. 46 of 1906, found that all the lands had already been divided and that there was nothing left to be divided. There is no such statement in the order. Nor was it correct to state that defendants Nos. 9 to 11 asserted in their counter-petition that they had been in possession of these 3 acres 72 cents in pursuance of the division effected in execution of their decree in Original Suit No. 1 of 1899. In their counter-petition these defendants raised the question whether the matter of these 3 acres 72 cents was "*res judicata*" by reason of the above said order in Execution Petition No. 46 of 1906 and the High Court's order in Appeal against Order No. 52 of 1907 by dismissing the appeal against it. Defendants Nos. 8 and 13 have not opposed the petition.

In my opinion the matter is not "*res judicata*", for the reason that the order in Execution Petition No. 46 of 1906 is silent on the point of these 3 acres and 72 cents and the petitioners' decree in Original Suit No. 1 of 1899 granting them a moiety of this property is apparently still in full force and effect and they are entitled to execute it as long as it is kept alive, and the decree cannot be superseded by the mere omission of the Court executing it to pass orders on a claim made under it.

The case is similar to that of *Nityananda Gantayet v. Gajapati Vasudeva Devu* (1). It is true that in Civil Miscellaneous Appeal No. 52 of 1907 the petitioners in appealing against the order dated the 21st November 1906 took as their sixth ground of appeal in their appeal petition that the lower Court had failed to notice that out of the 54 acres and 89 cents directed to be divided 3 acres 72 cents had not been divided in Original Suit No. 1 of 1889, and that they were in the possession of the defendants and that the petitioners were entitled to a division of them. But there is nothing to show that this point was pressed at the hearing or even brought to the notice of the High Court. The main question there was whether the partition made in execution of the decree in Original Suit No. 1 of 1889 could be re-opened in executing the subsequent decree in Original Suit No. 1 of 1899 and on that point the appeal failed.

The Subordinate Judge's order should, therefore, in my opinion, be set aside and the

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present petition should be returned for passing the necessary orders in the light of the above remarks.

In the result the order of the lower Court will be confirmed and this appeal dismissed without costs.

Mr. G. Venkataramiah, for the Appellants.

Mr. K. V. L. Narasimham (for Mr. B. Narasimha Rao) and Mr. N. Rama Rao, for the Respondents.

JUDGMENT.—We agree with the conclusion arrived at by Spencer, J. What the appellants sought to do by the Execution Petition No. 46 of 1906 was to re-open entirely the partition effected on the application of the respondents. That was disallowed by the Subordinate Judge and his order was upheld in appeal by the High Court.

As a matter of fact, as rightly found both by Sadasiva Aiyar and Spencer, JJ., 3 acres 72 cents in Survey No. 448 were not divided on the previous occasion and the mere fact that this was mentioned in the grounds of appeal to the High Court, cannot be said to have the effect of implied adjudication debarring the appellants before us, from having a division. The real question before the High Court was, whether the previous partition was liable to be re opened at all, and not as to the particular items of property which had or had not been divided.

It would be absolutely going too far to say that, under these circumstances, the principle of *res judicata* has any application to the appellants' petition [see *Nityananda Gantayet v. Gajapati Vasudera Devu* (1)].

The result will be that the order of the High Court confirming the order of the Subordinate Judge will be set aside and the petition of the appellants will be remitted to the Subordinate Judge for disposal according to law. The respondents will bear the costs of the appellants throughout. The 5th respondent's estate will be liable to recoup to the appellants the sum of Rs. 22, which he has paid into Court.

Appeal allowed; Case sent back.

V.R.P.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 395 OF 1916.

November 3, 1916.

Present:—Mr. Justice Chapman.

KARU SINGH AND ANOTHER—

APPELLANTS

versus

Musammam BIBI NASIBAN AND OTHERS—

RESPONDENTS.

Landlord and tenant—Ejectment—Assignee from tenant, resistance by, to landlord's entry—Right to resist, proof of, by defendant—Burden of proof.

Where in a suit in ejectment the defendant acknowledges the landlord's title but pleads that the defendant is the assignee from the tenant and is not bound to quit, the onus is on him to show that he had a right to resist the landlord's entry. The mere fact that the plaintiff has failed to prove a special case set up by him, though it may be a point in defendant's favour, does not relieve the Court from finding affirmatively on the evidence whether the defendant has a right to resist the landlord's entry. [p. 358, col. 1.]

Second appeal from the decision of the District Judge, Patna, dated the 3rd July 1916, confirming the decree of the Munsif, Barh, dated the 12th January 1915.

Messrs. Farnendra Nath Sinha and Shivanandan Rai, for the Appellants.

Mr. Mohammad Tahir, for the Respondents.

JUDGMENT.—The subject of this suit is certain land upon which huts or houses have been built in Mokamah. The landlords alleged that they allowed one Musan to occupy the land and the homestead. On the death of Musan the landlords allowed Musan's sons defendants Nos. 3 and 4 to remain on the property.

In October 1913 the two sons of Musan left the village and migrated elsewhere. The plaintiffs went to take possession when they were opposed by a person named Nasiban, who claimed under a transfer from the two sons of Musan. The landlords were unable to eject Nasiban and accordingly had recourse to the Court. The learned Munsif dismissed the suit upon the ground that the two sons of Musan had permanent and transferable rights in the land. The learned District Judge in appeal has expressly refrained from deciding as to the nature of the right to the land held by Nasiban or before her by the sons of Musan. The learned District Judge has disposed of the case in the following

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sentence: "The plaintiffs' case is based on an allegation of a conditional settlement made about fourteen years ago, and that having broken down, they cannot shift their ground and throw the burden of proof as to the permanent nature of the grant on the defendants."

The case was contested by the defendant Nasiban alone.

Now, it being conceded that the plaintiffs are the proprietors of the land, it was for the transferee Nasiban to make out her right to resist the plaintiffs' entry on the land. The mere fact that the plaintiffs tried to make out a particular case and failed might be a point to set up in favour of the defendant Nasiban's case; but it did not relieve the Judge from finding affirmatively on evidence that the defendant, the transferee Nasiban who resisted, had a right to resist the entry of the plaintiffs on the land. I may note that in the Record of Rights the entry in the column 'status' is a word *gair mazrooa* from which I infer that the persons in occupation of the land were not recorded by the Survey Officers as having either an occupancy or a non-occupancy right in the land.

It may be that the tenancy was transferable but there must be a finding to that effect.

The result is that I set aside the judgment and decree of the learned District Judge and remand the appeal to the District Judge for a fresh decision. Costs will abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 794 OF 1915.

June 27, 1916.

Present:—Justice Sir George Knox, KT.

POORAN SINGH—PLAINTIFF—

APPELLANT

versus

Musammat HAIDRI—DEFENDANT—

RESPONDENT.

Jurisdiction—Civil or Revenue Court—Suit for declaration of invalidity of lease—Agra Tenancy Act U. P. Act II of 1901, s. 197.

A suit for a declaration that a certain lease is invalid does not lie in a Civil Court. [p. 359, col. 2.]

Ram Singh v. Girraj Singh, 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252, followed.

Kanhi Ram v. Durga Prasad, 27 Ind. Cas. 913; 37 A. 223; 13 A. L. J. 278, *Gomti Kunwar v. Gudri*, 25 A. 138, A. W. N. (1902) 220, referred to.

The intention of United Provinces Act II of 1901, as well as of the Acts before it, was that when a Rent Court could try the issue which lay between the parties, then the Rent Court and Rent Court alone had jurisdiction. [p. 359, col. 2.]

Second appeal from the decision of the Subordinate Judge, Budaun, dated the 19th March 1915.

FACTS.—Pooran Singh plaintiff and his brother Sher Singh jointly owned some property. In 1907, an application for partition was filed. On the 6th of August 1908, Sher Singh gave a perpetual lease of 38 *bighas* 16 *biswas* to his mistress *Musammat Haidri*. On the 15th of June 1910, the partition proceedings came to an end and a portion of the leased land fell to the plaintiff's share. On the 25th of March 1912, the plaintiff's suit for ejectment of *Musammat Haidri* was dismissed for default by the Revenue Court. Thereupon the plaintiff brought the present suit in the Civil Court for a declaration that the lease granted by Sher Singh was null and void. The Courts below dismissed the suit, holding that the suit was not maintainable in a Civil Court. The plaintiff appealed to the High Court.

Mr. *Lakshmi Narayan*, for the Appellant.—The suit has been thrown out on the ground that Civil Courts have no jurisdiction in matters of this kind. They have relied on the case of *Ram Singh v. Girraj Singh* (1). In that case, a lease was set up in the Revenue Court which went into the question and decided it. In the present case, the matter was never gone into by reason of the fact that the suit had been dismissed for default and the plaintiff's cause of action for setting aside the lease accrued only after he came to know of its existence. Moreover the principle laid down in this case, namely that the real substance of the relief has to be looked at and not the form, is opposed to the case of *Gomti Kunwar v. Gudri* (2), which was based upon the Privy Council

(1) 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252.

(2) 25 A. 138; A. W. N. (1902) 220.

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case of *Gokul Mandar v. Pudmanund Singh* (3). *Gomti Kunwar's* case (2) has also been followed in *Kidambi Venkatachariar v. Lakshmi Doss* (4).

In the case of *Kanhi Ram v. Durga Prasad* (5) it was held by the same Bench which decided *Ram Singh's* case (1) that although the Revenue Court has held a person to be the sub-tenant of the defendant, the plaintiff could institute a suit in the Civil Court for a declaration that he was the tenant-in-chief and not the defendant.

The present suit is clearly maintainable in the Civil Court: section 9, Civil Procedure Code, *Chrit Ram v. Hira* (6), *Jagrup v. Gaya Prasad* (7).

A second suit for ejectment would be maintainable in the Revenue Court and would not be barred.

It has also been held that if a suit for ejectment fails, the plaintiff can bring a suit for ejectment in the Civil Court on the allegation that the defendant is a trespasser: *Zubeda Bibi v. Sheo Charan* (8), *Hamed Ali Shah v. Wilayat Ali* (9) and *Jagar Nath v. Ajudhya Singh* (10).

In any event the District Judge ought to have acted under the provisions of section 197 of the Tenancy Act: *Badam Singh v. Musammam Sabta Kuar* (11), *Naubat Singh v. Baldeo Singh* (12).

Mr. S. A. Haidar, for the Respondent, was not heard in reply.

JUDGMENT.—The suit which has given rise to this second appeal was a suit brought by the plaintiff, who is here the appellant, to obtain a declaration that a certain lease, dated the 6th of August 1908, is void as against him. The plaintiff and Sher Singh defendant No. 2 were brothers. They both owned certain plots measuring 33 *bighas* 16 *biswas*. An application was

made for partition and the partition was sanctioned on the 15th of June 1910. At that time defendant No. 2 was the *lambardar* and while the partition was still pending, he gave a perpetual lease of the entire plot in favour of one *Musammam Haidri* defendant No. 1. The major portion of the plots, amounting to 20 *bighas* 4 *biswas*, fell at the partition to the share of the plaintiff. He brought a suit in the Revenue Court for the ejectment of *Musammam Haidri*. That case was dismissed on 25th March 1912 for default. The appellant then brought the present suit in the Civil Court to obtain a declaration that the lease was invalid and ought to be set aside. *Musammam Haidri* contested the suit and pleaded that it was not cognizable by the Civil Court. Both the Courts below, following the law as laid down in *Ram Singh v. Girraj Singh* (1), held that the suit did not lie in the Civil Court and dismissed the claim.

In appeal before me it is contended that the Court below had jurisdiction and in any case should have exercised the powers conferred upon it by section 197 of Local Act II of 1901. In the course of the argument it was further contended that the case just cited by me can be distinguished and that in any event it is opposed to what was laid down in the case of *Kanhi Ram v. Durga Prasad* (5) and also in the case of *Gomti Kunwar v. Gudri* (2). The principle laid down in *Ram Singh v. Girraj Singh* (1) has my fullest sympathy. As I understand Local Act II of 1901, the intention of that Act as well as of the previous Acts before it was that when a Rent Court could try the issue which lay between the parties, then the Rent Court and Rent Court alone had jurisdiction. I understand this to be the principle which governed the Judges in *Ram Singh v. Girraj Singh* (1). At any rate I have the authority of that case for my decision in the present case and, as I said, the principle has my fullest sympathy. I dismiss the appeal with costs, including fees in this Court on the higher scale.

- Appeal dismissed.

(3) 6 C. W. N. 825 (P. C.); 29 C. 707; 29 L. A. 196; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323.

(4) 31 M. 62; 3 M. L. T. 186; 17 M. L. J. 601.

(5) 27 Ind. Cas. 913; 37 A. 223; 13 A. L. J. 278.

(6) A. W. N. (1881) 54; 2 Ind. Dec. (N. s.) 436.

(7) A. W. N. (1884) 5; 3 Ind. Dec. (N. s.) 757.

(8) 22 A. 83; A. W. N. (1899) 189; 9 Ind. Dec. (N. s.) 1055.

(9) 22 A. 93; A. W. N. (1899) 193; 9 Ind. Dec. (N. s.) 1092.

(10) 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408.

(11) 2 A. L. J. 119.

(12) 9 Ind. Cas. 666; 8 A. L. J. 312; 33 A. 479.

HARMANOGE NARAIN SINGH v. GANOUR SINGH.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1522 OF 1913.

October 31, 1916.

Present:—Mr. Justice Roe and Mr. Justice
Jwala Prasad.

HARMANOGE NARAIN SINGH—

PLAINTIFF—APPELLANT

versus

GANOUR SINGH AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 19, 20—Occupancy rights, acquisition of—Hindu Law—Widow's estate—Acquisition of occupancy rights during lifetime of widow—Eviction by reversioners, validity of.

Occupancy rights are not the creation of a *zemindar* or of the manager or of the temporary holder of an estate; any person cultivating lands in an estate acquires in time occupancy rights therein and the temporary holder can do nothing to prevent the acquisition of those rights save by evicting the occupancy *ryot* by legal process. Any person holding in good faith as a cultivating *ryot* land under a temporary manager, proprietor or even lease-holder would acquire occupancy rights therein after twelve years' cultivation.

Hence occupancy rights acquired during the time when an estate was in the hands of a Hindu widow cannot be questioned by the reversioners after her death.

Second appeal from the decision of the Subordinate Judge, Mozufferpore, dated the 17th February 1913, affirming that of the Munsif, Muzufferpore, dated the 5th August 1912.

Dr. D. N. Mitter (with him Mr. Baikun'ha Nath Mitter), for the Appellant.

Mr. Ganesh Dutt Singh (with him Mr. Baidya Nath Narain Sinha), for the Respondents.

JUDGMENT.—In this case the appellant is reversioner to an estate which was in the hands of a Hindu widow from the year 1876 up to the year 1904. During that period certain connections of hers obtained a settlement of the parcel of land now in dispute as cultivating *ryots* and have been recorded as holding occupancy rights therein. The appellant seeks to evict them, *firstly*, on the ground that the land in suit was *zerait* land of the estate and that, therefore, the respondents could not legally acquire occupancy rights therein; and *secondly*, that the widow had no authority to create occupancy rights in these lands.

With regard to the *second* argument occupancy rights are not a creation of the *zemindar* or of the manager or of the

GANGARAM GANPATI v. LAXMAN GANOBA.

temporary holder of the estate, any person cultivating lands in an estate acquires in time occupancy rights therein and the temporary holder can do nothing to prevent the acquisition of those rights save by evicting the occupancy *ryot* by legal processes. It is certain that any person holding in good faith as a cultivating *ryot* land under a temporary manager, proprietor or even lease-holder would acquire occupancy rights therein after twelve years' cultivation.

With regard to the *first* point raised that the lands are *zerait* land, it has been found as a fact that they are not *zerait* lands, and we cannot go behind that finding unless it is shown that the appellants did not have a fair trial on this issue. It is suggested that they might have proved their case by means of a local enquiry, but we note that there was no application made for a local enquiry until after the evidence in the case had been completed.

The appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 151 OF 1915.

March 15, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

GANGARAM GANPATI BHOPALE—

DEFENDANT—APPELLANT

versus

LAXMAN GANOBA SHET—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Sale—Part-payment of purchase-money—Transfer of possession—Subsequent purchaser by registered deed, right of.

Defendant contracted to purchase certain property from N., paid half of the purchase-money and was put in possession of the property and the other half of the purchase-money was agreed to be paid after the sale-deed was passed. N. subsequently sold the property by a registered deed to plaintiff, who purchased it with notice of the contract with defendant. On a suit by plaintiff for possession:

Held, that plaintiff could not profit by his conveyance and that his suit was not maintainable. [p. 361, col. 2.]

Held, also, that plaintiff could only stand in the shoes of N. and receive the balance of the purchase-money due, on payment of which he would have to convey the property to the defendant, [p. 361, col. 2.]

GANGARAM GANPATI v. LAXMAN GANOBA.

Quære.—Whether a defendant who contracts to purchase a certain property and pays a portion of the purchase-money has no defence against a suit by his vendor for possession? [p. 361, col. 2.]

Lalchand Motiram v. Lakshman Sahadu, 28 B. 466; 6 Bom. L. R. 50; *Kurri Veerareddi v. Kurri Bapireddi*, 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395, doubted.

Second appeal from the decision of the first class Subordinate Judge, Nasik, in Appeal No. 228 of 1913, confirming the decree passed by the second class Subordinate Judge, Malegaon, in Civil Suit No. 215 of 1912.

Mr. K. H. Kelkar, for the Appellant.

Mr. W. B. Pradhan, for the Respondent.

JUDGMENT.—The plaintiff sued for a declaration that a certain immoveable property belonged to him and for a decree that possession of the same should be delivered to him by the defendant. He bases his title upon a purchase of the properties in question from Narayen Ganpati on the 5th of December 1911. It has been held by the lower Appellate Court that prior to this date the plaintiff had notice of the execution of a contract for the sale of the same property by Narayen to the defendant. The defendant contends that he has paid to Narayen portion of the purchase-money agreed upon and that the balance was to be paid after the sale-deed was passed. It is found by the lower Appellate Court that nearly half of the purchase-money was in fact received by Narayen from the defendant under the contract of sale.

The question is whether the defendant has a good defence to a suit by a purchaser from Narayen who can rely upon a registered sale-deed and whether he can, notwithstanding the sale-deed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract.

The defendant's right to enforce the benefit of the obligation of his intended vendor against the purchaser with notice is expressly affirmed by section 40 of the Transfer of Property Act, as explained by the illustration. The plaintiff is, moreover, according to the Specific Relief Act, section 3, a trustee for the defendant of the land purchased by him: see illustration (g). Section 91 of the Indian Trusts Act affirms the same rule as

the Specific Relief Act. The Legislature has herein adopted the law applied in the cases of *Daniels v. Davison* (1) and *Potter v. Sanders* (2). It is not contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase, the defendant had any notice that the vendor would refuse performance. Therefore at the date of the plaintiff's suit, namely, the 16th of April 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation. It must not be taken from the above remarks that the defendant would be in a worse position in relation to the plaintiff if at the date of suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying upon his possession. In this connection reference may be made to *Orr v. Sundra Pandia* (3); *Krishna Menon v. Kesavan* (4) and *Rangnath Saktharam v. Govind Narasim* (5).

The result is that the plaintiff cannot profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase-money due, on payment of which he would have to convey to the defendant. This, however, is not the relief which he seeks, and the result is that his suit for possession must fail.

This decision may appear to be inconsistent with the result arrived at in *Lalchand Motiram v. Lakshman Sahadu* (6) and in *Kurri Veerareddi v. Kurri Bapireddi* (7), from which, if rightly decided, it would appear that the defendant would have no defence against a suit by his vendor for possession, although by reason of the statutory provisions above referred to, he has a complete defence against his vendor's assignee, notwithstanding that

(1) 1109 16 Ves. 249; 10 R. R. 17; 33 E. R. 978.

(2) 1846 6 Hare 1; 67 E. R. 1057; 7 R. R. 1.

(3) 17 M. 255; 6 Ind. Dec. (N. S.) 176.

(4) 20 M. 315; 7 Ind. Dec. (N. S.) 216.

(5) 28 B. 634; 6 Bom. L. R. 592.

(6) 28 B. 466; 6 Bom. L. R. 510.

(7) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.

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the latter has no greater knowledge than the vendor possessed.

It may be necessary hereafter, when a suitable occasion arises, to consider in a Full Bench, whether the Transfer of Property Act necessarily involves such inconsistent positions. The facts of the present case do not raise the question decided in *Lalchand Motiram v. Lakshaman Sahadu* (6). When the question does arise for consideration, the observations of the Privy Council in *Immadipattam Thirugnana Kondama Naik v. Periya Dorasami* (8) and the words "of itself" in the last clause of section 54 of the Transfer of Property Act, to which attention was called by Sir Lawrence Jenkins in *Karalia Nanubhai v. Mansukhrum* (9), will doubtless be considered.

Appeal accepted.

(8) 24 M. 377 at p. 384; 28 I. A. 46; 5 C. W. N. 217; 7 Sar. P. C. J. 811.

(9) 24 B. 400 at p. 402; 2 Bom. L. R. 220; 12 Ind. Dec. (N. S.) 799.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 159
OF 1915.

June 15, 1916.

Present:—Mr. Justice Fletcher and
Mr. Justice Teunon.

AKSHOY CHANDRA MAJHI AND OTHERS
—DEFENDANTS—APPELLANTS

versus

MANMATHA NATH CHATTERJEE—

PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 35 (3)—'Assign', whether donee of gift is—Execution, admission of, by donee after donor's death—Registration.

A donee under a gift deed is an 'assign' of the executant within the meaning of section 35 (3) of the Registration Act.

Section 35 of the Act authorises the registration of a deed of gift, after the death of its executant, if the donee appears before the Registering Officer and admits the execution.

Appeal against the decree of the Subordinate Judge, second Court, Burdwan, dated the 13th November 1914, reversing that of the Munsif, second Court, Katwa, dated the 4th September 1913.

Babus Satish Chandra Mookerjee and Khetra Gopal Banerjee, for the Appellants.

Babus Surendra Kumar Bose and Sarat Kumar Pal, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned Subordinate Judge of the second Court of Burdwan, dated the 13th November 1914, reversing the decision of the Munsif of the second Court at Katwa. The suit brought before the learned Munsif was one for recovery of possession of certain lands, to which the plaintiff founded his title on a deed of gift executed by a lady. The lower Appellate Court has found that the deed of gift was executed. The only question that was raised before that Court and which has also been pressed before us in this appeal is as to the registration of that deed. Under the provisions of the Transfer of Property Act, a gift of an immoveable property can only be made by a deed of transfer duly registered. The lady died a few hours after executing the deed of gift. The document was, however, registered within the four months required by the Indian Registration Act and the only question is, "was the plaintiff an assign of the deceased lady within the meaning of the third clause of section 35 of the Indian Registration Act, which authorises the registration of a document where the executant is dead and his representative or assign appears before the Registering Officer and admits the execution?" The plaintiff was vested with the interest that the deceased lady had in the property comprised in the deed of gift; and ordinarily, he would be an assign of the lady. No reason has been shown why the word "assign" should not be given its ordinary signification, and it is quite possible that the Legislature inserted the word "assign" in the third clause of section 35 to provide for the case where the representative would not appear and unless the transferee was authorized to appear and admit the execution, the deed could not be registered. I think the conclusion arrived at by the learned Subordinate Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

DUNDAPPA MALLAPPA SIGANDHI v. SECRETARY OF STATE.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 136 OF 1913.

February 23, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

DUNDAPPA MALLAPPA SIGANDHI

AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay District Police Act (Bom. Act IV of 1890), ss. 42, 44, 13, scope of—Public street—Vyasantol of procession, prohibition of, for all time and throughout a district—Government Resolution, if ultra vires—Public, right of, to use public roads.

The Government of Bombay Resolution dated the 6th of May 1911 prohibiting *Vyasantol* processions in the District of Belgaum for all time is illegal and *ultra vires* and is not covered either by section 42 or by section 44 of the Bombay District Police Act. [p. 364, col. 2; p. 366, cols. 1 & 2.]

Section 42 of the Bombay District Police Act expressly limits the powers of prohibition conferred upon the Magistrate both in time and in place, the limitation of place being to a particular town or village or the vicinity thereof. Section 44 (1) of the District Police Act deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited. [p. 364, col. 2; p. 366, col. 1.]

Section 13 (2) of the District Police Act does not confer any unlimited power on the Government to prohibit processions. [p. 366, col. 1.]

All members of the public have a right to use the public streets in a lawful manner, and it lies on them who would restrain them to show some law or custom abrogating the privilege. [p. 364, col. 1; p. 366, col. 1.]

Therefore, the *Lingayats* of the District of Belgaum have a right to exhibit *Vyasantol*, their religious symbol, in procession in any public street, subject to the lawful orders that may be passed under any provisions of law such as section 144 of the Code of Criminal Procedure or sections 42 and 44 of the Bombay District Police Act. [p. 365, col. 1; p. 366, col. 1.]

Sadagopachariar v. Rama Rao, 26 M. 376; *Bastinappa v. Dharmappa*, 7 Ind. Cas. 663; 12 Bom. L. R. 586; 34 B. 571, referred to.

First appeal from the decision of the District Judge, Belgaum, in Suit No. 14 of 1913.

Mr. *Strangman* (with him Mr. S. R. *Bakhale*), for the Appellants.

Mr. *Jardine*, Advocate-General (with him Mr. S. S. *Patkar*, Government Pleader), for Respondent No. 1.

Mr. *Bahadurji* (with him Messrs. G. K. *Parekh* and K. H. *Kelkar*), for Respondents Nos. 2 to 6.

JUDGMENT.

BATCHELOR, J.—This appeal is brought by

the plaintiffs in the suit. They sued as representatives of the *Lingayat* community of the town of Athni, and the object of their suit was to obtain a declaration of their right to exhibit in public their religious emblem known as the *Vyasantol*.

The learned District Judge has decided against them because he has upheld the validity of a certain contested order of Government, *viz.*, Government Resolution, Judicial Department, No. 2568 of the 6th May 1911.* Upon that point only the

*RESOLUTION.

The *Lingayats* of Athni in the Belgaum District pray for permission, under section 44 (1) of the District Police Act (Bombay Act IV of 1890), to parade the *Vyasantol* procession through certain streets of the town of Athni on the occasion of the visit of their High Priest, the Swami of Chitaldurg. The procession is intended to do honour to him and to show the respect and reverence with which his followers regard him.

2. The main points requiring consideration under section 44 (1) of the District Police Act (Bombay Act IV of 1890) are:—

(a) whether any dispute or contention exists which is likely to lead to a grave disturbance of the peace; and

(b) what order would be proper having regard to the apparent legal rights and the established practice of the parties.

3. As to a) there can be no doubt, on the evidence produced and from the past history of nearly a century, that a dispute has always existed and does now exist about the right to parade the *Vyasantol* procession, both in Belgaum and in other districts. Similarly the same evidence shows that disturbances of the peace have in the past been caused by this procession, which has been described as "an obnoxious ceremony" and "an unbecoming procession." The element of disturbance is in the symbol of the great Vyasa's hands represented as cut off, and paraded in that manner. Though the *Vaishnavite Brahmins* are the class who consider themselves most directly aggrieved, there is no doubt that Vyasa has been held in the highest respect and is considered to be a god by those *Brahmins* who are followers of Shiva, and by the non-*Lingayat* Hindus generally. These last, though they may not voluntarily and actively lead any opposition, would certainly sympathise with an agitation against the processions. The Governor-in-Council is, therefore, convinced that the dispute that exists is such as to raise a reasonable apprehension of a grave disturbance of the peace. The fact that the District Magistrate, Belgaum, ordered a special party of Police to attend at Athni shows that in his opinion the occurrence of a riot was not improbable.

4. As regards (b) the Governor-in-Council is of opinion that there can be no legal right to parade through the streets with this symbol. He agrees with the Commissioner, S.D., that the *Vyasantol* is not a necessary part of religious worship. The

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plaintiffs failed in the Trial Court, and that point only is the subject for our decision in this appeal.

Now the proposition with which we start, in a consideration of this subject, is the well-known principle that all members of the public and every sect have a right to use the streets in a lawful manner, and it lies on those who would restrain them in its exercise to show some law or custom having the force of law depriving them of the privilege: see *Sadagopachariar v. Rama Rao* (1), which was followed by a Bench of this Court in *Baslingappa v. Dharmappa* (2).

These general or common law rights may be restricted by Statute: in this instance by the Bombay District Police Act. But the restrictions imposed must, it is manifest, be justified by the Act. The question, therefore, is whether the Government Resolution, which I have quoted, is justified under the District Police Act. For, it is admitted by the learned Advocate-General that the Resolution is not to be saved by reference to section 144 of the Criminal Procedure Code read with section 38 of the District Police Act. The learned District Judge, commenting upon the terms of the Resolution, observes that the order is not drafted with legal precision and does not suggest that legal advice was taken. The want of precision to which the Judge here alluded adds some difficulty to our task. But the question is, whether, without pressing technicalities, the substantial requirements of the District Police Act have been complied with. In my opinion, the answer is in the negative. The authority issuing the order ascribes it to section 44, sub-section 1. That

ascription, however, is, I think I may say, obviously a mistake. For whereas the Resolution under notice purports to prohibit this *Vyasantol* procession, section 44 (1) deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited. That notwithstanding, the Resolution may, of course, still be valid if it can be attributed to powers vested in the Government by any other sections of the Act, and the only section to which recourse has been had for this purpose is section 42. That section also, in my opinion, fails to serve the turn of the respondents. For, in the first place, the authority empowered under section 42 is not the Government, but the local Magistrate of the District, and the words 'whenever and for such time as it shall appear necessary' appear to me in the context to mean 'appear necessary to that Magistrate.' It was suggested that the powers thus vested in the District Magistrate might be capable of legal exercise by the Government by reason of the provisions of section 50 read with section 13, sub-section 2, of the Act. It is not at present necessary to pronounce upon this argument, and I will only say that I am doubtful whether it should be conceded. Assuming, however, that the argument is sound, it goes no further than this that the present orders, though issued by Government, have the same validity as if they had been issued by the District Magistrate. The question, therefore, is whether these orders, if issued by the District Magistrate, would be lawful orders under section 42. I think they would not. For section 42 enables the Magistrate to issue these orders only whenever and for such time as it shall appear necessary and the orders are to operate only in such town or village or the vicinity thereof as may be directed; in other words, the powers of prohibition conferred upon the Magistrate are by the Statute expressly limited both in time and in place, the limitation of place being to a particular town or village or the vicinity thereof. This particular order, as I understand it, is to operate for all time, and instead of being limited to any town or village or the vicinity thereof is to prevail throughout the whole of the Belgaum District.

On these grounds, therefore, I think that

(1) 26 M. 376.

(2) 7 Ind. Cas. 663; 12 Bom. L. R. 586; 34 B. 571.

objection of the *Brahmans* and others is not to the procession itself, but to the parading of the *Vyasantol*. On the question of the established practice, which after all is the most important one, it is admitted not only that there have been no processions of the kind in the Belgaum District within the memory of the present generation but that it has been prohibited whenever the *Lingayats* attempted to revive it.

5. The Governor-in-Council for these reasons is pleased to direct that permission should not in future be given to hold *Vyasantol* processions in the Belgaum District.

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the Resolution in question is beyond the powers conferred by the Act.

The learned Advocate-General, as a last effort to sustain the Resolution, suggested that it might be upheld if it were regarded as being nugatory. I am unable, however, to read it in that sense. From what I have already said, it is manifest that we must attend not so much to the words as to the plain meaning of this Resolution, and of the meaning of it I have not been able to entertain any doubt. As I read the Resolution, its meaning and effect is, and was intended to be, the prohibition of the *Vyasantol* procession throughout the Belgaum District for all time.

For the reasons which I have given I am of opinion that no such orders could lawfully be issued under the Bombay District Police Act. Therefore, the point upon which the judgment of the Court below has gone against the appellants must now be decided in their favour; the decree of the District Judge must be reversed and the suit must be remanded to his Court to be heard and decided on the other issues.

Costs to be costs in the suit.

SHAH, J.—This appeal arises out of a suit brought by the *Lingayat* plaintiffs in the District Court of Belgaum for a declaration that the *Lingayats* have a right to exhibit *Vyasantol*, their religious symbol, in procession on religious and other occasions, and that the Government Resolution No. 2658 (Judicial Department) of the 6th May 1911 is illegal and *ultra vires* in so far as it forbids the exhibition of the symbol entirely for all time and throughout the District. Among other things, it was urged by way of defence that the validity of the Government Resolution could not be questioned in a Civil Court. The material issues were decided by the lower Court against the plaintiffs, principally on the ground that the Government Resolution was within the powers conferred by the District Police Act (Bom. Act IV of 1890) on the Government, and that its validity could not be questioned in a Civil Court except so far as section 81 of the Act permitted it. The result was that the plaintiffs' suit was dismissed with costs.

In this appeal against the decree of the

District Court, the only point argued is whether the Government Resolution of the 6th May 1911 is illegal and *ultra vires*.

At the outset it will be convenient to deal with the point, which has been raised by the learned Advocate-General, that the Resolution does not prohibit anything and is merely a direction to the District Magistrate that permission should not be given in future to hold *Vyasantol* processions in the Belgaum District. Taking the Resolution as a whole, I have no doubt that it was intended to prohibit, and has clearly the effect of prohibiting, *Vyasantol* processions in the District of Belgaum without any limitation as to time, so far as the Government are concerned. The Resolution cannot, therefore, be treated as merely nugatory as suggested by the Advocate-General.

As regards the validity of the Resolution, it is conceded, and, in my opinion, rightly conceded, by the Advocate-General that section 38 of the District Police Act has no application to the present case. No reliance was placed on behalf of the defendants on section 81 of the Act in the course of the argument; and it is clear that the section can have no application, unless the order contained in the Resolution is made by the Government under an authority conferred by the Act.

The question, therefore, arises, whether the order in dispute can be referred to any authority conferred by the District Police Act on the Government. It is argued that the requisite authority is conferred by section 50 read with section 13, clause 2. Under section 50 orders made by the Magistrate of the District under Chapter IV are subject to the provisions of section 13 (2); and section 13, clause (2), provides that in exercising authority under the preceding sub-section the Magistrate of the District shall be governed by such orders as Government may from time to time make in this behalf. Assuming, without deciding, that the Government have the power under section 13 (2) of making such discretionary orders, as the District Magistrate is empowered to make under sections 42 and 44, so as to make them binding on the District Magistrate under section 50, it is clear that the orders to be made must be justified under sections

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42 and 44. If they transgress the provisions of sections 42 and 44, they would be *ultra vires* to that extent. Section 13, clause (2), does not confer any unlimited power on the Government to prohibit processions.

Having regard to the decisions in *Baslingappa v. Dharmappa* (2) and *Sadagopachariar v. Rama Rao* (1), it is clear that the plaintiffs have a right to use the public streets in a lawful manner and it lies on those who would restrain them to show some law or custom abrogating the privilege, and that subject to the lawful orders that may be passed under any provisions of law such as section 144 of the Code of Criminal Procedure or sections 42 and 44 of the District Police Act, they would be entitled to hold the *Vyasantol* processions in any public street. As I have already pointed out, the Government by their Resolution prohibit the *Vyasantol* processions in the whole District of Belgaum, without any limit as to time. The prohibition, that section 42 of the District Police Act contemplates, is limited as to time and space. It provides that the Magistrate of the District may, whenever and for such time as it shall appear necessary, prohibit in a town or village or the vicinity thereof the exhibition of symbols, which, in the opinion of the Magistrate, may probably inflame religious animosity between different classes. The order of the Government is not confined to any town or village but extends to the whole District, and it is not limited in any manner as to time. I feel clear that it is outside the ambit of section 42. Under section 44, it is still more difficult to justify the order of the Government. Under that section, when it appears to the District Magistrate that a dispute exists which is likely to lead to grave disturbance of the peace, he can give such orders, with reference to any religious exhibition or procession, as to the conduct of the persons concerned towards each other and towards the public as he shall deem necessary and reasonable under the circumstances. Such orders apparently are to have operation in a particular town or place. The present order of the Government does not appear to me to fall within the scope of section 44, as it involves an unqualified prohibition of the *Vyasantol* processions in

the whole District, and pays no regard to the apparent legal rights of the persons interested. Further, under section 44 (2), any order made under section 44 (1) is subject to a decree of a competent Court and is liable to be recalled or altered if it is inconsistent with a decree that may be passed in a suit, filed by an interested person, as to the rights and duties of the persons affected by the order. This subsection would save the present suit even if the order of the Government were within the scope of section 44 (1), because no order made under the first paragraph is to be inconsistent with the legal rights of the parties as determined by a Court of competent jurisdiction. But, in my opinion, the order of the Government is clearly outside the scope of sections 42 and 44; and it is not possible to treat it as having been made under an authority conferred by the Act.

I am unable to agree with the learned District Judge in his opinion that "it is within the competence of Government in the exercise of their power of control to give a general direction to the District Magistrate." No authority has been cited in support of this view; and on the proper construction of the sections of the Act, I cannot hold that the Act confers upon the Government an unlimited power of prohibiting religious processions in the whole of any District. On these grounds I am of opinion that the Government Resolution is illegal and *ultra vires* in so far as it prohibits the *Vyasantol* processions in the whole District without any limit as to time, and that it is no bar to the plaintiffs' suit.

I, therefore, concur in the order proposed by my learned brother.

Appeal allowed ; Suit remanded.

DILTOR KEOR v. HARKHOO SINGH.

PATNA HIGH COURT.
FIRST CIVIL APPEALS NOS. 49 AND 159
OF 1913.

November 13, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Atkinson.

[Musammat DILTOR KOER—PLAINTIFF—
APPELLANT
HARKHOO SINGH—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 6 (1)—Set-off, legal and equitable—Landlord and tenant—Rent, suit for—Liability to defendant on accounts—'Ascertained sum', meaning of—Set-off, right to, in claims arising in respect of same matter—Trust—Voluntary management of property—Constructive trustee—Liability of manager to account.

The expression 'ascertained sum' in Order VIII, rule 6 (1), Civil Procedure Code, means an amount which is beyond challenge and beyond dispute, concluded and conclusive. [p. 369, col. 1.]

A set-off can be claimed on the basis of a contractual relation between the parties. [p. 369, col. 1.]

In the absence of such a contract, there is a right to an equitable set-off when the set-off arises out of the same transaction out of which the claim springs. If it is found that the set-off is foreign to the original claim, the set-off will not be allowed. [p. 369, cols. 1 & 2.]

In a claim for rent due by a tenant under a lease, it is not open to the latter to plead a set-off of amounts due to him by the plaintiff on accounts in respect of payments made on the plaintiff's behalf in respect of other properties which are not the subject-matter of the suit. The defendant can, however, claim a set-off in respect of payments made on the plaintiff's behalf *qua* the property which he holds under him. [p. 368, col. 2.]

A volunteer acting in the management of another's property, without remuneration, becomes clothed with the character, position and capacity of a trustee and is deemed in law a constructive trustee, and, as such, is undoubtedly liable and bound to account for the management of the property committed to him. Voluntary service is the foundation underlying all trusteeship and the law precludes a trustee from making a profit or acquiring a benefit from his office as trustee. The fact of the payment of a salary affords no test in determining the liability to account. [p. 370, col. 2; p. 371, col. 1.]

Appeal from the decision of the 3rd Subordinate Judge, Patna, dated the 30th September 1912.

Dr. D. N. Mitter (with him Messrs. Purnendu Narain Sinha, Ram Prasad and Baikunth Nath Mitter), for the Appellant.

Dr. Sarat Chandra Bysack (with him Messrs. Hari Bhushan Mukherji and Rai Guru Saran Prasad), for the Respondent.

JUDGMENT.

ATKINSON, J.—A gentleman called Tundun Singh died prior to the 19th of April 1891, leaving a widow and three daughters him surviving. The plaintiff is the second daughter, the third daughter Muntor Koer is dead, having died in December 1906, and the eldest daughter is also dead and is represented by her son. Upon the death of Tundun Singh, a family arrangement was arrived at and embodied in a written agreement dated the 19th April 1891, whereby all the property of Tundun Singh, save four denominations, was equally divided amongst his three daughters, each of whom took a share to the extent of 5 annas 4 pies. The plaintiff Diltor on the 5th April 1892 leased her one-third share of that property to the defendant Harkhoo Singh. The plaintiff's one-third share represented 61 villages in all, and the rent reserved by the lease was Rs. 3,975 per annum payable in various proportions on the dates specified in the deed itself. There is no dispute as to the validity of the deed. The defendant entered into possession of the lands and continued to hold the lands under the lease for the term of seven years; and he remained on in possession after the expiration of the lease and is in possession still of the lands, and the rent that is sought to be recovered is the rent for the years 1315 and 1316 *Fasli*. The defendant also admits that he is liable, since the period when the lease expired, to hold the lands subject to all the provisions and terms embodied in the lease itself. Accordingly the plaintiff in action No. 49 of 1913 seeks to recover Rs. 6,114-11-0 for arrears of rent due for the years that I have already mentioned, and that sum of Rs. 6,114-11-0 is arrived at after the plaintiff has given the defendant credit for payment of Government revenue. Primarily, the plaintiff would be bound to pay all the charges affecting the property, namely Government revenue, road cess, and whatever superior rents might be payable in respect of the same, and, in so far as the defendant has paid Government revenue and road cess, or has paid any superior rents so far as they affect the *thika* properties, of course, as against the rent due, he must be entitled to get credit for such payments, because the obligation

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to make all such payments is not upon him but upon the plaintiff, who is the proprietor or owner of this property. It seems a very simple matter, and one would have thought that it was a matter easily disposed of within a reasonable limit of time. However, it has taken over six years for a simple claim for rent payable under a lease to be disposed of in the subordinate Courts.

The defendant's defence to this action for rent is one of a very extraordinary character, unless indeed the defendant is clothed with the authority and occupies the position which the plaintiff alleges he does in the corresponding Suit No. 1.9, namely that of an agent, manager or trustee. The defendant's defence to the action shortly stated is:—"I was your lessee of the leased lands, but I consented to pay in respect of your other properties (which I will refer to in a moment) all the charges that might affect them, and that whatever payments I made in respect of those properties I was to be entitled to set off by way of payment as against the rent payable by me to you under the lease."

It appears that in the year 1891 the plaintiff purchased a 5 annas share in three villages, Dibra, Shahpur and Fatehpur, and also that upon the death of her sister Muntor, childless, she inherited the 3-annas share which that lady also bought in these same villages, as well as her one-third share in the family property settled by the agreement of the 19th April 1891. These properties have been referred to in the course of the argument as the non-*thika* properties. The defendant's case or defence is, that he was to make all payments which could be properly claimed against the plaintiff in respect of these non-*thika* lands, whether by way of wages for servants, or Government cess or road cess or superior interests, and he avers in the claim that he was to pay them, and the payments which he made he was to be entitled to set off as against the rent payable under the lease of 1892. The plaintiff denies that contention altogether, and says that the payments the defendant may have made form the subject-matter of a different transaction; that the defend-

ant was to pay her rent under his contract and that whatever claim he had for acting as her manager was to be settled in a different proceeding and on a different basis entirely. Dr. Bysack in a very strenuous argument has suggested that really the only question for the determination of the rent suit is, whether or not the contract that was made between the plaintiff and defendant was the one which is pleaded in paragraphs 3 and 4 of the written statement, or is the simple contract alleged by the plaintiff. In fact he says that the real thing is this, that the disbursements to be made by the defendant in respect of the non-*thika* properties were to be made by way of a settlement of the rent due under the lease. Well, we do not at all hold with that view. We think that there was no such contract made between the parties as is alleged in the written statement and as has been contended for here. We think the case is one of a simple lease made between landlord and tenant, whereby the tenant contracts to pay rent to his landlord and that, if the defendant as tenant makes payments on his landlord's behalf *qua* the property which he holds under him, that, therefore, only to that extent is the defendant entitled to set off as against the rent due what sums he has paid. I have indicated the nature of the items to be set off, but in order to emphasize it I desire to draw particular attention to the fact that the claim is conversant only with the *thika* properties. Therefore, the first question which appears to us to require an answer is, what was the contract between the parties? Was the defendant to pay all the expenses and outgoings of all the plaintiff's property and set off the same as against the *thika* rent? or was the defendant only to pay outgoings and Government demands of the *thika* properties and set off the same as against the *thika* rent payable by the defendant to the plaintiff? We are of opinion that 'yes' is the proper answer to be given to the second question and 'no' to the first, namely that the set-off as against the *thika* rent is only conversant with payments made by the defendant in respect of the *thika* properties and no other.

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Then in the written statement an attempt is made by way of further defence to set off as against the rent due a very large sum which is claimed in very loose and ambiguous terms, and so far as it purports to be a set-off seems to be directly in violation of every rule of pleading. The defendant says: "You owe me on a general account items amounting to Rs. 18,000 and odd. I will set off as against your rent so much; it leaves you a debtor in my hands of Rs. 9,145 and, therefore, I owe you nothing, and your action for rent must be dismissed." It is impossible to tell how the claim of set-off is made out, no details are given, it is lacking in precision, and some of the items appear to have been arrived at in a very scratchy way. No one single item seems to us to be verified or vouched, nor can it be said to be ascertained, ascertained in the sense that it is beyond challenge or dispute. But the items which are claimed to be set off are items not connected with the *thika* property but with general disbursements made by the defendant in his capacity as the plaintiff's agent or trustee. We do not think that the various sums that are sought to be set off are in themselves what are termed in law 'ascertained sums'; nor are they within the express provisions of section 11 of the Code of Civil Procedure sufficiently ascertained to justify and entitle the defendant to claim a legal set-off as distinct from an equitable set-off. Dr. Bysack did not argue whether he had the right to an equitable set-off. He was very strenuous in his argument that he ought to be entitled to set off by way of rent what he claims to have paid on foot of Nowratan's decree. I do not see why that claim should be allowed at all. It is certainly not an ascertained sum in the sense that it is beyond dispute. He claims it as a definite sum; it may be, I feel sure it will be, hotly contested that the amount allowed by the Subordinate Judge is not in itself the amount for which he ought to get credit. Therefore, this item cannot be said to be ascertained; ascertained, as I have said, means beyond challenge and beyond dispute, concluded and conclusive. Well, that being so, we do not think that a right to an equitable set-off can exist in this case, because the right to equitable set-off

is founded upon the condition that the set-off must arise out of the same transaction out of which the claim springs. If it is found that the set-off is foreign to the original claim, then the Courts of Equity prior to the Judicature Act in England did not allow the set-off. Here the set off springs not under the contract created by the lease of 1892, but out of a claim arising from a breach of trust, in a totally different matter under a totally different right, and in respect of totally different property. Therefore, an equitable set-off is entirely out of this case; in fact the whole of the defendant's alleged claim to set off appears to me to be more in the nature of a counter-claim than a set-off. That really disposes of the action for rent. I shall indicate in a moment the form of direction which we will give and the case must be sent back to ascertain what are the specific items for which the defendant is to have credit as against the rent due.

The next question is, was the defendant manager, agent or trustee for the plaintiff in the management of what has been referred to as the non-*thika* property? Dr. Bysack contends that he was not, that he was never clothed with the character of an agent, that he was never manager, and that what he did was done more or less as a matter of friendship or as a mode of paying his rent, that it never imposed any obligation or duty upon the defendant. But the Judge in this case finds as a fact that Harkhoo Singh the defendant did look after the plaintiff's *sir* property not as manager but as a relative. I got lost in my endeavour to find out what the learned Judge meant by that 'not as manager but as a relative.' I think, viewing the evidence in its entirety and having studied it with the greatest possible care, not only from the point of view of the plaintiff but from that of the defendant also, and having gone through every single exhibit referred to in the case, that it is obviously plain that Harkhoo Singh managed and controlled the plaintiff's property. Whether he did so for a reward payable under an express contract does not satisfactorily appear, but what is established by the evidence of the plaintiff's and defendant's witnesses is, that by his actions and conduct the defendant put himself in a fiduciary capacity towards the plaintiff in reference

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to the management of her non-*thika* property. He received the rent and profits of her property; he exercised control and domination in his relationship with the tenants, his order and mandate prevailed, and the *patwaris* and *gomasthas* in their diverse capacities acted in obedience to his direction and order. The defendant instituted rent suits on behalf of the plaintiff against the tenants, and generally conducted and controlled the course of the litigation; and if money was required demanded it for the purpose. Most significant of all, however, are the three revenue *chalans* of 1907 and 1909, which show payments of revenue by the defendant of the non-*thika* property as agent for the plaintiff. By what right, by what authority did he, the defendant, make these payments unless he had put himself in the position of manager of this lady's property, thereby acting as her trustee? However one fact can never be lost sight of in this case, that in *Fasli* 1311 the defendant rendered his account, having rendered antecedently five prior accounts, on the basis of his liability to account. The account was settled and the parties were satisfied, and what is asked and prayed for by way of relief in this suit is an account by the defendant for the years 1312 to 1316 *Faslis* that is from the settlement of the last account in 1311. Exhibit 16 (a), page 81, clearly, I think, points to an admission by the defendant of his liability to account, as also Exhibit 15 (a), page 78, and Exhibit 20 at page 85. It may be said that these Exhibits refer to a period antecedent to the period of account sued for in this action. That fact, admittedly true, is wholly immaterial, because these documents are only relied upon to establish the genesis and origin and nature of the relationship and its character existing between the plaintiff and the defendant in their dealings with the plaintiff's property. We shall not attempt to take the account or investigate its *bona fides* or accuracy. All we decide in these two actions is the main outstanding feature of liability—the liability for rent and the liability on the defendant's part to account.

The relationship between the defendant and the plaintiff is somewhat mixed. He was a cousin and a kinsman. She was

a *pardanashin* lady living a considerable distance from the property in suit, and naturally she would look to the defendant, who is her kinsman and who had managed the property for her mother in her lifetime and who had managed the property for her sister, and the natural thing for her to do would be to look to the defendant to assist her in the management of her property in the way he did.

Dr. Bysack relied very strongly upon an admission made by the plaintiff's husband at page 125, line 12, of his evidence that he used to manage his wife's property. I think that an entirely erroneous importance has been attached to that admission. I think that what the plaintiff's husband meant and said was, that as between the defendant and the plaintiff he used to conduct the negotiations with the defendant on behalf of the plaintiff but that he never acted in regard to the plaintiff's property as the defendant himself did. The learned Judge who tried this case seems to have erred lamentably in his view of the law touching the defendant's liability to account, having regard to the defendant's admissions which are not denied, because it is sworn to specifically by Muneshar Lall and by the plaintiff's husband that the defendant admitted he was asked to manage the plaintiff's *sir* property. The learned Judge seems to have thought that to establish the defendant's liability to account as manager it was necessary, in support of the plaintiff's case, to prove or establish a contract appointing the defendant manager at a fixed salary or scale of remuneration, because he seems to imply that if a relative acts voluntarily without remuneration in the management of his kinsman's property, no question of liability to account would arise. Of course if that was the view of the learned Judge he was hopelessly wrong. No doubt a manager appointed at a salary is one thing, but it is equally certain and different that a volunteer acting in the management of another's property without remuneration becomes clothed with the character, position and capacity of a trustee, and is deemed in law a constructive trustee, and as such is undoubtedly liable and bound to account for the management of the property committed to him. The fact of the payment of a salary

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affords no test in determining the liability to account. Voluntary service is the foundation underlying all trusteeship, and the law precludes a trustee from making a profit or acquiring benefit from his office as trustee. Therefore, we are clearly of opinion that the Subordinate Judge erred in law in finding that the defendant was not liable to account. The Judge finds as a fact that the defendant did manage the plaintiff's property as a relative. Taking this finding of fact coupled with the evidence and documents submitted in evidence by both sides, we are clearly of opinion that the defendant occupied the position of a constructive trustee in law, and by reason thereof he has clearly to account for all moneys which he ought to have received, which he did receive, and which he disbursed in the due course and management of the property. To allow this decree to stand would be a defiance of justice and the negation of equity and good conscience. Dr. Bysack says in effect, "I will account for whatever moneys I have received." If this decree were to stand the defendant would not be called upon to account for a single penny. Dr. Bysack's own admissions show that his client is liable to account for something; he does not know to what extent. But if we hold, as we have held now, that the defendant is in the position of a manager and has been acting as a manager of this lady's property, then he must account. That he has made disbursements, I think, is beyond doubt. If he is an honest defendant he can very well discharge himself of the burden the law casts upon him, if he cannot then he must suffer.

Accordingly we think the form of the decree in this case should be as follows.

In Suit No. 49 of 1913 we decree the rent suit *qua* the *thika* properties, subject to the defendant's right to set off as against the rent due all revenue and other outgoings primarily payable by the plaintiff in respect of the same but in fact paid by the defendant during the years 1315 and 1316 *Faslîs*. We shall remand the case to have the defendant's claim ascertained, and direct that upon ascertainment the same should be set off as against an aliquot part of the rent due, and the plaintiff shall thereupon be entitled to a decree for the

balance so found due. We shall direct this inquiry to be expedited and disposed of without delay. The plaintiff will be declared entitled to her costs of the rent suit in the lower Court, and also of this appeal and of the enquiry now directed. We decline to put any stay upon the execution of that decree for rent.

In Suit No. 159 of 1913 we shall declare the plaintiff entitled to the account claimed by her plaint for the years 1312 to 1316 *Faslîs* as against the defendant in respect of the property mentioned in paragraph 8 of the plaint, with liberty to the defendant to file an account by way of discharge, if so advised, of all disbursements made by him as agent, manager or trustee in respect of the said property. We shall remand the case to the Subordinate Judge to have the account taken and we shall direct him to proceed with the hearing of this matter as expeditiously as possible. The costs in the lower Court and of this appeal and of taking of the account will abide the issue of the taking of the account.

MULLICK, J.—I agree.

Appeal allowed; Case remanded.

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 483 OF 1915.

February 2, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

MOHANLAL NAGJI—PLAINTIFF—
PETITIONER

versus

BAI KASHI—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Subject-matter of suit, value of—Suit for injunction and declaration—Fiscal valuation—Real value, if can be shown.

In the Bombay Presidency it is open to a plaintiff to sue in a second class Subordinate Judge's Court for a declaration and injunction, even though the immoveable property referred to or affected by the injunction exceeds the pecuniary limit of that Judge, *i. e.*, Rs. 5,000. [p 373, col. 2.]

Therefore, a plaintiff by suing for a declaration and injunction in a second class Subordinate Judge's Court makes neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law

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allows him to do, he places upon the relief which he is seeking. [p. 373, col. 2.]

Hirjibhai v. Jamshedji, 21 Ind. Cas. 783; 15 Bom. L. R. 1021 at p. 1032, applied.

Mr. *Setalvad* (with him Mr. N. K. Mehta), for the Petitioner.

Mr. *Jayakar* (with him Mr. G. N. Thakor), for the Opponent.

JUDGMENT.

BACHELOR, J.—This is an application for leave to appeal to the Privy Council, the applicant being the original plaintiff in the suit. The suit was filed for a declaration that the plaintiff was the adopted son of one Nagji Vithal and for an injunction restraining interference by the defendant.

The suit was originally instituted in the Court of the first class Subordinate Judge at Broach. It so happened that he was the only Subordinate Judge then at Broach, and by him the suit was transferred for hearing to the second class Subordinate Judge. It was contended by Mr. Jayakar that as the trial before the second class Subordinate Judge was acquiesced in by the plaintiff, the result is the same as if the suit had been filed in the Court of the second class Subordinate Judge. That position has not been contested, and I will assume for the purposes of my judgment that this part of Mr. Jayakar's argument is unassailable.

The Trial Court found in favour of the plaintiff and that decree was confirmed on appeal by the learned District Judge. But in the appeal to the High Court, which was heard by my learned brother Shah and myself, we came to another conclusion, being satisfied that there had been the exercise of undue influence by the plaintiff. Therefore, we reversed the decision of the lower Court and dismissed the plaintiff's suit. From that decree the plaintiff now seeks to go in appeal to the Privy Council.

The suit as instituted by the plaintiff was valued by him at the sum of Rs. 135, and this present application is met at the outset by the objection that the plaintiff cannot now be heard to say that, within the language of section 110 of the Civil Procedure Code, the amount or value of the subject-matter in dispute on appeal is Rs. 10,000 or upwards. The argument

is that since the plaintiff himself elected to value his suit at only Rs. 135 and conducted it in the Court of the Subordinate Judge, the limit of whose pecuniary jurisdiction was Rs. 5,000, he cannot now contend that the subject-matter of the suit is worth Rs. 10,000. It is urged in support of this argument that the word 'subject-matter' occurring in section 110 of the Civil Procedure Code must be used in the same sense which the expression bears in section 24 of the Bombay Civil Courts Act. This argument is based upon the decision of the Chief Justice and Mr. Justice Beaman in *Hirjibhai v. Jamshedji* (1). That was a suit brought in the Court of the second class Subordinate Judge for taking accounts, and the claim was valued at Rs. 101 for the purposes of Court-fees and jurisdiction. The plaintiff, however, in applying for leave to appeal to the Privy Council, alleged that the amount or value of the subject-matter of his suit was far in excess of Rs. 10,000. The Court decided against him, and the scope of the decision is stated very clearly towards the end of Mr. Justice Beaman's judgment, where we read:—

"We are, therefore, very clearly of opinion that the proposition we began by stating is correct, and has been supported by good reasoning in the case of *Golap Sundari v. Indra Kumar Hazra* (2). That proposition is that the amount or value of the subject-matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted. It follows that the amount or value of the subject-matter of a suit, for the purposes of section 109, clauses (a) and (b), and section 110 of the Civil Procedure Code, if that suit is instituted in a Court the pecuniary limit of whose jurisdiction is Rs. 5,000, can never be greater than Rs. 5,000."

Though the facts of the present case are in some respects different from those of the application before the Chief Justice and Mr. Justice Beaman, notably in this respect that whereas that was a suit for

(1) 21 Ind. Cas. 783; 15 Bom. L. R. 1021 at p. 1032.

(2) 1 Ind. Cas. 86; 13 C. W. N. 493; 9 C. L. J. 367.

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accounts, this was merely a suit for an injunction and declaration, yet I am not prepared to hold that the present application can be taken out of the scope of the decision in *Hirjibhai v. Jamsheji* (1), in so far as that decision interprets the words occurring in the first paragraph of section 110 of the Civil Procedure Code—I mean the words ‘the amount or value of the subject-matter in dispute on appeal to His Majesty in Council.’ But even supposing that Mr. Jayakar is successful in bringing this part of his application within the ambit of the decision which I have quoted, it remains to consider whether the petitioner is not entitled to obtain leave to appeal under the second paragraph of section 110. For the section enacts that a petitioner is so entitled if, in the circumstances which are now before us, the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value. For the purposes of the present argument we are assuming that the property affected by our decree exceeds in value the sum of Rs. 10,000. And the argument which we have to consider is, whether upon that assumption there is anything in the past conduct of the present petitioner which should, as by a species of an estoppel, debar him from asserting and proving, if he can, that such is the value of the property affected. In my opinion there is nothing which should debar him. And in this respect the application is, I think, clearly distinguishable from the facts which were before the Court in *Hirjibhai's* case (1). That, as I have said, was a suit for accounts, and the plaintiff elected as his forum the Court of a Subordinate Judge whose pecuniary jurisdiction was limited to Rs. 5,000. The Court, therefore, for reasons which may readily be appreciated, held the plaintiff bound by this action of his to acquiescence in the statement that the value of the subject-matter of his suit could not exceed Rs. 5,000. Here, however, our facts are otherwise. The suit was, as I have said, brought only for an injunction and a declaration. By a series of decisions of this Court, which are at present binding upon us and of which I need notice only the case of *Vachhanni Keshabji v. Vachhani*

Nambha (3), it is the law in this Presidency that it is open to a plaintiff to sue in a second class Subordinate Judge's Court for a declaration and injunction even though the immoveable property referred to or affected by the injunction exceeds the pecuniary limit, i. e., Rs. 5,000, of the second class Subordinate Judge's jurisdiction. That being so, the plaintiff in this case by suing in the second class Subordinate Judge's Court seems to have made neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the relief which he was seeking.

Admittedly, the decision in *Hirjibhai v. Jamsheji* (1) proceeds upon the reasoning that a plaintiff should not be allowed to put inconsistent values upon the subject-matter of his claims at different times according to the shifting character of his interests. But if I am right in what I have already said, it will be clear that this reasoning cannot affect the present plaintiff, for the merely fiscal valuation which he put upon the injunction and declaration which he sought is wholly independent of the real or market value of the immoveable properties.

I am consequently of opinion that the decision in *Hirjibhai v. Jamsheji* (1) cannot be invoked so as to shut out the present plaintiff from appealing to the Privy Council, if he succeeds in proving that the condition described in the second paragraph of section 110 is in his case satisfied, that is to say, if he can succeed in proving that the decree or final order must involve directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000.

In my opinion, therefore, he must have an opportunity of proving that that is the value of the property.

As the affidavits which have been put in on both sides with reference to the question as to the value of the property are in direct conflict, we think it desirable to act under the powers given to us by Order

(3) 1 Ind. Cas. 103; 33 B. 307; 11 Bom. L. R. 30; 5 M. L. T. 230.

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XLV, rule 5, of the Code. Under that rule, therefore, we refer to the Court of first instance the dispute as to the amount or value of the property which must be involved directly or indirectly by the decree or final order in this appeal. It is conceded that the Sutarel property is no part of the property in suit, which is concerned only with the property at Derol. The Court of first instance will take evidence and report on the question referred to it.

SHAH, J.—I entirely agree.

Dispute remitted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 255 OF 1916.

July 13, 1916.

Present:—Mr. Justice Broadway.

SAIDU SHAH AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

MALAWA RAM AND OTHERS—DEFENDANTS

—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaratory suit—Consequential relief claimable—Suit, whether competent—Mortgage, redeemable—Suit for declaration that certain conditions were not enforceable, maintainability of.

A declaratory suit is not maintainable when the plaintiff is entitled to claim consequential relief.

Where, therefore, a mortgagor, instead of claiming possession of the mortgaged property by redemption, sues for a declaration that certain conditions of the mortgage are not enforceable, his suit must be dismissed.

Second appeal from the decree of the District Judge, Ludhiana, dated the 2nd November 1915, reversing that of the Munsif, 2nd class, Jagraon, District Ludhiana, dated the 28th July 1915, decreeing the claim in part.

FACTS.—Plaintiffs executed a mortgage in favour of defendants, which provided that the mortgage-debt should carry interest at the rate of 12 per cent. per annum and that there should be no redemption for 50 years. Plaintiffs sued to have the mortgage declared ineffective, on the ground that the above conditions were unconscionable and unenforceable. The first Court upheld the condition postponing redemption, but declar-

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ed that the rate of interest was unreasonable.

On appeal, the District Judge upheld both the conditions as valid and enforceable and dismissed plaintiffs' suit *in toto*. Plaintiffs appealed to the Chief Court.

Chaudhri Nabi Bakhsh, for the Appellants.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—Dr. Nand Lal takes a preliminary objection that under section 42 of the Specific Relief Act, the suit as framed does not lie, inasmuch as the plaintiff can claim possession of the land by redemption if his allegations are correct. The proviso to that section prohibits a declaratory decree being passed where the plaintiff can seek further relief. Mr. Nabi Bakhsh agrees that the plaintiff can claim further relief and does not object to the suit being dismissed so long as he is able to bring the redemption suit.

I, therefore, reject the appeal and leave the plaintiff to bring a suit for redemption, if so advised. Parties will bear their own costs in this appeal.

Appeal rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2242 OF 1914.

August 23, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. V. SRIRAMULU NAIDU—PLAINTIFF

—APPELLANT

versus

KOLANDAIVELU MUDALI—DEFENDANT

—RESPONDENT.

Malicious prosecution, suit for—Illegal distraint of cattle—Damage to reputation—Cattle Trespass Act (I of 1871), s. 20.

Per Curiam.—A suit for damages for malicious prosecution is not confined to criminal proceedings alone nor would such an action lie for all criminal prosecutions. The cases for which such a suit lies are those in which there is either (a) damage to a man's reputation or (b) danger to his liberty or (c) damage to his property. [p. 375, cols. 1 & 2; p. 376, col. 1.]

Per Seshagiri Aiyar, J.—A suit for damages for malicious prosecution under section 20 of the Cattle Trespass Act may lie in some cases, for though in such an accusation there may not be either danger to the liberty or damage to the property of the accused, still there may be "damage to the reputa-

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tion" of the person accused, considering his position in life* and the motive and status in life of the accuser. [p. 376, cols. 1 & 2.]

Per *Napier, J.*—A charge of illegal distraint of cattle does not come within the mischief of the principle of damage to the reputation of the accused and no suit for damages lies. The damage to a man's reputation must be something serious, as if the matter whereof he is accused be scandalous. [p. 376, col. 2.]

Whitworth v. Hall, (1831) 2 B. & Ad. 695; 9 L. J. (o. s.) K. B. 297; 109 E. R. 1302; 36 E. R. 715; *Quartz Hill Gold Mining Company v. Eyre*, (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668; *Metropolitan Bank v. Pooley*, (1885) 10 A. C. 210; 54 L. J. Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756; *Lockenour v. Sides*, 57 Ind. 360; *Allen v. Flood*, (1898) A. C. 1 at p. 7; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595; 14 T. L. R. 125; *Sarile v. Roberts*, 1 Ld. Raym. 374; 91 E. R. 1147; *Wiffen v. Bailey and Romford Urban District Council*, (1915) 1 K. B. 600; 84 L. J. K. B. 688; *C. H. Crowdy v. L. O'Reilly*, 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105; *Ramasami Aiyar v. Govinda Pillai*, 32 Ind. Cas. 448; 30 M. L. J. 180; 3 L. W. 82; (1916) 1 M. W. N. 156; 39 M. N. 952, referred to.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 20 of 1914, preferred against that of the District Munsif, Tiruvallur, in Original Suit No. 545 of 1912.

Mr. K. R. Rangaswami Aiyar for Mr. A. K. Madhaya Rau, for the Appellant.

Mr. T. Ramachandra Rao, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—The plaintiff impounded the defendant's cattle. Thereupon the latter complained under section 20 of the Cattle Trespass Act. But the plaintiff was acquitted. The present suit is for damages for malicious prosecution on the ground that the defendant instituted proceedings falsely and maliciously. Both the Courts below have held that such a suit would not lie. Hence this second appeal.

It is not with reference to criminal proceedings alone that a suit for malicious prosecution lies. An action will lie for the institution of bankruptcy proceedings, for filing an ungrounded petition to wind up a Corporation, for procuring the arrest of a person even for a civil debt, and for instituting proceedings to declare a person a lunatic. See *Whitworth v. Hall* (1), *Quartz Hill Gold Mining Company v. Eyre* (2), *Metro-*

(1) (1831) 2 B. & Ad. 695; 9 L. J. (o. s.) K. B. 297; 109 E. R. 1302; 36 E. R. 715.

(2) (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668,

politan Bank v. Pooley (3) and *Lockenour v. Sides* (4). But neither would an action of this nature lie for all criminal prosecutions. A man may be prosecuted for driving a motor car without lights, for laying down a drain in an improper manner, etc. If the prosecution fails in such cases, the prosecutor will not be held liable for malicious prosecution.

Lord Davey explained in *Allen v. Flood* (5) on what basis, an action for malicious prosecution rests: "In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle (referring to defamation). From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite, he loses the protection, and is liable to an action, not for the malice, but for the wrong done in subjecting another to the annoyance, expense, and possible loss of reputation of a causeless prosecution." This is also the view of Lord Herschell (see page 125). Sir F. Pollock in his book on Torts says that this is the true foundation of the action. According to these authorities, the gist of the action is not the prosecution, but the aspersion on character or reputation which the prosecution involves.

I shall now proceed to consider the present case in the light of the above principles. The proceedings under the Cattle Trespass Act are of a criminal nature; but no imprisonment is provided for the offence under section 20. A fine in the nature of solatium is to be levied. A complaint under section 20 is included in the definition of the term 'offence' [section 4 (o) of the Code of Criminal Procedure]. Under section 260, clause (m), it is triable summarily. Therefore all the ingredients of a criminal prosecution are to be found with reference to the complaint; but the question still remains, whether a complaint of this nature involves moral turpitude or stigma on

(3) (1885) 10 A. C. 210; 54 L. J. Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756.

(4) 57 Ind. 360.

(5) (1898) A. C. 1 at p. 172; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595; 14 T. L. R. 125,

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character. In the well-known case of *Quartz Hill Gold Mining Company v. Eyre* (2), Brett, M. R., and Bowen, L. J., accept the dictum of Lord Holt in *Savile v. Roberts* (6) as practically exhausting the classes of cases for which a suit for malicious prosecution would lie. There must be in the previous proceedings either (a) damage to a man's reputation or (b) danger to his liberty or (c) damage to his property. There can be no question in this case of danger to a man's liberty. Under section 386 of the Code of Criminal Procedure, if the fine that was imposed is not paid, there may be a distress of property: see per Lord Buckley in *Wiffen v. Bailey and Romford Urban District Council* (7). The accused is not liable to be sent to jail. It is conceivable that clause (c) may cover this case. As Lord Justice Bowen says, as the theory is that in ordinary civil actions, the costs awarded to a successful litigant are intended to compensate him for the trouble incurred by him, there will be no action for malicious prosecution in such cases. See also per Buckley, L. J., in *Wiffen v. Bailey and Romford Urban District Council* (7). In the present case, no costs could have been awarded to the accused under the Cattle Trespass Act; and probably, if the claim for costs were one of the items of the claim for damages, it may be open to argument that there was probable damage to property within the dictum of Lord Holt. But, in the present case, although the claim for such costs was in the plaint, it was advisedly given up in appeal. It is not, therefore, necessary to consider this question further.

The only other ground on which the action can be sustained is that the plaintiff's reputation suffered by the complaint under section 20 of the Cattle Trespass Act. It certainly looks as if it would be straining the language too far to say that an injury to a man's reputation has been done by accusing him of having improperly and maliciously impounded the cattle of the complainant. A great deal will depend upon the position in life of the man who has been thus accused, and upon the

motive and status in life of the accuser. I am not prepared to hold that an accusation of this kind is not covered by the head of "damage to reputation". Mr. Justice Mookerjee, in *C. H. Crowdy v. L. O'Reilly* (8) seems inclined to give an extended application to the principle.

The District Munsif in paragraph 14 of his judgment says that there has been enmity between the plaintiff and the defendant for some years. It may be that the prosecution was started with intent to harm the reputation of the plaintiff. The Munsif has, however, held that there was no malice or want of probable and reasonable cause for the complaint by the defendant. The District Judge has expressed no opinion on the facts; but the evidence has been placed before us and on reading them, (see section 103 of the Code of Civil Procedure) I see no reason to differ from the conclusion of the District Munsif. I would, therefore, dismiss the second appeal with costs.

NAPIER, J.—I agree with my learned brother that this appeal should be dismissed and I entirely concur with him as to the principles governing suits for maliciously setting the law in motion [*vide* my judgment in *Rama Aiyer v. Govinda Pillai* (9)], but I would go rather further than he does in applying those principles to a suit for maliciously proceeding under section 20 of the Cattle Trespass Act. The Court of Appeal in England has, in *Quartz Hill Gold Mining Co. v. Eyre* (2) and *Wiffen v. Bailey and Romford Urban District Council* (7), accepted the proposition that where it is based on damage to a person's reputation it must be something serious, the words of Holt, C. J., in *Savile v. Roberts* (6) being "as if the matter whereof he is accused be scandalous"; and Bowen, L. J., in *Quartz Hill Gold Mining Company's case* (2), at page 692, draws an analogy between such cases and spoken slander, giving as examples charges that a man has been guilty of an indictable offence

(6) 1 Ld. Raym. 374; 91 E. R. 1147.

(7) (1915) 1 K. B. 600; 84 L. J. K. B. 688.

(8) 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105.

(9) 32 Ind. Cas. 448; 30 M. L. J. 180; 3 L. W. 82; (1906) 1 M. W. N. 156; 39 M. 952.

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which is criminal and scandalous in its character and involves the loss of liberty or fair fame. Accepting this explanation as to what is meant by damage to fair fame, I cannot regard a charge of illegal distraint of cattle as coming within the mischief of the principle.

Appeal dismissed.

V.R.P.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2353 OF 1914.

September 21, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

SUBRAMANIAM CHETTIAR—PLAINTIFF
—APPELLANT
versus

ARJUNA PERUMAL, MINOR, BY HIS MOTHER
AND GUARDIAN VELAMMAL—

DEFENDANT—RESPONDENT.

Contract Act (IX of 1972), ss. 73, 74—Contract, breach of—Remedy of party wronged—Non-reservation of right to damages, effect of—Deposit, forfeiture of, effect of, on claim for damages.

In cases of breach of contract, parties have their right to damages under section 73 of the Indian Contract Act, and unless they expressly contract out of that right, under section 74, they are entitled to such compensation as flows from the breach. [p. 377, col. 2.]

The forfeiture of a deposit for failure to perform a contract is not affected by section 74 of the Act, though in estimating the damages, the amount forfeited may be taken into account and may go towards mitigating the claim. [p. 377, col. 2.]

Allahabad Improvement Trust v. Tikandra Jang Bahadur, 30 Ind. Cas. 584; 38 A. 52; 13 A. L. J. 1079, dissented from.

Natesa Aiyar v. Appavu Padayachi, 19 Ind. Cas. 462; 38 M. 174; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391; 38 M. 178, *Vellore Taluq Board v. Gopalasami Naidu*, 26 Ind. Cas. 226; 17 M. L. T. 84; 38 M. 801; *Orr v. Chitha Chinna Yegappa Chetty*, 28 Ind. Cas. 318; (1915) M. W. N. 241; 17 M. L. T. 229, referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 100 of 1913, preferred against that of the District Munsif, Paramagudi, in Original Suit No. 782 of 1911.

Mr. A. Krishnasami Aiyar, for the Appellant.

Mr. C. S. Venkatachariar, for the Respondent.

JUDGMENT.—Subramanian Chetty agreed to sell paddy to Ayodhia Pillai and received a deposit of Rs. 500. Ayodhia Pillai failed to perform his part of the contract and is sued for damages by Subramania. The finding is that it was Ayodhia that broke the contract. The question is whether Subramania is restricted in his claim by the amount of the deposit. The Courts below have held that he is not entitled to recover anything more.

In second appeal Mr. Venkatachariar wants to support the judgments of the Courts below by asking us to read a finding in their judgments to the effect that the parties agreed at the time of the contract that nothing more than Rs. 500 is to be recovered, in case of breach. We are unable to agree with this contention. There is no finding, as a matter of fact, that there was an agreement that the only amount payable as damages is Rs. 500. The District Judge gives as reason for refusing damages the fact that the contract contains no stipulation for damages for breach of contract. If this reasoning is to be given effect to, then in every case where the parties fail to provide for damages for breach, the offending party is not liable to pay damages.

The parties have their right to damages under section 73 of the Indian Contract Act, and unless they expressly contract out of that right under section 74 they are entitled to such compensation as flows from the breach. The decision in *Allahabad Improvement Trust v. Tikandra Jang Bahadur* (1) no doubt supports the respondent, but, with all respect, we are unable to follow it. In this Presidency it is now settled that the forfeiture of the deposit for failure to perform is not affected by section 74 of the Contract Act. *Natesa Aiyar v. Appavu Padayachi* (2). In a later case (Full Bench), *Vellore Taluq Board v. Gopalasami Naidu* (3) it was held that the amount forfeited may be taken into account in estimating the damages. That was also the view taken by one of

(1) 30 Ind. Cas. 584; 38 A. 52; 13 A. L. J. 1079.

(2) 19 Ind. Cas. 462; 38 M. 178; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391; 38 M. 178.

(3) 26 Ind. Cas. 226; 17 M. L. T. 84; 38 M. 801,

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us in *Orr v. Chitha Chinna Yegappa Chetty* (4). It follows from these rulings that the general right to damages remains unaffected by the forfeiture, although in estimating the damages the amount may go towards mitigating the claim.

In this view, the decision of the Court below must be reversed. It has been found that Subramania suffered damage to the extent of Rs. 1,031-10-3. Deducting from this the sum of Rs. 500, Subramania is entitled to a decree for Rs. 531-10-3 with interest thereon at 6 per cent. from this date from the estate of Ayodhia Pillai. He is entitled to his costs in this Court. There will be no costs in the Courts below.

Appeal allowed.

V.R.P.

(4) 28 Ind. Cas. 318; (1915) M. W. N. 249; 17 M. L. T. 229.

COURT OF THE BOARD OF REVENUE, MADRAS.

REVISION PETITION No. 8 of 1916.

November 28, 1916.

Present:—Mr. Clegg, F. M.

POTHA VENKATASAWMI—

PETITIONER

versus

TRUSTEE, VIZIANAGARAM ESTATE—
COUNTER-PETITIONER.

Madras Estates Land Act (Mad. Act I of 1908), s. 131—Tender to Divisional Officer, whether sufficient.

The deposit required by section 131 of the Madras Estates Land Act may be tendered to the Divisional Officer, who is bound to receive it. The amount need not be paid into the sub-treasury.

Revision petition from the order of the Honorary Deputy Collector, Vizagapatam, in Sale Application No. 1466 of 1914-15, dated the 13th March 1916.

Mr. J. Janakiramayya, for the Petitioner.

Mr. S. Desikachariar, for the Counter-Petitioner.

ORDER.—The Honorary Deputy Collector has contravened the express provisions of section 131 of the Act. The deposit was tendered to him with an application to set aside the sale within the prescribed limit of thirty days and should have been received. The applicant is not bound to deposit the sum in the sub-treasury. The rule under the Act

merely says he may do so. There is a dispute as to whether the petitioner has any right or interest in the land affected by the sale, which it is necessary to determine before the sale can be cancelled. The Honorary Deputy Collector or his successor-in-office will be required to submit within one month after notice to the parties to this petition a finding on this point after taking such evidence as is necessary.

[On receipt of this order the Honorary Deputy Collector submitted the following finding:—]

* * * * *
"5. In the result, I find that the petitioner has a right and interest in the land affected by the sale, that is *zeraiti* land, Patta No. 15, of Kalamrajupeta of the Gajapatnagaram Tana of the Vizianagaram Estate, as its purchaser."

After receipt of the finding, the Court passed the following

FINAL ORDER.—It is clear from the finding of the Honorary Deputy Collector, which I accept that the petitioner has an interest in the land affected by the sale. The sale will be set aside, the amounts specified in section 131 (1) of the Act will be paid to the counter-petitioner, who is landholder and auction-purchaser, out of the deposit made by petitioner. The purchase-money is ordered also to be returned to the counter-petitioner under section 131 (2). The costs of this revision petition will be paid by the counter-petitioner.

Petition allowed; Sale set aside.

V.R.P.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 285
of 1915.

November 24, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge.

JHANDA MAL—PLAINTIFF—PETITIONER
versus

Musammat SARDAR BEGAM—DEFENDANT.
—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151, 152—Amendment of judgment and decree—Error in judgment.

When by some oversight or otherwise a Judge in writing his judgment commits a mistake which

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injuriously affects either party to the case he can, and should, exercise his power under sections 151 and 152 of the Civil Procedure Code, 1908, to correct the mistake and amend the decree accordingly.

Application, under sections 151 and 152 of the Civil Procedure Code, for amendment of the judgment and decree passed by the Chief Court of the Punjab in Civil Appeal No. 2183 of 1914 on the 22nd February 1915 and reported as 27 Ind. Cas. 775.

Mr. Beechey, for the Petitioner.

Mr. B. Bevan Petman, for the Respondent.

JUDGMENT.—(1). [On 30th March 1912, the learned Subordinate Judge gave plaintiff a decree for pre-emption of a site on which was a house belonging to the vendee. The decree was to the effect that plaintiff should get the site on payment of Rs. 300, that defendant should remove the house within four months, that if she failed to do so, plaintiff should have the right to pay Rs. 3,600 to defendant within one month of the default and get possession of the house and site. In April 1912, vendee-defendant appealed, asking that the decree be set aside; and that appeal was not decided until 15th June 1914, when the lower Appellate Court dismissed plaintiff's suit. On 30th September 1914, plaintiff filed a second appeal here, and I after discussing the whole case at length and concurring with the first Court in its findings on 22nd February 1915 "accepted the appeal with costs." When plaintiff attempted thereafter to execute his decree, the executing Court on 11th May 1915 held that plaintiff, who deposited Rs. 3,600 on 8th March 1915, had not complied with the terms of the decree, and that the suit stood dismissed with costs. Plaintiff has now come to this Court with this petition under sections 151 and 152, Civil Procedure Code.

(2). I think under section 151 I can and should give him relief. In accepting his appeal, knowing that he had not paid the Rs. 3,600 within five months of the original decree, I, of course, meant that he should have five months from date of my decree; in short, I intended my decree to be a reproduction of the decree of 30th March 1912, with 22nd February 1915, substituted for 30th March 1912. I can now, under section 151 aforesaid, so alter my judgment as to make this result clear and I do so hereby; and of

course the decree will be amended accordingly. As plaintiff deposited Rs. 3,600 on 8th March 1915, the deposit is well within time. Plaintiff decree-holder is now at liberty to apply to the executing Court for review of its order of 11th May 1915. The parties will bear their own costs.

Petition allowed.

COURT OF THE BOARD OF REVENUE. MADRAS.

REVISION PETITION No. 10 of 1915.

November 30, 1916.

Present:—Mr Clegg, F. M.

VEERAPPA CHETTIAR—PETITIONER

versus

MOOTHI KARUPPAN—COUNTER-

PETITIONER.

Madras Estates Land Act (Mad. Act I of 1908), ss. 74, 75 (6), 75 (7)—Appraisal of produce—Apportionment of varam, jurisdiction as to—Disagreement with assessors—Award, when final.

The officer deputed to make an appraisal under Madras Act I of 1908 has jurisdiction to decide the rate of 'varam' in cases of dispute. [p. 380, col. 1.]

Where the assessors accept the appraisal of the officer, but differ as to the rate of the 'varam', the award is not final under section 75 (7) and the officer can record his opinion on the rate after hearing objections. [p. 380, col. 1.]

Revision petition from the order of the District Collector, dated the 29th March 1916, in Revision Petition No. 4 of 1915.

Mr. G. S. Ramachandra Aiyar, for the Petitioner.

Mr. T. R. Ramachandra Aiyar, for the Counter-petitioner.

JUDGMENT.—The petitioner's main contention is that the Revenue Divisional Officer had no jurisdiction in this case.

2. The first point is that the application under section 74 is for appraisal and not for division of the produce; therefore the officer deputed to make the appraisal has no jurisdiction to decide the rate of "varam" when there is a dispute. On the other hand, it is contended by the counter-petitioner that the petition is also for division, that division of produce does not mean mere physical division, but includes a decision as to the shares payable. The object of section 75 is to divide the produce or determine the rent payable.

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The rent is payable by appraisalment of the standing crop in this case. It is incumbent on the officer deputed to determine the rent payable. See section 75 (6). Without a decision as to the rate of "varam" it is obvious that you cannot determine the rent and the provisions of the section would be futile.

3. The next contention is that inasmuch as the assessors and the officer agreed as to the appraisalment and they were only appointed to appraise and nothing more, the award was final under section 75 (7). The assessors accepted the appraisalment but differed on the rate of "varam". The award must contain a decision as to the money value of the "varam". Reading the latter portion of section 75 (6) with section 75 (7), I think it is clear that the award is final only when the assessors agree with the officer as to the award. Section 75 (5) enacts that in making his award the officer shall record and have regard to the opinions of the assessors. It does not restrict the opinions to the appraisalment.

I hold, therefore, that the Revenue Divisional Officers had jurisdiction to hear objections.

On the question of the burden of proof I see no ground for interference.

The petition is dismissed with costs.

Petition dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 378
OF 1913.

March 16, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Richardson.

MANSARAM DAS AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

AHAMAD HOSAIN PRADHAN AND OTHERS
—PLAINTIFFS—RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), s 30—
Mortgage by certificated guardian without Court
sanction—Minor's right to avoid—Burden of proof—
Interest on mortgage of minor's property.*

A mortgage of a minor's property executed by his certificated guardian without sanction by the District Judge can be avoided by the minor only on restoration of the benefit actually received by him under the

transaction. But it is for the mortgagee to show to what extent the money raised by the mortgage was applied for the benefit of the minor's estate. [p. 381, col. 1.]

Where in a mortgage-bond executed by a certificated guardian of a minor the rate of interest was Rs. 7-8-0 with annual rests, which rate was not sanctioned by the Court nor placed before it:

Held, that the mortgagee should not get more than 12 per cent. simple interest. [p. 381, col. 2.]

Appeal against the decree of the Subordinate Judge, Rangpur, dated the 30th June 1913.

Babus Bepin Behari Ghose and Atul Chandra Gupta, for the Appellants.

Babus Basanta Kumar Bose and Atul Chandra Dutt, for the Respondents.

JUDGMENT. This appeal arises out of a suit on a mortgage-bond executed by defendant No. 2 on behalf of her son Monasharam Das defendant No. 1, who at the date of the mortgage was a minor. The mortgage was executed in favour of one Rahamatulla Prodhan, whose heirs the plaintiffs are. It is not denied that defendant No. 2 had executed the mortgage. But the defence was that no consideration was actually paid for the bond. It appears that defendant No. 2 was the certificated guardian of defendant No. 1 under Act VIII of 1890. She applied to the District Judge for permission to raise a loan of Rs. 2,000 on mortgage from one Hossain patwari at an interest of Rs. 1-4-0 per cent. per month. The permission was granted; but Hossain subsequently being unable to advance the loan, the defendant No. 2 again applied to the Judge for permission to raise the loan from Rahamatulla the father of the plaintiffs. This application was granted by the District Judge. Subsequently, it appears that the District Judge called upon the guardian of the minor (defendant No. 2) to state whether the mortgage had been executed or not, and on her failing to do so the Judge on the 8th March 1906 revoked the order granting permission to the guardian to execute the mortgage. The creditor Rahamatulla, it appears, had acted upon the original order of the District Judge granting permission to raise the loan from him, a copy of the order having been shown to him on behalf of the guardian. It may be observed that Rahamatulla was specifically named in the application for permission as the person in whose favour the mortgage-bond was to be executed on taking the loan from

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him. But although the order revoking the permission was made, no notice was given either to the said Rahamatulla or even to the guardian. The guardian denies in her written statement that any such notice had ever been given to her, and her witness, Mohesh Chandra Barman, denies that any notice was served upon her. Rahamatulla appears to have acted *bona fide* in advancing the loan on the mortgage without any knowledge whatever of the order revoking the permission; although the order was passed before he advanced the money. It is unnecessary, however, to decide whether the order revoking the permission is effective as against Rahamatulla.

Assuming that the order was effective, the transaction stands in the same position as if there were no sanction by the Judge to the certificated guardian. The order was merely a voidable one under section 30 of the Guardians and Wards Act at the instance of the minor, and the minor, who is now of age, can avoid the transaction only on restoration of the benefit received by him under the order. [See the cases of *Eastern Mortgage and Agency Company, Limited v. Rebati Kumar* (1) and *Hem Chandra Sarkar v. Lalit Mohan Kar* (2).] There can be no doubt that the full consideration was paid. Apart from the oral evidence adduced on behalf of the plaintiffs, there are two receipts executed by defendant No. 2, the guardian, which show payments of the money on certain dates, namely the 1st April 1906 and 27th June 1906. These two receipts were registered and defendant No. 2 was identified by one Mohesh, who is an uncle of defendant No. 1 and lived in the same mess with him. There can be no doubt, therefore, that the money was actually paid by Rahamatulla to the guardian.

It is contended before us that it is for the creditor to show how much of the money was actually applied for the benefit of the minor and that he cannot get any decree for more than the amount so applied. No doubt it is for the plaintiff to show to what extent the money was applied for the benefit of the minor's estate. The guardian in her application to the Judge stated that there was urgent

necessity for raising a loan of Rs. 2,000 for paying off the creditors of the estate; and as we have said, there is no doubt that Rs. 2,000 were actually advanced to her by the father of the plaintiffs.

The defendants were called upon to produce account books. They produced an account book which does not appear to be the genuine book, because it does not contain any entry as to the payments of Rs. 1,200 and Rs. 800 made to the guardian in March and April 1906. But the account book produced by the defendants shows that, at any rate, a portion of the money advanced was actually applied for the benefit of the estate. The defendants withheld the real account books and having regard to all the evidence and circumstances of the case, the Court below came to the conclusion that it has been established that the entire amount had been applied to the benefit of the minor's estate. That being also our opinion, the plaintiffs are entitled to a decree for Rs. 2,000 advanced on the mortgage-bond.

The only question which remains to be decided is, what is the rate of interest which ought to be allowed. The order of the Judge does not specify the rate of interest. In the application made by the guardian to the Judge for permission to raise a loan by mortgaging the property to Hossain *patwari* Rs. 1-4-0 was stated as the rate of interest. In the mortgage-bond executed in favour of Rahamatulla the rate of interest was Rs. 1-8-0 with annual rests. This rate of interest does not appear to have been placed before the Court, nor was it sanctioned by the Court. We are of opinion that compound interest at Rs. 1-8-0 ought not to be allowed. We think the plaintiffs should not get more than 12 per cent. simple interest. That interest is to be calculated upon the amounts advanced on the 31st March 1906, 11th April 1906 and 27th June 1906 respectively, after deducting Rs. 193 admitted by the plaintiffs to have been paid by the defendants on account of the debt.

Let a decree be made accordingly. The subsequent interest will be at the rate of 6 per cent. per annum. Six months will be allowed to the defendants for redemption.

The parties will pay costs in proportion in both Courts.

Decree varied.

(1) 3 C. L. J. 260.

(2) 14 Ind. Cas. 515; 16 O. W. N. 715; 16 O. L. J. 537.

BAVAJI PATNAIK v. GOVINDA PATNAIK.

COURT OF THE BOARD OF REVENUE,
MADRAS.

REVISION PETITION No. 9 OF 1916.

October 19, 1916.

Present:—Mr. Clegg, F. M.

BAVAJI PATNAIK—PETITIONER

versus

GOVINDA PATNAIK AND OTHERS—

COUNTER-PETITIONERS.

Madras Estates Land Act (Mad. Act I of 1908), ss. 75, 205—Appraisement proceedings—Co-sharer tenant under co-sharer landlord—Other co-sharers, whether necessary parties.

Where one co-sharer owns a third share of a village and pays rent to another co-sharer:

Held, that to a proceeding by the latter for appraisement of crops under section 75 of the Madras Estates Land Act, there is no necessity to join all the share-holders as parties.

Revision petition against the order of the Collector, Ganjam, in Revision Petition No. 29 of 1915.

Mr. K. V. L. Narasimham, for the Petitioner.

Diwan Bahadur L. A. Govindaraghava Aiyar, for the Counter-petitioners.

JUDGMENT.—These are appraisement proceedings for 1324 *Fasli* under section 75 of the Estates Land Act. It has not been shown how the procedure was not in accordance with that section.

The main grounds on which the Board is asked to revise these proceedings are (1) that the lands concerned do not form an estate; (2) that the petitioner is not a *ryot* but a *mokhasadar* and this land is his private land; (3) that the Revenue Courts should not have entertained these proceedings when there was litigation going on in the Civil Courts regarding the title and mesne profits; (4) that the proceedings are barred under section 11 of the Civil Procedure Code (*res judicata*) and (5) that all the land-holders should have joined in the application for appraisement.

The first objection was not made at all before the Deputy Collector but formed the ground for revision before the Collector. No reason has been satisfactorily urged before me for differing from the Collector's views. The parties must, therefore, be considered to be land-holder and *ryot* under the Act and the Deputy Collector has not exercised a jurisdiction not vested in him by law. The counter-petitioners

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had one-third share of the village and it has been found that the Board's petitioner was bound to pay one-third of his rent to counter-petitioners. There are no grounds for revising that finding under section 205. There was no necessity under the circumstances for all the share-holders to join in the appraisement proceedings. The civil litigation involves the questions of title and mesne profits. There is no reason for postponing or not entertaining these proceedings, which are for rents payable by petitioner in his capacity as *ryot* and distinct from the civil litigation. The Civil Courts in settling the question of mesne profits will doubtless take into consideration, if necessary, the payment under the Deputy Collector's decree for rents. No grounds for revision have been shown. The petition will be dismissed with costs.

Petition dismissed.

V. R. P.

PUNJAB CHIEF COURT.

CIVIL APPLICATION No. 17 of 1916.

February 29, 1916.

Present:—Sir Donald Johnstone, Kt.,

Chief Judge.

Musammât SARDAR BEGAM—DEFENDANT

—PETITIONER

versus

JHANDA MAL—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151, 152—Reductio ad absurdum—Defective judgment and decree—Pre-emption—Compensation for pre-emptor remaining out of possession of pre-empted property.

Section 152 of the Civil Procedure Code is wide enough to enable a Judge to avoid a *reductio ad absurdum*. [p. 383, col. 1.]

Where a vendee by his act or omission deprives the pre-emptor both of the use of the pre-emption money and the pre-empted property, the pre-emptor is entitled to get reasonable interest for the time he is so deprived. [p. 383, col. 1.]

Application, under sections 151 and 152 of the Civil Procedure Code, for amendment of the judgment and decree of the Chief Court passed on 22nd February 1915 in Civil Appeal No. 2183 of 1914 and reported as 27 Ind. Cas. 778.

Mr. B. Bevan Petman, for the Petitioner.

Mr. H. Beechey, for the Respondent.

KAMTA v. PARBHU DAYAL.

JUDGMENT.—(1). This case is the outcome of my orders in Civil Appeal No. 2183 of 1914 [*Jhanda Mal v. Sardar Begam* (1)] and Civil Miscellaneous Application No. 285 of 1915 [*Jhanda Mal v. Sardar Begam* (2)]. In the latter order I explained why it was necessary for me so to amend my former order as to give *Musammam* Sardar Begam time to remove materials. I pointed out that I intended in my earlier order to substitute the date of it (22nd February 1915) for the date (30th March 1912) to be found in the first Court's decree. This order of mine was dated 24th November 1915, and I regret that I did not go on to direct that, as 22nd February 1915 was long past, and the four months' term allowed had long expired if counted from that date, I, therefore, altered the date to 24th November 1915. *Musammam* Sardar Begam has again come up, and I find I must give her reasonable satisfaction. Mr. Beechey on the other side objects that she is estopped, and that section 152, Civil Procedure Code, does not apply. I can find no estoppel, and I think the section is wide enough to enable me to avoid a *reductio ad absurdum*.

(2). But I think Mr. Beechey's clients deserve some consideration. The lady's legal advisers should have put to the Court, both on 17th February 1915 (hearing of Civil Appeal) and on 24th November 1915, exactly what was required; and one result of all this loss of time is that since 8th March 1915, Mr. Beechey's clients have been standing out of Rs. 3,600 and that there have been two miscellaneous petitions argued.

(3). I, therefore, direct that the decree be so amended that *Musammam* Sardar Begam may have four months *from to-day* to remove materials, instead of four months from 22nd February 1915, subject to the condition that *on or before this day week* she do deposit in executing Court Rs. 288 for Mr. Beechey's clients, this being the interest at 6 per cent. per annum on Rs. 3,600 for 13 months. I also direct that the costs of the present proceeding be paid by her in the ordinary course. Pleader's fee Rs. 25.

Petition accepted.

(1) 27 Ind. Cas. 778; 168 P. W. R. 1916.

(2) 37 Ind. Cas. 378; 169 P. W. R. 1916.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORER No. 83
OF 1916.

November 3, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Stuart,

KAMTA AND OTHERS—DEFENDANTS—

—APPELLANTS

versus

PARBHU DAYAL AND ANOTHER—PLAINTIFFS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23

—*Preliminary point—Decision on one issue—Remand.*

In a case four issues were framed and the first Court decided an issue and finally disposed of the suit. The lower Appellate Court remanded the suit under Order XLI, rule 23:

Held, that the decision was on a preliminary point within the meaning of Order XLI, rule 23, and the suit was properly remanded. [p. 383, col. 2.]

Mata Din v. Jamna Das, 27 A. 691; A. W. N. (1905) 159; 2 A. L. J. 685, referred to.

First appeal from an order of the Subordinate Judge, Mirzapur, dated the 12th February 1916.

Mr. S. D. Sinha, for the Appellant.

Mr. Newal Kishore, for the Respondents.

JUDGMENT.—In this case four issues were framed. The Munsif decided the first issue in favour of the defendants and dismissed the suit. Now the first issue was an issue which, if decided in favour of the defendants, finally disposed of the suit. If on the other hand it was decided in favour of the plaintiffs, it left other issues undetermined, and the suit, therefore, came up to the Appellate Court in the condition that if the first issue was wrongly decided, the remaining issues had not been decided at all, and it was necessary to decide them. Having regard to the previous decisions in this Court and particularly to the decision in *Mata Din v. Jamna Das* (1), we think that that was a preliminary point within the meaning of Order XLI, rule 23. It is most important that on these questions of practice the decisions of the Court should be consistent. We think, therefore, that the case was a proper one for remand under that order. A further point has been suggested that the Appellate Court improperly admitted additional evidence, but there seems to be no force in that point although it was put in the forefront of the memorandum of appeal.

(1) 27 A. 691; A. W. N. (1905) 159; 2 A. L. J. 685.

RAGHURAJ SINGH v. BISHEN TEWARY.

We are not disposing of the suit, which still remains to be decided on the result of issues Nos. 2, 3 and 4 in the Munsif's Court.

This appeal must be dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1592 OF 1915.

November 13, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

RAGHURAJ SINGH—DEFENDANT—

APPELLANT

versus

BISHEN TEWARY—PLAINTIFF, AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Ejectment, suit for—Necessary parties—Co-owner, maintainability of suit by.

Where a number of persons hold a joint interest in a cause of action and where the extent of the interest of each is an unspecified interest, it is open to any one of those persons to maintain on behalf of the whole body of interested persons a suit to establish the cause of action set forth and in the event of success of that one person all persons interested will enjoy the fruits of the litigation, unless there is some specific law forbidding such a procedure.

Kanna Pisharody v. Narayanan Somayajipad, 3 M. 234, 1 Ind. Dec. (N. S.) 718, followed.

Therefore, one of several co-owners can, on behalf of the whole body, maintain a suit for the recovery of the land against trespassers.

Second appeal from the decision of the Subordinate Judge, Chapra, dated 27th March 1915, reversing the decree of the Munsif, 3rd Court, Chapra, dated the 10th July 1914.

Mr. Saroshi Chandra Mitra (with him Mr. Baidya Nath Sinha), for the Appellant.

Mr. Parmeshwar Dayal (with him Messrs. Shambhu Saran and Anugrah Narain), for the Respondents.

JUDGMENT.—In this case upon the findings of fact arrived at by the lower Court, the only point on which the appeal can be argued is whether the plaintiff is entitled to sue, and if so, to what extent can he obtain relief.

The facts are that the plaintiff, and the defendants Nos. 4 and 5 who apparently have, apart from this suit, no joint interests with

the plaintiff, purchased in execution of a decree the right, title and interest of one Dhanukdhari in the lands in suit. The extent to which the plaintiff was interested in this purchase is not specified in the plaint. It is mentioned only that the purchase was a joint purchase.

The lower Appellate Court has found as a fact that the plaintiff and these two defendants are entitled by virtue of an auction purchase to take possession of the whole of the lands in suit and has, therefore, made a decree in favour of the plaintiff for such possession jointly with the defendants Nos. 4 and 5. It is argued that inasmuch as the defendants Nos. 4 and 5 have not made themselves plaintiffs in the suit and have asked for no relief, it is inequitable that they should be given possession with the plaintiff. And it is further argued that since the defendants Nos. 4 and 5 cannot in equity obtain any share, it follows that the plaintiff cannot obtain any share inasmuch as he has failed to specify in the plaint the extent of his interest as separate from the interests of defendants Nos. 4 and 5. We are of opinion that in these suggestions there is no force. The principle laid down in *Kanna Pisharody v. Narayanan Somayajipad*(1) is one which has been universally followed in the Courts throughout India. It is that where a number of persons hold a joint interest in a cause of action and where the extent of the interest of each is an unspecified interest, it is open to any one of those persons to maintain on behalf of the whole body of interested persons a suit to establish the cause of action set forth and that in the event of success of that one person all persons interested will enjoy the fruits of the litigation, unless there is some specific law forbidding such a procedure. There is no bar to the present suit in any codified law. Under the common law the plaintiff must be held entitled to bring on behalf of the whole body of persons interested a suit for the recovery of the land upon which the principal defendants are trespassing, and the whole body of those interested participate in the fruits of his success. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 3 M. 234; 1 Ind. Dec. (N. S.) 718.

RAGHUNADA DOSS V. MAHARAJA OF JEYPORE.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS PETITION NO. 50
OF 1916.

July 25, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

Sri RAGHUNADA DOSS—
PETITIONER

versus

Sri Sri Sri VIKRAMA DEO, MAHARAJA
OF JEYPORE—RESPONDENT.

Ganjam and Vizagapatam Agency Rules, rr. 10 (4), 18, 20—Review of order passed ex parte—Jurisdiction of Governor's Agent—Civil Procedure Code (Act V of 1908), s. 151—Order passed without notice—Remedy of party aggrieved.

Every litigant is entitled to be heard before an order is made to his prejudice, and the proper remedy of a party against whom an order has been made without hearing him is to apply to the same authority for a re-hearing. [p. 386, col. 1.]

Yandamuri Jagannadham v. Yandamuri Sesha-chelam, 28 M. 404; *Ganeswar Singh v. Ganesh Das*, 33 C. 1178; 10 C. W. N. 964; 4 C. L. J. 177; 16 M. L. J. 365; 8 Bom. L. R. 719; 3 A. L. J. 698; 1 M. L. T. 308; 33 I. A. 134, followed.

Apart from the provisions of section 151 of the Code of Civil Procedure, a Court has an inherent power to rectify any inadvertent mistakes made by it and when a party can have a mistake corrected by the Court which made the mistake, he should adopt that course rather than resort to the Appellate Court. [p. 387, cols. 1 & 2.]

Debi Bikhsh Singh v. Habib Shah, 19 Ind. Cas. 526; 15 Bom. L. R. 640; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 16 O. C. 194; 40 I. A. 150 (P. C.); *Vint v. Hudspeth*, (1885) 29 Ch. D. 322; 54 L. J. Ch. 844; 52 L. T. 74; 33 W. R. 738; *Ganeswar Singh v. Ganesh Das*, 33 C. 1178; 33 I. A. 134; 16 M. L. J. 365; 10 C. W. N. 969; 4 C. L. J. 177; 8 Bom. L. R. 719; 3 A. L. J. 698; 1 M. L. T. 308, followed.

Where the Agent to the Governor, Vizagapatam, set aside, after hearing the parties, an *ex parte* order previously made by himself without notice to the parties and without hearing them, and passed a final order correcting the mistake:

Held, that though the Agency Rules did not in express terms invest the Agent with the power to review his own order, the Agent had inherent power to rectify a mistake committed by him without hearing the parties and the High Court would not, on technical grounds, interfere with a decision that was correct on the merits. [p. 386, col. 1; p. 387, col. 1.]

Bibi Mutto v. Ilahi Begum, 6 A. 65; 3 Ind. Dec. (N. s.) 639; *Amir Hasan v. Ahmad Ali*, 9 A. 36; A. W. N. (1896) 293; 5 Ind. Dec. (N. s.) 454, followed.

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the agent to the Governor at Vizagapatam to put the petitioner in possession of Sri Balajiswami Mutt at Gunupur

and its properties as directed by the High Court and as per his orders dated the 5th March 1913 and 11th March 1913.

Mr. T. Rangachariar, for the Petitioner.

The Hon'ble Mr. B. N. Srinivas, for the Respondent.

JUDGMENT.

SPENCER, J.—The Agent to the Governor, Vizagapatam, was directed by this Court in Civil Miscellaneous Petition No. 152 of 1909 to investigate and decide the question whether the petitioner Raghunatha Doss is the lawful *mahant* of Sri Balajiswami Mutt in Jaypore or not and to dispose of the application for restitution of property accordingly. The result is that we have before us a finding of the Special Assistant Agent that the said individual is the lawful *mahant*, an order dated 6th March 1913 of the Agent to the Governor made *without hearing the parties* accepting the Special Assistant Agent's finding, two written endorsements dated 12th March 1913 on petitions objecting to the Special Assistant Agent's finding and asking for a hearing, and an order dated 22nd May 1913 made *after hearing both sides* deciding that Raghunatha Doss was not the lawful *mahant*.

We are now asked under rule 20 of the Agency Rules to direct the Agent to review his last order on the ground that having once passed an order in the matter, he had no jurisdiction to review it without a fresh direction from the High Court.

There are no merits in the present application to recommend it. I have no doubt that the final order of the Government Agent, which follows the carefully considered decision of a former Government Agent Mr. H. G. Turner, is right. If the matter had come before us on appeal from the first order of the Government Agent, we should feel the necessity of directing him to pass a proper order after hearing the parties. Now that he has decided the case in a proper way, it will serve no useful purpose to again remand it. To ask us to declare in favour of his first order is in effect to ask us to prefer a worse judgment to a better upon a purely technical objection. It is an

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elementary principle of justice that every litigant is entitled to be heard before an order is made to his prejudice. If any authority be needed for this self-evident proposition, it will be found in the wording of Agency Rule XVIII which speaks of "the officer hearing the appeal" and in *Yandamuri Jagannadham v. Yandamuri Seshachelam* (1), and in *Ganeswar Singh v. Ganesh Das* (2) the Privy Council lay down in the latter case that the proper remedy of a party against whom an order has been made without hearing him is to apply to the same authority for a re-hearing, as was done in the present case. The first order having been passed without notice to the parties had thus no judicial value. As the whole matter is before us and the parties have been fully heard and as I am satisfied that the order appealed against is a just order, the proper course, in my opinion, is to dismiss the present application with costs.

This is sufficient to dispose of this petition, but as the question has been raised and argued at length whether the Agent acted without jurisdiction in reviewing his own order, I may state how, I think, that plea fails.

Under the Civil Procedure Code if a Court passes an order or decree without hearing one of the contesting parties, it is provided that that party may apply to the Court that passed the order to set aside its *ex parte* order or decree (see Order IX, rules 6, 8, 9 and 13). The procedure to be followed when an order is passed *ex parte* both of plaintiff and defendant is similar (see Order IX, rules 3 and 4).

Although it has been held that *ex parte* decrees and orders are capable of being reviewed under the provisions of the Civil Procedure Code [vide *Bibi Mutto v. Ilahi Begam* (3) and *Amir Hasan v. Ahmad Ali* (4)], yet the ordinary procedure for dealing with the consequences of the non appearance

of parties is distinguishable from the procedure for review of judgment and is contained in Order IX of the Civil Procedure Code.

Now the Agency Rules are silent as to the procedure to be followed by Agency Courts in the event of parties not appearing at the hearing of suits and appeals. It is only as regards the examination of witnesses that rule 13 specifically states that the rules prescribed by the Civil Procedure Code will apply. But rule 10, clause 4, invests the Agent and his Divisional Assistants with the same powers as are vested in District and Subordinate Courts respectively, subject to the modifications contained in these rules.

Where nothing appears to the contrary, it may, therefore, be reasonably assumed that a Government Agent, who takes the step that a District Court, acting as directed by the Civil Procedure Code, would take under similar circumstances, is acting legally. When the matter before the Agent is an appeal not summarily dismissed, rule 18 states positively that he "will proceed as directed by the Code of Civil Procedure". In this view, the order dated 22nd May 1913 was not *ultra vires*.

The petition is dismissed with costs.

PHILLIPS, J.—Under rule 10 of the Rules framed for the Vizagapatam Agency Tracts, the Agent to the Governor has the powers of a District Court, subject to any modifications contained in the rules, and under that rule, the Agent has held that he has the power of reviewing his own order, and purports to do so in the case now under reference. For petitioner, it is contended that the Agent has no such power and *secondly*, that even if he has such power, his present order is wrong because it is a review of a review. I think the second objection may be disposed of briefly on the ground that the Agent has not reviewed an order passed in review. The petitions put in by counter-petitioner on 5th March 1913 and 8th March 1913 were apparently written before the order of 6th March 1913 had been received by him, and they are certainly not applications to review that order. The first is merely a petition asking for a hearing before orders are passed, and the second is a petition setting forth

(1) 28 M. 404.

(2) 33 C. 1178; 10 C. W. N. 989; 4 C. L. J. 177; 16 M. L. J. 365; 8 Bom. L. R. 719; 3 A. L. J. 698; 1 M. L. T. 308; 33 I. A. 134.

(3) 6 A. 65; 3 Ind. Dec. (N. S.) 639.

(4) 9 A. 36; A. W. N. (1886) 293; 5 Ind. Dec. (N. S.) 454.

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the objections which counter-petitioner wished to urge against the finding of the Senior Assistant Agent. There was no hearing of either petition, but the Agent summarily dismissed them on the ground that counter-petitioner was not entitled to a hearing and that orders had already been passed. As the orders were not passed on any application to review the original order, of which counter-petitioner was then unaware, they cannot be treated as orders passed in review. I think it unnecessary to deal with the more difficult question of whether the Agent has the power of review, for I agree with my learned brother that on the merits petitioner has no case. Even if I were of opinion that the Agent has no power of review and that the order under reference was passed without jurisdiction, it would be manifestly unjust to set it aside and restore the order of 6th March 1913 which was passed without hearing the parties. Both orders would have to be set aside and the whole proceedings commenced afresh. However, I do not think that this course is necessary now, for the order under reference corrects an order which had been made previously without hearing the parties. It is an elementary principle that a party is entitled to be heard before an order is passed to his prejudice and the Agent acted illegally in passing the order of 6th March 1913 without hearing either party. Even if he considered it to be an appeal, which it was not, the Agency Rules do not empower him to dismiss an appeal without allowing the appellant to be heard in support of it, although he need not summon the respondent. In a case where a Deputy Commissioner passed orders in the absence of a party who had died, and subsequently reviewed his order, it was held by the Privy Council that he was right and Lord Shaw remarked: "Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made," *Debi Bakhsh Singh v. Habib Shah* (5). When a party can have a mistake corrected by the Court which

made the mistake, he should adopt that course rather than resort to the Appellate Court [vide *Vint v. Hudspeth* (6) and *Ganeswar Singh v. Ganesh Das* (2)]. In this view as the whole case is open before us, I agree that we should not interfere in a case where an initial injustice has been corrected and substantial justice done.

Petition dismissed.

V.R.P.

(6) (1885) 29 Ch. D. 322; 54 L. J. Ch. 844; 52 L. T. 741; 33 W. R. 738.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 708
OF 1916 AND SECOND APPEAL No. 92 OF 1914.
August 30, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

TANGUTURI JAGANNADHAM *alias*
HANUMANTHA RAO—PETITIONER
IN No. 708 OF 1916—RESPONDENT IN No. 92
OF 1914

versus

K. SESHAGIRI RAO AND OTHERS—
RESPONDENTS IN No. 708 OF 1916—APPELLANTS
IN No. 92 OF 1914.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90
—Sale without notice to judgment-debtor, validity of—
Auction-purchaser, extent of protection to, under
irregular sale—Notice, absence of—Burden of proof.

A Court auction-sale held without notice to the judgment-debtor, whose interests are to be directly affected by the sale, is vitiated by such a grave and material irregularity that it is liable to be set aside on that sole ground, unless it is proved that the judgment-debtor had knowledge of the execution proceedings or wilfully kept himself in the background or there are other valid defences to his claim. [p. 388, col 2.]

Malkarjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739; *Raghunath Das v. Sundar Das Khetri*, 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.), followed.

Ramachari v. Duraisami Pillai, 21 M. 167; 7 Ind. Dec. (N. s.) 475, referred to.

A *bona fide* auction-purchaser is protected as against an irregular sale where the decree in execution of which the sale is held, was passed by a Court having jurisdiction, though the decree was vitiated by illegality or was afterwards set aside. But irregularity in the conduct of the sale itself which vitiated it can be urged against the Court

(5) 19 Ind. Cas. 526; 15 Bom. L. R. 640; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 16 O. C. 194; 40 I. A. 150 (P. C.).

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auction-purchaser also in proper proceedings by way of application or of suit within the time prescribed by law. [p. 388, cols. 1 & 2.]

Zain-ul-Ab-Din Khan v. Muhammad Asghar Ali Khan, 10 A. 166 (P. C.); 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112, *Krishna Chandra Mandal v. Jagendra Narain Roy*, 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537; *Malkarjun v. Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 363; 7 Sar. P. C. J. 739; and *Satis Chandra Ghose v. Rameswari Dasi*, 31 Ind. Cas. 894; 22 C. L. J. 409; 20 C. W. N. 665, distinguished.

Where a sale is sought to be set aside for want of notice to the judgment-debtor and that the same was not in fact issued through Court, it is for the Court auction-purchaser to prove that the judgment-debtor was otherwise aware of the sale and to set up appropriate defences. [p. 389, col. 1.]

Application under section 114 and Order XLVII, rule 1, of the Code of Civil Procedure for review of the judgment of the High Court in Second Appeal No. 92 of 1914, printed as 32 Ind. Cas. 391, on the file of the High Court.

Mr. T. Prakasam, for the Petitioner.

Mr. K. Krishnaswami Aiyangar, for the Respondents.

JUDGMENT.—This Civil Miscellaneous Petition No. 708 of 1916 is an application to review our judgment in Second Appeal No. 92 of 1914,* as it proceeded on the basis that the suit to set aside, among other things, the Court auction-sale of item No. 13 (at which the 15th defendant became the purchaser of that item) was brought more than a year after that sale and was, therefore, barred by Article 12 of the Limitation Act. It is not now disputed that we were in error in having entertained the opinion that the suit was brought after an interval of more than one year from the date of the confirmation of the sale of item No. 13.

It is, however, argued for 15th defendant's legal representatives (the appellants) that the sale should not be set aside as the 15th defendant was a *bona fide* purchaser at the Court auction without notice of the irregularities relied on by the plaintiff. A third party who is the *bona fide* purchaser at a Court auction-sale is no doubt protected where the decree, in execution of which the sale was held, was passed by a Court having jurisdiction, though the decree was vitiated by illegality or was afterwards set aside. But irregularity in

the conduct of the sale itself which vitiated it could be urged against the Court auction-purchaser also in proper proceedings by way either of application or of suit taken within the period fixed by law and the observations in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1), *Krishna Chandra Mandal v. Jagendra Narain Roy* (2) and *Malkarjun v. Narahari* (3), relied on by the appellants' learned Vakil [See also *Satis Chandra Ghose v. Rameswari Dasi* (4)] have no bearing on the question before us. The question for decision in those cases was whether sales in execution held under decrees afterwards reversed were valid. We think that we are bound by the Privy Council decisions in *Malkarjun v. Narhari* (3) and *Raghunath Das v. Sundar Das Khetri* (5) to hold that a Court auction-sale held without notice to the judgment-debtor whose interests were to be directly affected by the sale (as in the present case), without notice to a major judgment-debtor who was wrongly treated as a minor, is vitiated by such a grave and material irregularity that the judgment-debtor is entitled to bring a suit to set aside the sale on that sole ground, unless the defendant pleads facts which raise valid defences to the claim of the plaintiff which is, *prima facie*, a sustainable claim. One of such defences is indicated by the decision in *Ramachari v. Duraisami Pillai* (6), namely, that the plaintiff, knowing of the proceedings before the sale actually took place, allowed another judgment-debtor to represent him in the execution proceedings, wilfully kept in the background and allowed the sale to proceed, when he could have stopped it by pointing out the irregularity to the Court at once.

If the decision in *Ramachari v. Duraisami Pillai* (6) intended to lay down that

(1) 10 A. 166 (P. C.); 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112.

(2) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

(3) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 363; 7 Sar. P. C. J. 739.

(4) 31 Ind. Cas. 894; 22 C. L. J. 409; 20 C. W. N. 665.

(5) 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.).

(6) 21 M. 107; 7 Ind. Dec. (N. S.) 475.

*See 32 Ind. Cas. 391.—Ed.

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the plaintiff in such a suit ought to allege in the plaint not only that no notice was served on him through Court as required by law but that even otherwise he had no notice of the sale proceedings, we respectfully dissent from such a view. But we are not at all clear that the learned Judges intended to go so far as to lay down such a proposition.

The observations of the Privy Council found at page 348 of the decision in *Malkarjun v. Narhari* (3), which was decided later than the case of *Ramachari v. Duraisami Pillai* (6), seem to imply clearly that it was for the Court-purchaser to set up any appropriate defences when the plaintiff has made the only necessary allegation in his plaint, namely, that no notice through Court as required by law was issued to and served on him.

We are finally asked to send down for finding an issue as to whether the plaintiff had notice of the sale proceedings otherwise than through Court and whether he is estopped by his conduct from relying on the material irregularity in the sale proceedings.

We think that the 15th defendant not having raised that defence in his written statement, it would be inadvisable to allow him to raise it at this late stage and we, therefore, refuse it to be so raised.

In the result the Second Appeal No. 92 of 1914 is dismissed with the plaintiff's costs incurred by him in this Court, including the costs of the Review Petition, Civil Miscellaneous Petition No. 708 of 1916.

Review petition allowed;
Second appeal dismissed.

V. R. P.

PATNA HIGH COURT.
FIRST CIVIL APPEAL NO. 221
OF 1915.

November 20, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Atkinson.

INDRA DEO NARAYAN SINGH—
PETITIONER—APPELLANT

versus

MATUKDHARI SINGH—OPPOSITE PARTY
—RESPONDENT.

Civil Procedure Code (Act V of 1903), O. IX, r. 13—

Decree, ex parte, application to set aside—Minor—Guardian ad litem, father, whether proper—Hindu Law—Joint-family.

A father is fully competent to be the guardian *ad litem* of his minor son and to protect his interests. [p. 390, col. 1.]

A mortgagee sued his mortgagors, members of a joint Hindu family one of whom was a minor, on the mortgage. The minor's father, who was himself a defendant, was appointed guardian *ad litem* of his son, but he failed to put in any defence and an *ex parte* decree was passed against the minor. The latter applied to set aside the decree:

Held, that the minor was fully represented in the case by his father, and that the decree was, therefore, binding on him. [p. 391, cols. 1 & 2]

Appeal from a decision of the Sub-Judge, 3rd Court, Patna, dated the 22nd February 1915.

Messrs. *Ganesh Dutta Singh* and *Shivnandan Rai*, for the Appellant.

Rai Guru Saran Prasad, for the Respondent.

JUDGMENT.

ATKINSON, J.—Nathuni Prasad is the maternal uncle of the present appellant. Jadunandan Prasad Singh, the grandfather, and Ram Das Singh the father of the appellant and the appellant himself are members of a joint Hindu family. The grandfather as *karta* of the family made a mortgage charging the family property with payment of money, and it is alleged that the debt so contracted was for a family necessity. The mortgagees under the mortgage instituted a suit on the 26th April 1909 to realise the amount of their mortgage-debt. The defendants to that suit were Jadunandan Prasad Singh the grandfather, Ram Das Singh his son, the present appellant and the defendant No. 4, who appears to be a subsequent purchaser of this property. At the date of the institution of the suit the appellant was a minor. Neither the grandfather nor any member of the joint family contested the suit. The suit was contested only by defendant No. 4. The appellant being a minor at the time, his father Ram Das Singh was on the 25th of May 1909 appointed guardian of his minor son, and on the 31st May 1909 Ram Das filed a petition on behalf of his father, himself, and as guardian of his son for time to file a written statement in answer to the claim of the mortgagees on foot of the mortgage-bond. No written statement was filed by any of these three persons, and as against them the suit proceeded and was

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decreed *ex parte* on the 30th August 1909. The present appellant on the 2nd February 1915 made an application to have the decree of the 30th August 1909 set aside on the following grounds, (1) that he had no notice of the proceedings incidental to that decree, (2) that he was not properly represented in the suit, and (3) that his interests were not properly looked after. He alleged that he had been living since the death of his mother in 1904 with his maternal uncle and that at the time when the process was served upon his father, he was not an inmate of his father's house, and that he received no notice of any kind whatsoever affecting him with knowledge of the proceedings in the mortgage suit. The learned Judge finds that that story is an entire concoction, that the appellant was not living with his maternal uncle, but that he was living in the house of his father, and that he was affected with notice of the proceedings. On the *second* point it was suggested that he was not properly represented. We entirely disagree with that contention. The appellant's father was appointed his guardian and he was fully competent to be the guardian *ad litem* of his son, and as such he was properly appointed and could have afforded the son in the course of the litigation every protection, if indeed he had any defence to the action at all.

Thirdly it is alleged that the interests of the minor were not looked after. As to this there is no evidence whatsoever before us which would justify us in arriving at the affirmative conclusion that the minor's interests at the time had been disregarded.

The present application is made under Order IX, rule 13. It is specific in its terms and it enables a person to apply to set aside an *ex parte* decree if he satisfies the Court that the summons was not duly served, or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. Admittedly the appellant was not able to satisfy the Court that the summons was not duly served. We entirely agree with the finding of fact on that point arrived at by the learned Judge.

It remains to consider whether any sufficient cause was alleged or proved for the minor not appearing when the suit was called on for hearing. We have listened

very attentively to the argument of the learned Vakil for the appellant, but he has utterly failed to convince us that any cause was shown or that proof of any cause was given to the learned Judge to show or to excuse the non-appearance of the minor appellant by his guardian at the trial. There is no affidavit or evidence given by the father or by the grandfather. It is suggested that the guardian either disregarded his duty or if he did not disregard his duty, that probably he may have been purchased off by the mortgagees from filing his defence to resist their claim. This is a matter of speculation and no evidence having been given to justify these allegations, we do not think that we would be justified in acceding to this application, and accordingly we dismiss the application with costs measured at one gold *mohur*.

MULLICK, J.—I agree.

Application dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 740 OF 1915.

February 2, 1916.

Present:—Mr. Justice Shah Din.

MIHAN SINGH AND OTHERS—DEFENDANTS—
PETITIONERS.

versus

Musammât BHAGWAN KĀUR—

RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 77 (3), as amended by Punjab Act III of 1912, scope of—Revenue Court, question exclusively triable by—Procedure—Civil Courts, duty of.

Where, in a case cognizable by a Civil Court, the question was whether defendants were occupancy tenants of the land in dispute:

Held, that the matter was one which could, under section 77 (3) of the Tenancy Act, be heard and determined only by a Revenue Court, and that the Civil Court trying the suit should have returned the plaint for presentation to the Collector in accordance with the provisions of Act III of 1912. [p. 391, col. 1.]

Petition for revision, under section 44 of Act III of 1914, of the order of the Senior Subordinate Judge, Ferozepore, dated the 25th May 1915, reversing that of the Munsif, 2nd class, Zira, District Ferozepore, dated the 9th April 1915, and remanding the case for trial according to law.

Mr. Daulat Ram, for the Petitioners.

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Lala *Shaukat Rai*, for the Respondent.

JUDGMENT.—The Senior Subordinate Judge is right in holding that the suit as laid was one cognizable by a Civil Court; but he has ignored the proviso to sub-section (3) of section 77 of the Punjab Tenancy Act, which was added by Punjab Act III of 1912. That proviso runs as follows:

"1. Where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court, the Civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by Order VII, rule 10, Civil Procedure Code, and return the plaint for presentation to the Collector."

"2."

In the present case the principal plea urged by the defendants was that they were occupancy tenants of the land on which the trees in dispute stood, and that as such they had a right to cut those trees. The question whether the defendants were occupancy tenants or not of the land on which the trees stood is a matter which can, under sub-section (3) of section 77 of the Punjab Tenancy Act, be heard and determined only by a Revenue Court; therefore, the proviso to sub-section (3) applies to this case, and the Munsif who heard the suit should have proceeded in accordance with the directions contained in the first paragraph of the said proviso. *Fakiria v. Dhani Nath* (1) which has been followed by the Senior Subordinate Judge and the Full Bench decision of this Court, *Haji Muhammad Bakhsh v. Bhagwan Das* (2), have been rendered obsolete by the enactment of the proviso to sub-section (3) of section 77, to which reference has been made above.

I accept this revision and setting aside the order of the Senior Subordinate Judge send the case back to the Munsif with a direction that the provisions of the first clause of the proviso aforesaid be complied with. The parties will pay their own costs in this Court.

Petition accepted.

(1) 24 P. R. 1907; 131 P. W. R. 1907; 26 P. L. R. 1908.

(2) 3 Ind. Cas. 498; 76 P. R. 1909; 119 P. W. R. 1909; 66 P. L. R. 19'Q,

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 76 OF 1915.

October 20, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Stuart.

CHIRUNJI LAL AND OTHERS—APPLICANTS—
APPELLANTS

versus

AJODHIA PRASAD AND OTHERS—OPPOSITE
PARTIES—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 16—
Appeal—Application for adjudication dismissed—
Parties, proper—Practice—Insolvency Court, power of, to
refuse application for adjudication—Adjudication,
order for.*

In an appeal by a debtor against an order of an Insolvency Court dismissing his application for adjudication, notice of the appeal should be given to a substantial number of creditors to enable them to represent their interests as respondents. [p. 392, col. 1.]

An Insolvency Court has inherent power to refuse an application for adjudication by a debtor when it is satisfied that it will result in no benefit to anybody and is an abuse of the process of the Court. [p. 392, col. 2; p. 393, col. 1.]

Where there are considerable debts and also certain assets which can be administered and a dividend paid to all the creditors, it is contrary to the policy of the Provincial Insolvency Act to refuse adjudication. [p. 393, col. 2.]

The fact that a debtor, who is otherwise within the provisions of the Insolvency Act which renders an adjudication against him possible, is also a dishonest man, is not a reason for refusing an order of adjudication; but where fraudulent conduct is disclosed, such as that the debtor was carrying on a dishonest business to obtain some material benefit for himself through the machinery of the Insolvency Court, the Court must take it into serious account when the time arrives for him to apply for his discharge. [p. 392, col. 2; p. 393, col. 1.]

Tirloki Nath v. Badri Das, 23 Ind. Cas. 4; 36 A. 250; 12 A. L. J. 355; *Ex parte Painter, In re Painter*, (1895) 1 Q. B. D. 85; 64 L. J. Q. B. 22; 71 L. T. 491; 1 Manson 499; *In re Hancock, Ex parte Hillearys*, (1904) 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389; 52 W. R. 547; 11 Manson 1, referred to.

First appeal from an order of the Second Additional Judge, Aligarh, dated the 31st March 1915.

Dr. *Sundar Lal* and Dr. *Surendra Nath Sen*,
for the Appellants.

Messrs. *Girdharilal Agarwala, Iqbal Ahmad*
and *Pearey Lal Banerji*, for the Respondents.

JUDGMENT.

WALSH, J.—This case is by no means easy to deal with and raises several questions of

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some importance. Not for the first time in this Court within my short experience questions are raised which show what, I think, has been recognised for some time by the legal profession, that there is a real necessity for a rigorous amendment of the existing insolvency law in these Provinces. It is a question of some public importance which calls for the attention of the Government. Now there was one preliminary question, which it is desirable to dispose of which was mentioned by Dr. Sundar Lal on behalf of the appellant at the opening of the appeal, namely, where the debtor has petitioned on his own behalf for an order of adjudication and his petition has been dismissed and he desires to appeal, whom he ought to make parties as respondents to his appeal. There is no provision in the Act dealing specifically with the matter. If there was a Receiver, then in the rare event of a debtor appealing from an order of an Insolvency Court, the proper person to make respondent would be the Receiver, but *ex hypothesi* there can be no Receiver, inasmuch as the appointment of a Receiver depends upon the adjudication. In this particular case there was an *interim* Receiver who had been appointed before the hearing of the petition and whose appointment was continued for the purposes of convenience, when it was known that the order of dismissal would be taken to the Court of Appeal. We are disposed to agree with Dr. Sundar Lal that that order, although a very natural and convenient one to make, was a nullity if anybody had chosen to call it in question and, therefore, the present appellant was well advised under the circumstances in not making the *interim* Receiver a party to the appeal. The persons really interested in the discussion before us were the general body of creditors and without attempting to lay down a rule of universal application, we think that the better practice in such cases is to do what has been done in this case or even less than what has been done in this case, to give notice to a substantial number of creditors of the proposed appeal, so as to enable them to represent their interests as respondents. Now the grounds upon which the learned Judge has dismissed the application may be summarised as follows:—

(1) It is alleged, and the Judge appears to have held, that one, if not more, of the appli-

cants (there are in fact three applicants for insolvency) had supplied his mother with funds. What precise branch of the criminal law that act is supposed to constitute a breach of, we do not for the moment appreciate, but if it be the fact, then the money which could not otherwise be recovered from the mother, might be recovered by the Receiver under the Insolvency Act. That ground appears to us, so far from being a ground for refusing an adjudication in bankruptcy, to be rather a reason in favour of making the order.

The *second* ground is that the insolvent has deliberately incurred liabilities and committed various frauds in the course of doing so. The fact that a debtor, who is otherwise within the provisions of the Insolvency Act which renders an adjudication against him possible, is also a dishonest man, does not seem to us to be a reason for refusing an order of adjudication. Conduct of that kind can be dealt with either independently of, or through the machinery of, the Insolvency Act, and if he has committed any offence, he can be dealt with for it, whether he is made an insolvent or not.

The *third* ground is that he appears to have collected funds while proceedings in insolvency were contemplated, and not to have accounted for them. The observations we have made about the *second* ground apply equally to the *third* ground. It, therefore, appears to us that the three grounds upon which the learned Judge proceeded are not grounds recognised by law for refusing an adjudication. The respondents, however, have, in addition to the specific matters relied upon by the learned Judge in the Court below, put forward other arguments of a somewhat similar character. It is safe to say that none of them amount to an allegation of what is known as an abuse of the process of the Court or really do any more than aggravate the allegation made against the debtor at the hearing. It is perfectly true that it is open to an Insolvency Court, (we think it is generally recognised that the principles which regulate the administration of the Bankruptcy Act of 1883 in England are applicable to the Provincial Insolvency Act), and according to the English authorities it is quite clear that there is an inherent power in the Insolvency Court, to refuse an application by a debtor

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when it is satisfied that it will result in no benefit to anybody and is an abuse of the process of the Court. Before pointing out shortly the illustrations of that principle, because as Dr. Sundar Lal has rightly pointed out, it is very easy to use vague language and take it out of one context and apply it to another, and it is, of course, a dangerous method of interpretation it is important in this case to point out two things. *First*, owing to the nature of the resistance offered to the debtor's application and to the way in which the Judge has treated the case, there are certain findings of fact in the judgment before us of an undoubtedly embarrassing character to the appellant. We have not dealt with these findings of fact in any way and they must be regarded as immaterial, or if I may use the term *ultra vires*, in the judgment of the Court below inasmuch as they do not constitute, in our opinion, legal grounds for the order that was made and, therefore, any future proceedings which may be taken upon the facts and admissions of the debtor in the evidence of the Court below must be taken wholly and entirely without regard to any findings arrived at in the judgment now under review. *Secondly*, if it be true that the debtor, or the three debtors, are really fraudulent persons, who have been carrying on a dishonest business and hope to obtain some material benefit for themselves through the machinery of the Insolvency Court: such as for example payment of a dividend of their debts instead of payment in full, and obtaining a speedy discharge and starting a fresh career at an early date, it must be clearly understood that all these matters of the conduct of the debtors in the insolvency proceedings are matters which ought seriously to be taken into account when the time arrives for the appellants to apply for their discharge. It only remains to point out that we see nothing in what we are deciding which is inconsistent with the principle which has already been recognised by a Full Bench decision of this Court and which is reported as *Tirloki Nath v. Badri Das* (1) and which is consistent with the practice in England. But it

should be recognised that the grounds upon which the Court has refused to interfere either at the instance of a creditor or at the instance of a debtor are limited. It is impossible to state them in the form of a general proposition, but two or three cases may at any rate be mentioned by way of illustration. In the case of *Ex parte Painter, In re Painter* (2), where a debtor who was possessed of a pension which he could not alienate and whose assets were only £12, filed his petition in order to evade a judgment summons; he was practically the only creditor, it was held that this was not an abuse of the process of the Court. Now the only conceivable object of the debtor in that case was to evade arrest, because he had a pension which bankruptcy could not effect and which enabled him to pay his creditors if he pleased, and although he had only £12 assets in addition to the pension, which would have enabled him to pay his debts in order to evade arrest, he petitioned the Bankruptcy Court, and there is a later case, *In re Hancock, Hillearys, Ex parte* (3), the facts of which (it is not necessary to refer to them in detail) were that the debtor had a very small income and there was practically no hope of anything for the creditors beyond his personal earnings and he wanted to evade committal which is, of course, the same thing as arrest; the Court of Appeal held that that also was not an abuse of the process of the Court. In this case there are very considerable debts and apparently, though that is not certain, considerable assets. At any rate there are a number of creditors, and it seems to us, at any rate so long as the existing Act is in force, administering that Act according to the recognised principles of law, that it would be contrary to the policy of that Act to refuse the adjudication in this case which will enable the assets to be administered and a dividend to be paid to all the creditors.

Under these circumstances the appeal must be allowed and we make the order which ought to have been made by the learned Judge, that is to say, we adjudicate the three appellants insolvent under the petition

(2) (1895) 1 Q. B. D. 85; 64 L. J. Q. B. 22; 71 L. T. 481; 1 Manson 499.

(3) (1904) 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389; 52 W. R. 547; 11 Manson 1.

(1) 23 Ind. Cas. 4; 36 A. 250; 12 A. L. J. 355.

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presented by them on the 9th of August 1913, that is to say, the order of adjudication in this case will date from the 9th of August 1913 under the provisions of section 15, subsection 6, of Act III of 1907.

We certainly think there are many grave circumstances appearing in the findings in this case which demand immediate action on the part of the Receiver. The Court should immediately appoint, if it can, a competent and responsible Receiver to enquire into the circumstances and to take steps under section 36 or any other section applicable to the facts, assuming there is a *prima facie* case. If no Receiver is appointed, then we think this is a case in which the District Judge, who will have to act as Receiver, should lose no time, although we recognise that he has very little time for such work, investigating the circumstances and instituting proceedings. It must be taken that we form no opinion whatever upon the merits or otherwise of such proceedings.

STUART, J.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 499 OF 1911.

August 11, 1916.

Present:—Mr. Justice Seshagiri Aiyar.
GOPISETTI NARAYANASWAMI NAIDU
GARU, RECEIVER, NIDADAVOLE;
ESTATE—PLAINIFF—APPELLANT

versus

GANGISETTI BANGARAYYA AND OTHERS

—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (Mad. Act I of 1908), s. 6, cl. (6), scope of—Suit for rent—Land situated in a zamindari—Ryoti land—Presumption—Ijara lease—Jurisdiction of Civil Court.

Prima facie land situate within the ambit of a zamindari must be deemed to be ryoti land unless the zamindar shows it is private land. [p. 394, col. 2.]

A claim for rent in respect of land in an 'estate' is cognizable by the Revenue and not by the Civil Courts; unless the plaintiff sets forth particulars taking it out of the cognizance of the former. [p. 395, col. 1.]

A claim is not exempted from the jurisdiction of the Revenue Courts simply because it arises out of an *ijara* lease. [p. 395, col. 1.]

Clause 6 of section 6 of the Madras Estates Land Act applies only to the case of a middleman taking an *ijara* and not where a ryot himself claims an *ijara* of his holding. [p. 395, col. 1.]

Petition, under section 115 of Act V of 1902, praying the High Court to revise the order and judgment of the Court of the Subordinate Judge, Kistna, at Ellore, in Miscellaneous Appeal No. 21 of 1910, (Original Suit No. 346 of 1910 on the file of the Court of the District Munsif, Tanuku).

Mr. P. Nagabhushanam, for the Appellant.

The Hon'ble Mr. B. N. Sarma, for the Respondents.

JUDGMENT.—The question raised in revision is whether the suit is cognizable by a Revenue Court or by a Civil Court. The District Munsif before whom this and a number of connected suits were tried, was of opinion that the matter came within the jurisdiction of the Deputy Collector. There was an appeal against that. Mr. Nagabhushanam has preferred this civil revision petition to this Court against the appellate order. He contends that the proper tribunal is the Civil Court and not the Revenue Court.

One circumstance may be mentioned which, to my mind, is practically conclusive of this matter, and it is this. In the connected suits disposed of along with this by the Munsif there was a civil revision petition to this Court, No. 853 of 1910, and others. In those petitions Mr. Justice Phillips was of opinion that the order of the District Munsif was right and that the Civil Courts had no jurisdiction. That decision was taken up in appeal to two Judges of this Court in Letters Patent Appeal and the decision of Mr. Justice Phillips was confirmed. If I interfere now, the result of it will be that in the same batch of suits tried by the same District Munsif, one of them will have to be tried by the Revenue Court and the others by the Civil Courts. The question is whether this anomalous state of affairs is really necessary having regard to the facts of this case. *Prima facie* a land within the ambit of the zamindari must be deemed to be ryoti land, unless the zamindar shows that it is private land. There is no allegation in the plaint in this suit as regards the nature of the land, whether it is ryoti or private land. Nor is there any allegation that the land is zamindari land,

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Under these circumstances *prima facie* the presumption is that this land being in an estate and the claim being one for rent, the suit lies in the Revenue Courts.

Mr. Nagabhushanam's contention is that there is an *ijara* lease in respect of this land and other lands and that fact takes away the jurisdiction of the Revenue Courts. He has not been able to cite before me any authority for the proposition that where there is a *ryoti* land and the suit is for rent, the proper forum is the Civil Court and not the Revenue Court simply because the claim for rent arises out of an *ijara* lease. He mainly relied upon clause 6 of section 6 of the Madras Estates Land Act, which lays down that "a person holding land as an *ijaradar* or farmer of the rent shall not, while so holding, acquire otherwise than by inheritance or devise a right of occupancy in any land comprised in the *ijara* or farm."

I have very little hesitation in holding that this applies only to middlemen, who are a very well known class of persons and whose existence is recognized by a number of decisions in this Presidency. Where a middleman takes an *ijara* he does not acquire the occupancy right of a *ryot*. That is the class of cases contemplated by this clause 6 of section 6, and not cases where the *ryot* himself claims an *ijara* of his holding. Mr. Nagabhushanam drew my attention to the decision of two learned Judges of this Court in *Tallapragada Subba Row v. Gopiseti Narayanaswami Naidu* (1). One of them Mr. Justice Napier seems to dissent from the view taken in the Letters Patent Appeal against the decision in the connected suits. From a perusal of that judgment it seems to me that the learned Judge there was considering the question of middlemen, not that of *ryots*, because he says in one portion of his judgment that the person was not a "*ryot*". That makes all the difference between the two classes of cases. As regards the question of the correctness of the decision in the Letters Patent Appeal referred to, with all deference I am unable

to see how, if Mr. Justice Napier holds that the person against whom rent is claimed was not a "*ryot*", the question of the correctness of the decision in the Letters Patent Appeal really arose. I am mainly influenced by this consideration, namely, that the learned Judges in the connected batch of petitions in this Court have held that it is the Revenue Courts which should try the suits: and I do not think that any object will be gained by a trial of these suits before a Civil Court. Moreover, all the questions that Mr. Nagabhushanam wants to raise, *viz.*, question regarding the land not being a "*ryoti* land," etc.—all these questions can be gone into in the Revenue Court.

For these reasons I am of opinion that there is no substance in this petition.

The petition must be dismissed with costs.

Petition dismissed.

V.R.P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 918 OF 1915.

November 2, 1916.

Present:—Justice Sir George Knox, KT.

BIJAI NARAIN SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Sri Maharaja PARBHU NARAIN

SINGH—PLAINTIFF—RESPONDENT.

Adverse possession—Possession, non-adverse in inception, when becomes adverse—Landlord and tenant—Non-payment of rent after expiry of term, effect of—Kabuliyat, contents of, when admissible—Evidence.

When possession is non-adverse in its inception, it is necessary to prove some overt act of adverse possession before adverse possession can be deemed to exist. [p. 397, col. 1.]

Mere non-payment of rent by the tenant after the expiry of the stipulated term will not make his possession adverse as from that date. The presumption is that the tenant continues to retain physical possession as he retained it before. [p. 397, col. 2.]

Pusa Mai v. Makdum Bakhsh, 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584, distinguished.

Musammmt Bilas Kunwar v. Desraj Ranjit Singh, 30 Ind. Cas. 299; 37 A. 557; 19 O. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 491; 17 Bom. L. R. 1003; 22 C. L. J. 516 (P. C.); (1915) M. W. N. 757; 42 I. A. 202; *Ganpat Rai v. Multan*, 33 Ind. Cas. 97; 14 A. L. J. 263; 38 A. 226, referred to.

(1) 36 Ind. Cas. 727; 20 M. L. T. 36; 31 M. L. J. 339; 4 L. W. 293.

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Where there is a *kabuliyat* but no lease, the executant of the *kabuliyat* cannot utilise the contents of that document against the owner of the land for his own benefit. But the owner of the land can utilise the contents of the *kabuliyat* to prove what the executant of the *kabuliyat* has undertaken to do. [p. 396, col. 2.]

Nand Lal v. Hanuman Das, 26 A. 368; 1 A. L. J. 96; A. W. N. (1904) 46; *Kashi Gir v. Jogendro Nath Ghose*, 27 A. 136; A. W. N. (1904) 189; 1 A. L. J. 576; *Sikandar v. Bahadur*, 2 A. J. J. 208; A. W. N. (1905) 48; 27 A. 462; *Beni v. Pura Das*, 27 A. 190; A. W. N. (1904) 212, followed.

Sheo Karan Singh v. Parbhu Narain Singh, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167 (F. B.); 5 M. L. T. 347, referred to.

Second appeal against the decision of the District Judge, Benares, dated the 3rd February 1915.

Dr. S. N. Sen, for the Appellants.

Messrs. Gokal Prasad and Beni Madho Ghosh, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal arose are stated very clearly in the elaborate and well-reasoned judgment of the learned District Judge. I need not detail them. It is sufficient to note the points put forward by the learned Counsel for the appellants. These points are that the contents of the *kabuliyat* dated the 4th of September 1879 are not admissible in evidence, that even if they are admissible in evidence they do not prove that Bishesar Singh was a tenant of the plaintiff-respondent and that in any circumstance after the expiration of the term fixed by the *kabuliyat*, Bishesar Singh and his successors became trespassers whose adverse possession has ripened into full proprietorship after a lapse of more than twelve consecutive years. There was a fourth ground taken in appeal, but that was abandoned in argument. As to the admissibility in evidence of the contents of the *kabuliyat* the learned Counsel has taken me through a series of decisions of this Court with reference to this point. These are *Nand Lal v. Hanuman Das* (1), *Kashi Gir v. Jogendro Nath Ghose* (2), *Sikandar v. Bahadur* (3). There is also a decision on a similar point in *Beni v. Pura Das* (4). It would

appear that the correctness of the view taken in the first three decisions which I have mentioned was challenged and that the point was argued before a Full Bench in the case of *Sheo Karan Singh v. Parbhu Narain Singh* (5). The Full Bench did not, however, determine the point and so far as I am concerned, I am bound by the decisions in question. These decisions do not, however, in my opinion, assist the case for the appellants. They nowhere state that the contents of a registered *kabuliyat* cannot be admitted in evidence to prove the obligations undertaken by the executant or to prove the relationship between the parties. What these decisions simply lay down is that where there is a *kabuliyat* but no lease, the executant of the *kabuliyat* cannot utilise the contents of that document against the owner of the land for his own benefit. But the owner of the land can clearly utilise the contents of the *kabuliyat* to prove what the executant of the *kabuliyat* has undertaken to do. The plaintiff-respondent is, therefore, entitled to show from the contents of this *kabuliyat* that Bishesar Singh not only asserted no title contrary to that of the plaintiff-respondent, but that Bishesar Singh admitted himself to be a tenant under the terms of this document itself. He is entitled to utilise it in this way, and an examination of the contents can only show that Bishesar Singh recognised the plaintiff-respondent as holding a superior title in the land in question and agreed to pay rent for that land by abstaining to collect from the plaintiff-respondent an equal amount which the latter owed him in another connection. The period of this *kabuliyat* expired in 1295 *Fasli*. The learned Counsel, for the appellants, argues that when the period of the *kabuliyat* expired Bishesar Singh must be taken to have been in adverse possession. How does the case stand? Bishesar Singh was certainly not in adverse possession so long as the *kabuliyat* was in force. When the period of the *kabuliyat* expired he continued to retain physical possession as he retained it before. He did not pay rent to the plaintiff-respondent; he never had done so; but he is

(1) 26 A. 368; 1 A. L. J. 96; A. W. N. (1904) 46.

(2) 27 A. 136; A. W. N. (1904) 189; 1 A. L. J. 576.

(3) 2 A. L. J. 208; A. W. N. (1905) 48; 27 A. 462.

(4) 27 A. 190; A. W. N. (1904) 212.

(5) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347.

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not shown to have collected from the plaintiff-respondent the amount the plaintiff owed to him. Therefore, it can only be taken that the rent due with regard to this land was set off between the parties against the amount due from the plaintiff-respondent. In these circumstances can any question of adverse possession arise, specially when the relationship between the parties is considered? The plaintiff-respondent was first entitled to the revenue accruing from this land. Bishesar was the *zemindar*. The plaintiff-respondent, however, had purchased the rights of a tenant at fixed rates. After the recognition of the plaintiff-respondent as a Ruling Chief the right to receive the revenue vested in the British Government. The plaintiff-respondent became the *zemindar*, the appellants became under-proprietors and the plaintiff-respondent continued to be recognised as a tenant at fixed rate. In these circumstances, how can there be adverse possession? It may also be taken that when possession is non-adverse in its inception, it is necessary to prove some overt act of adverse possession before adverse possession can be deemed to exist. Here there is no overt act. I have been referred by the learned Counsel for the appellants as an authority for a view to the contrary, for which he argued with great skill, to the decision in *Pusa Mal v. Makdum Bakhsh* (6). But not only were the facts of that case considerably different from the facts of the present case, but that decision was passed before the pronouncement of their Lordships of the Privy Council in *Musammatt Bilas Kunwar v. Desraj Ranjit Singh* (7), which was followed by a Bench of this Court in the later case of *Ganpat Rai v. Multan* (8). I, therefore, hold that the appellants have acquired no title by adverse possession. This disposes of all the points raised. The appeals fail and are dismissed with costs, including fees on the higher scale.

Appeals dismissed.

(6) 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584.

(7) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516 (P. C.); (1915) M. W. N. 757; 42 I. A. 202.

(8) 33 Ind. Cas. 97; 14 A. L. J. 263; 38 A. 226.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 182
OF 1916.

November 27, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.GOKUL NATH JHA—JUDGMENT-DEBTOR
—APPELLANT*versus*

PRAN MAL MARWARI AND OTHERS—

DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14, s. 47—Compromise decree—Mortgage—Execution—Mortgaged property, whether can be sold in execution.

In a suit for recovery of money due on a hand-note a compromise was effected in the following terms:—

"Till the realization of the entire decretal amount with costs and interest, the defendants have given as security the under-mentioned property for which a separate registered bond has been executed....In default of one instalment the petitioner shall be bound to pay the entire amount of the decree with costs and interest, etc. The plaintiffs shall be entitled to realize their dues on all the instalments, firstly, from property given in security and afterwards...from the petitioners' persons and other properties."

A decree was passed in terms of the compromise:

Held, that by virtue of Order XXXIV, rule 1, Civil Procedure Code, the property given in security could not be sold in execution of the consent decree. [p. 398, col. 2; p. 399, col. 1.]

Shyama Sundar Lal v. Bajpai Jainarayan, 30 C. 1060, 7 C. W. N. 914, distinguished.

Aubhoyessury Debee v. Gouri Sunkur Panday, 22 C. 859; 11 Ind. Dec. (N. S.) 568, followed.

Kissory Lal Chowdhury v. Raja Seobun Boglu, 3 Ind. Cas. 999; 13 C. W. N. 787, referred to.

Appeal against the order of the Deputy Commissioner of Sonthal Parganas, dated the 10th April 1916, confirming that of the Sub-Judge, Godda, dated the 31st January 1916.

Mr. Saroshi Chandra Mitra, for the Appellant.

Mr. Nares Chandra Saha, for the Respondents.

JUDGMENT.

JWALA PRASAD J.—This appeal arises out of an order of the Deputy Commissioner of the Sonthal Parganas, dated 10th April 1916, confirming an order of the Subordinate Judge, dated 31st January 1916, directing the execution of a decree obtained by the respondents on the 20th December 1911, and the sale of property in execution thereof. The respondents had brought a suit in the Court of the Subordinate Judge to enforce

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their claim in respect of money due from the appellants on a hand-note. On 18th November 1911 during the pendency of the suit, the appellants executed a registered mortgage-bond in favour of the respondents, pledging the property now pursued as security for the repayment of the debt. On 20th December 1911 the parties filed a petition of compromise, the terms of which were based upon the terms of this mortgage-bond. It was agreed that a decree be passed in favour of the plaintiffs-respondents against the defendant-appellant for Rs. 4,000, principal and interest. The decretal amount was to be paid by instalments set forth in the petition of compromise. The property which has in the present proceedings been advertised for sale was pledged as security for the payment of the instalments. Paragraph 4 of the compromise petition recites as follows:—

"Till the realization of the entire decretal amount with costs and interest the defendants have given in security the under-mentioned property, for which separate registered bond dated 18th November 1911 has been executed which is filed herewith for the perusal of the Court. We hereby promise that in default of one instalment your petitioners shall be bound to pay the entire amount of the decree with costs and interest, etc., till the date of realization. The plaintiffs shall be entitled to realise their dues on all the instalments, firstly, from property given in security and afterwards in case of the property not being sufficient from your petitioners' persons and other properties. But if the first two instalments are paid on the dates fixed, then in case of the default in the other *kist* the plaintiff will realise that *kist* alone with interest."

On 20th December 1911 the Court passed a decree in favour of the respondents for the sum agreed upon between the parties in terms of the compromise petition. No instalment due on the compromise petition was paid and the decree-holders-respondents applied for the execution of the decree for the entire sum due to them by attachment and sale of the property pledged as security in the consent decree. Both the Courts below have allowed the execution to proceed, directing the attachment and

sale of the property. The judgment-debtors have appealed to this Court. The sole question is, whether the decree as it stands can be executed and the property pledged in security can be attached and sold in execution of the decree or the respondents should bring a separate suit and obtain a proper mortgage decree.

The Courts below have proceeded on the assumption that there was a condition in the decree that the decretal amount was, in case of default, to be realised by attachment and sale of the property in question. I, however, do not find any clear direction either in the compromise petition or in the decree that in default of payment of the instalments the decree-holder is entitled in execution of the decree to attach or sell the property in question. Paragraph 4 of the petition of compromise quoted above *in extenso* will show that the property in question is only offered as a security for the payment of the instalments in the terms of the mortgage-bond of 18th November 1911.

The parties compromised the suit on the basis of a separate mortgage-bond already executed by the judgment-debtor. The decree-holder cannot proceed against the property unless he brings a proper suit on the basis of the mortgage-bond. The ruling reported as *Shyam Sundar Lal v. Bajpai Jainarayan* (1) does not apply to this case, as the decree-holder in that case was not the mortgagee and the security bond for the due performance of the decree was given by the defendant in favour of the Court by its order under section 545 of the then Code of Civil Procedure. The ruling clearly says that "if he (decree-holder) be such a mortgagee, no doubt he cannot sell the properties comprised in the mortgage without obtaining in the first instance a decree under the provisions of section 67 of the Transfer of Property Act." In this case the decree-holder is a mortgagee under the mortgage-bond. The ruling reported as *Abhoyesury Debee v. Gouri Sunkur Panday* (2) clearly applies to this case, as there is no direction in the consent decree or in the compromise

(1) 30 O. 1080; 7 C. W. N. 914.

(2) 22 C. 859; 11 Ind. Dec. (N. s.) 688.

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petition for the sale of the property. This view is supported by *Kissory Lal Chowdhury v. Raja Seebur Begla* (3), where it is observed at page 790* that "if the consent decree had not contained a direction that the property charged should be sold for non-payment, this application would have failed on the authority of *Aubhoyessury Debee v. Gouri Sunkur Panday* (2). Had that decree fallen short of declaring that sale should take place under certain contingencies, it is clear that a separate suit should have been necessary".

The respondents are, therefore, not entitled to attach and sell the property in question in execution of the decree and the order of the District Judge is bad and should be set aside.

The appeal is allowed with costs.

ROE, J.—I agree. The mortgage being prior to the compromise decree, the debt arises out of the mortgage. Therefore under Order XXIV, rule 14, the mortgaged property cannot be sold.

The plaintiff-respondent must institute a regular suit for the realization of the amount due to him.

The appeal is decreed with costs. Hearing fee five (5) gold mohurs.

Appeal allowed.

(3) 3 Ind. Cas. 999; 13 C. W. N. 787.

*Page of 13 C. W. N.—Ed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1809 OF 1914.

May 3, 1916.

Present:—Mr. Justice Lindsay.

KARIYA MAHTO KURMI—DEFENDANT—
APPELLANT

versus

RAM SARUP AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 4—Review—Production of new document—Proof, necessity of.

A party applying for review of judgment on the ground of discovery of a document not produced at the trial is required, under rule 4 of Order XLVII, to furnish strict proof of the non-availability of the document at the time of the trial or to satisfy the Court that its non-production was not due to any lack of diligence on his part. [p. 400, cols. 1 & 2.]

Second appeal from the decision of the Additional District Judge, Gorakhpur, dated the 4th September 1914.

Mr. Wallach, for the Appellant.

Messrs. Hamilton and Moti Lal Nehru, for the Respondents.

JUDGMENT.—These appeals are connected and may be disposed of by the same judgment. The facts are as follows:—

The parties are co-sharers in the village of Padri Mahdeo Buzurg. The appellant here, Kariya Mahto, is the owner of a plot No. 627/3 in this village and adjacent to it is another plot No. 627/4, the property of the respondents Ram Sarup and Bhagwat Prasad.

The parties are at variance regarding the boundary line between these two plots and in the year 1913 they brought cross-suits against each other.

In one suit No. 526 of 1913, Ram Sarup and Bhagwat Prasad were the plaintiffs. Their case was that Kariya had encroached upon a portion of their plot No. 627/4 and included it in his plot No. 627/3. In the other suit No. 622 of 1913, Kariya was the plaintiff and his story was that Ram Sarup and Bhagwat Prasad had taken away a portion of his plot No. 627/3 and included it in their plot No. 627/4.

Suit No. 526 of 1913 was tried first and Ram Sarup and Bhagwat Prasad won it. They got a decree on the 10th September 1913.

Kariya appealed and won the appeal, with the result that by its order of the 25th February 1914 the Appellate Court directed that the suit No. 526 of 1913 should be dismissed.

Meantime the suit in which Kariya was plaintiff was still pending. When he won his appeal he produced a copy of the appellate judgment before the Munsif and got a decree in his case No. 622 of 1913.

The opposite party filed an appeal and they also filed an application for review of the appellate judgment dated the 25th February 1914. Both of these came before another Judge than the one who had tried the appeal. He allowed the application for review and reversed the appellate order passed by his predecessor and acting upon the additional evidence which he permitted to be produced before him, he decreed the

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appeal of Ram Sarup and Bhagwat Prasad. The present position, therefore, is that Kariya has been defeated in both suits.

He has filed two appeals here. No. 1809 of 1914 is directed against the order allowing review of judgment. No. 94 of 1915 is against the appellate order allowing the appeal of Ram Sarup and Bhagwat Prasad by which Kariya's suit (No. 622 of 1913) has been dismissed.

In the first of these appeals it is argued that the Court below improperly admitted the application for review and, in my opinion, the argument must prevail. It is only necessary to refer to the terms of the application for review dated the 31st March 1914 to show that there was no case for review at all. The following grounds were set out in the application: (1) that the Judge who had decided the appeal by his order of the 25th February 1914 had paid no attention to a certain document, *viz.*, a list of plots prepared at partition, (2) that the map prepared by the Commissioner was correct and proved the applicants' case, they said they would file a copy of it before the Appellate Court, (3) that this documentary evidence was not before the Court at the time the appeal was heard and (4) that the partition map which had been relied upon was wrongly coloured and that the applicants had a correct map which they would put in.

This latter map, said to have been prepared at a later partition, was received by the Judge and upon the strength of it he has decided both cases in favour of Ram Sarup and Bhagwat Prasad. In his judgment allowing the review he remarks that neither the parties nor his predecessor-in-office had been aware that the earlier partition map relied on in the previous judgment had been superseded by the later map produced before him now by Ram Sarup and Bhagwat Prasad. It was for the applicants for review to show that this later map, which they persuaded the Court to accept, was not available at the time when the appeal was first tried, or to satisfy the Court that if it was available its non-production was not due to any lack of diligence on their part, and under rule 4 of Order XLVII, they were bound to furnish strict proof of any

allegations made to this effect. I have not been referred to any proof at all of the allegations contained in the petition for review and so far as I can see, the lower Appellate Court never called for any but was content to act upon the application as it stood. The learned Additional Judge was not entitled to act in this way and his order allowing the petition for review must be discharged.

It also follows that Appeal No. 94 of 1915 must be allowed, as the Judge's order appealed against is based upon the documentary evidence which he improperly admitted in the proceedings in review. The result is that both these appeals are allowed with costs.

Appeals allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 169 OF 1915.

November 5, 1915.

Present:—Mr. Lindsay, J. C.

Musammam BETANA—DEFENDANT—

APPLICANT

versus

KEDAR NATH—PLAINTIFF—

OPPOSITE PARTY.

Arbitration and award—Objections, evidence in support of—Objector to be given chance of adducing proof—Court, duty of—Civil Procedure Code (Act V of 1908), s. 15—Material irregularity—Revision.

Where a party to a suit referred to arbitration files objections to the award, he ought to be given a chance of calling evidence in support of his objections; and, if the Court refuses to give him such time, the refusal amounts to a material irregularity. [p. 401, col. 1.]

Application against the order of the District Judge, Sitapur, dated the 23rd March 1915, upholding that of the Subordinate Judge, Sitapur, dated the 6th August 1914.

Chaudhri Ram Bharose Lal (holding brief of Babu Bisheshwar Nath Srivastava), for the Applicant.

Mirza Sami Ullah Beg, for the Opposite Party.

JUDGMENT.—This is an application for revision by a defendant to a suit which was entertained in the Court of the Subordinate Judge of Sitapur. The facts, which it is necessary to state for the disposal of this matter, are as follows. There was a reference to

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arbitrators in the case and the arbitrators were directed to file their award on the 13th of July. The 13th being a holiday it was put in on the 14th of July and on that date the Subordinate Judge passed an order that the case was to come on the 30th of July 1914 and the parties were directed that if they had got any objection to the award they were to file them within ten days. The defendant who is the applicant here filed a petition of objections to the award alleging various grounds upon which the award should be set aside, several of them amounting to allegations of corruption and partiality against the arbitrators. When the case came up on the 30th of July the defendant was called upon to substantiate her objections. Her Pleader informed the Court that he had no witnesses in attendance as he understood that the date had only been fixed for the case to be brought up and he did not understand that he was under any obligation to bring his witnesses on the 30th. I may also mention that having regard to the date fixed for filing objections there was very little time for the defendant-applicant to apply for attendance of witnesses and it seems highly probable that if she had applied for the attendance of witnesses at the time she filed objections they would not have been in attendance. However that may be, the Subordinate Judge refused to adjourn the case so as to give the applicant a chance of calling evidence in support of the objections. The case was decided at once. The award was filed and a decree was passed upon it. An appeal taken to the Court of the District Judge was dismissed apparently on the ground that no appeal lay. I am asked in revision to interfere with the proceedings of the Court below and to hold that the applicant ought to have been given an opportunity of producing evidence in support of her objections. The point seems to me to be incontestable. I think this applicant should have been given a chance of bringing forward proof of the statements which she made in order to have the award set aside. To deny the applicant a chance of calling evidence of this kind would be to deny her a right of making objections altogether. I think it may fairly be held that in the present case the Subordinate Judge acted with material irregularity in refusing an opportunity to the applicant to call her witnesses.

I allow this application. The case will go back to the Subordinate Judge with directions to receive the evidence called by the applicant in support of the objections to the award and to dispose of them according to law. The applicant will get her costs in this Court.

Application accepted.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEALS NOS. 5 AND 6 OF 1916.

October 30, 1916.

Present:—Justice Sir William Ayling Kt.,
and Mr. Justice Seshagiri Aiyar.

C. PARTHASARATHY CHETTY

—DEFENDANT No. 2—APPELLANT IN BOTH
versus

IN C. C. C. A. No. 5

YELCHOORI NARAYANA CHETTY AND
OTHERS—PLAINTIFF No. 2 AND DEFENDANTS
NOS. 1 AND 3—RESPONDENTS.

IN C. C. C. A. No. 6

K. S. RAJAGOPALACHARI AND ANOTHER
PLAINTIFF AND DEFENDANT No. 1—

RESPONDENTS.

*Contract Act (IX of 1872), ss. 128, 137 and 140—
Surety, liability of—Rights of creditor—Postponement
of surety's liability—Civil Procedure Code (Act V of
1908), s. 11—Suit to vacate order in claim proceedings
—Res judicata.*

Sections 128, 137 and 140 of the Indian Contract Act make it clear that a creditor has the right to proceed against a surety without exhausting his remedies against the principal debtor. The last section pre-supposes that the surety can be compelled to pay without the creditor resorting to the principal debtor for payment. [p. 402, col. 2.]

Sankana Kalana v. Virupakshapa Ganeshapa, 7 B. 146; 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 99; *Hajarimal v. Krishnarau*, 5 B. 647; 6 Ind. Jur. 139; 3 Ind. Dec. (N. S.) 426; *Totakot Shringunni Menon v. Kurusingul Kaku Varid*, 4 M. H. C. R. 190, referred to.

Gopal Nana Shet v. Joharnal, 19 B. 578; 10 Ind. Dec. (N. S.) 386, distinguished.

Where the object of a suit is to vacate an order passed in claim proceedings, the latter cannot operate as *res judicata*. [p. 403, col. 1.]

Appeals against the decrees of the City Civil Court, Madras, in Original Suits Nos. 258 and 189 of 1913, respectively.

Mr. V. C. Seshachariar (with him Messrs. O. P. Venkataraghavachariar and M. Raghava Chariar), for the Appellant.

Messrs. R. Kuppuswami Aiyar, and V. Pattabhirama Aiyar, for the Respondents.

PARTHASARATHY CHETTY v. YELCHOORI NARAYANA CHETTY.

JUDGMENT.—The first defendant in the suit mortgaged certain immoveable properties to one Venkatappa Chetty. The mortgagor (1st defendant) sued for redemption in Original Suit No. 14 of 1909. It was held in that suit that Venkatappa advanced only about Rs. 800 although the deed of mortgage stated that a larger sum was lent. The learned City Judge held in that case that only Rs. 800 was advanced and directed redemption on the payment of that sum. The first defendant paid the decree amount into Court and claimed the return of the title-deeds. Meanwhile Venkatappa appealed to the High Court against the decree. Before handing over the title-deeds, the City Judge ordered that security for a sum of Rs. 1,800 should be furnished. Thereupon the second defendant paid into Court the said sum as security, and the first defendant was given the title-deeds. In the High Court, it was held that the mortgagee, Venkatappa Chetty, was entitled to a further sum of about Rs. 2,000 more. On this decree being passed, Venkatappa claimed the payment of the money deposited as security. During the pendency of the appeal, the property was sold to the wife of the present plaintiff. The money was also attached by a person who had obtained a decree in the Small Cause Court. That attaching creditor is the third defendant in the suit. The City Civil Judge held in the claim proceedings that Venkatappa Chetty must first proceed against the property purchased by the plaintiff's wife. In consequence of this order the plaintiff had to pay the balance of the decree-debt in order to protect the property in his hands. This suit is brought by him for the payment of the money deposited by the 2nd defendant as surety in the mortgage suit.

The learned City Judge has come to the conclusion that his order in the claim proceedings was wrong and held that the plaintiff was entitled to recover the amount. The attaching creditor raised a question that the money deposited by the 2nd defendant really came from the first defendant and that he was entitled to attach it. The plaintiff and the attaching creditor entered into a compromise by which they

agreed that the former should get Rs. 700 and the latter Rs. 600. The decree is in terms of the compromise. The 2nd defendant has appealed against this decree. As the compromise does not affect the rights of the 2nd defendant, we see nothing illegal in the City Judge having accepted it.

The main contention of Mr. Seshachariar is that the liability of the 2nd defendant can arise only on the failure of the first defendant to satisfy the decree and that consequently there is no cause of action against his client.

It is well-settled that a creditor is entitled to proceed against the surety without exhausting his remedies against the principal debtor. Sections 28, 137 and 140 of the Indian Contract Act make this clear. The last section pre-supposes that the surety is compelled to pay without the creditor resorting to the principal debtor, for payment. *Sankana Kalana v. Virupakshapa Ganesappa* (1), *Hajarimal v. Krishnarav* (2) and *Totakot Shangunni Menon v. Kurusingal Kaku Varid* (3) support this proposition. We, therefore, hold that it was not incumbent upon the creditor to have proceeded against the mortgaged properties and the person of the first defendant before seeking to enforce his claim against the money deposited by the 2nd defendant. Moreover, as we read the order directing security to be furnished we understand it to direct that the amount paid into Court be held primarily liable.

Mr. Seshachariar relied on *Gopal Nana Shet v. Joharmal* (4). In that case the learned Judges held that the bonds etc., produced by the judgment-debtor should be first applied towards the satisfaction of the decree, before the amount paid by the surety is proceeded against. Apparently, the learned Judges understood the liability of the surety to be limited to satisfying the claim which may arise in case the judgment-debtor failed to satisfy the decree. We do not think this case is any

(1) 7 B. 146; 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 99.

(2) 5 B. 647; 6 Ind. Jur. 139; 3 Ind. Dec. (N. S.) 426.

(3) 4 M. H. C. R. 190.

(4) 19 B. 575; 10 Ind. Dec. (N. S.) 386.

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authority for the proposition that a surety cannot be proceeded against before the creditor exhausts all his remedies against the principal debtor.

As regards the argument based on the order passed on the claim proceedings, it is enough to say that the present suit is brought to vacate that very order. Consequently it cannot operate as *res judicata*.

No question about the right of the plaintiff to sue was taken in the Court below and we cannot allow it to be argued here.

There can be no question on the statement of the facts that plaintiff is entitled to claim payment of the money which he was compelled to pay and which money should have been recovered from what was deposited in Court by the 2nd defendant.

We think the learned Judge is right and dismiss the appeal (City Civil Court Appeal 5 of 1916) with costs. In view of our decision in the connected suit, the decree should be modified by inserting in line 41 in page 13 after the words "700 only," the words "and the third defendant to Rs. 600". A decree in the suit by the attaching creditor (Original Suit No. 189 of 1913) has become unnecessary owing to his having secured his right in the purchaser's suit (Original Suit No. 258 of 1913). We must, therefore, reverse the decree which we may point out, was not in form a proper one under any circumstances. The parties will bear their costs in this and in the Court below in this case (City Civil Court Appeal No. 6 of 1916).

Appeal allowed in part; Decree modified.
V. R. P.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 1132 OF 1913.
November 21, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.

JAGERNATH PROSAD SHAH DEO AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat KUARA KUAR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Mortgage by widow—Legal

necessity—Sale in execution of mortgage decree, whether passes husband's estate.

Where a widow is forced to mortgage not only her life-interest but also the estate itself for a legal necessity, the enforcement of that mortgage must be considered to be of equal legal necessity with the actual mortgage itself, and the sale of the property in execution of a decree based on the mortgage would pass not only the life-interest of the widow but also the estate of the husband. [p. 404, col. 1.]

Appeal against the decision of the District Judge, Saran, dated the 9th February 1915, passed in Appeals Nos. 32 and 37 of 1916, affirming that of the Sub-Judge, Chapra, dated the 30th June 1914.

Mr. *Lachmi Narain Sinha*; (with him Messrs. *Baidyanath Narain Sinha* and *Nirsu Narain Sinha*), for the Appellants.

Messrs. *Khurshed Husnain* and *Rajendra Pershad*, for the Respondents.

JUDGMENT.—In this case the important parties are by name Kuara Kuar and Gujra Kuar. They were co-wives and afterwards co-widows of one Ajudhia Sahu. On his death Kuara Kuar the elder widow managed to secure possession of the entire property with the result, as found as a fact by the lower Courts, that in order to derive any maintenance from the property at all the younger widow was forced to institute a suit for partition. In order to prosecute this suit she was required to file certain Commissioner's fees. To raise these fees she mortgaged the property in suit. The partition proceeded and she was placed in possession of a separate share. The mortgagees then foreclosed upon the property and sold it. Shortly afterwards the widow Gujra left her father-in-law's house and married again in the *sagai* form. Upon these facts the elder widow Kuara claimed that the interest of the younger widow had terminated by the remarriage and that inasmuch as in the circumstances of the case no more than the life-interest or rather the interest during widowhood of the mortgagor could be bound by the mortgage she as the sole widow remaining was entitled to enter into possession of the partitioned share now in the hands of the mortgagees. The lower Court found the facts as I have stated them but upon the ground that inasmuch as the property was worth over Rs. 5,000 and mortgaged for Rs. 500 only and in auction sold for Rs. 900 only, it cannot

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be said that the sale in execution was for legal necessity even though it be conceded that the mortgage was for legal necessity.

The sole point for consideration, therefore, is, where it is shown that the property of a widow has been mortgaged for legal necessity does the auction-sale based upon that mortgage necessarily pass the deceased husband's interest in the estate. The question appears to come before us in its present form as *res integra*. We have no hesitation at all in saying that where a widow is forced by legal necessity to mortgage not only her life-interest but also the estate itself for a legal necessity the enforcement of that mortgage must be considered to be of equal legal necessity with the actual mortgage itself. It would probably be open to the reverenters to show that the redemption of the mortgage lien could have been effected without recourse to the sale of the estate but for the gross neglect of the mortgagor in collusion with the mortgagee. That point does not arise in this case for there is no suggestion on the record that there was any method by which the mortgage lien could be enforced otherwise than by the sale of the property in suit.

Moreover it is worthy of consideration that prior to the appellant's mortgage there was in existence a former mortgage upon the life-interest of the mortgagor. The mortgagor's life-interest having been already mortgaged it is clear that the only thing left to the mortgagor was the estate itself and the value of that estate subject to the mortgage upon the life-interest was probably not much greater than the sum realised by the sale. There is no reason for supposing that the mortgagor could by any means have saved the sale of the estate mortgaged to the appellant.

We, therefore, hold that the plaintiff has no cause of action upon which she can claim any title in the property in the hands of the defendants-appellants. The appeal must, therefore, be decreed and the suit dismissed with costs in all Courts. The plaintiffs-respondents must pay the costs of the defendants-appellants. The defend-

ants-respondents do not seem to us to be entitled to any costs.

Appeal accepted.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 72 OF 1913.

ORIGINAL CIVIL SUIT No. 312 OF 1910.

October 3, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Phillips.

IN No 72 OF 1913

SHIYALI SUBRAYA CHETTY, MINOR,

BY HIS NEXT FRIEND,

SHIYALI RUNGIA CHETTY—

APPELLANT

versus

CALVE SUBRAYA CHETTIAR AND OTHERS
RESPONDENTS.

IN No. 312 OF 1910

CALVE SUBRAYA CHETTIAR AND
OTHERS—PLAINTIFFS

versus

CALVE SANKARA CHETTIAR AND
OTHERS—DEFENDANTS.

International Law, Private—Foreign judgment—Judgment in personam, enforcement of, re title to or possession of foreign land—Domicile of parties within jurisdiction of foreign Courts, effect of—Judgment declaring status of parties, recognition of, by forum rei sitae—Judgment of French Indian Court removing trustees and appointing new trustees, enforceability of, in British Indian Court where trust property is situate—Will, construction of—Adoption validity of—Implied prohibition.

*Per Abdur Rahim, Offg. C. J. (Phillips, J. dissenting).—*The Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country or generally to give redress for any injury to any immoveable not situate therein. In the case of immoveables the judgment pronounced of the *forum rei sitae* is absolutely conclusive. It makes no difference that the parties affected by the judgment are domiciled in foreign territory and its Court has, therefore, jurisdiction over them *in personam*. The judgment of the foreign Court will, however, be recognized by the *forum situs* only to the extent of carrying out any obligations on the parties arising out of contracts or of trusts. [p. 407, cols. 1 & 2.]

A judgment of a French Indian Court removing trustees appointed by the Will of a testator and substituting others in their stead cannot be enforced by an action in a British Court for possession from the discharged trustees of some immoveable properties covered by the Will and situated within the jurisdiction of the latter Court, especially when Letters of Administration have been granted to the defendants by the law in force in British India. The British Courts will not remove defendants from the

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trusteeship solely by virtue of the judgment of the French Court unless the plaintiffs have them removed and get themselves appointed by means of a suit in the Court having jurisdiction over the trust property in British India. [p. 408, cols. 1 & 2.]

Companhia De Mocambique v. British South Africa Company, (1892) 2 Q. B. 358; 61 L. J. Q. B. 663; *Bishop of Sodor and Man v. Earl of Derby*, (1751) 2 Ves. Sen. 337; 28 E. R. 217; *Pike v. Hoare*, (1763) 2 Eden 182; 28 E. R. 857; *Tulloch v. Hartley*, (1841) 1 Y. & C. C. C. 114; 62 E. R. 814; *Norris v. Chambres*, (1861) 29 Beav. 246; 30 L. J. Ch. 285; 7 Jur. (n. s.) 59; 9 W. R. 259; 54 E. R. 621; 3 L. T. (n. s.) 720; 131 R. R. 551; *Holmes v. Reg.*, (1861) 31 L. J. Ch. 58; 2 Johns & H. 527; 8 Jur. (n. s.) 76; 5 L. T. 518; 10 W. R. 39; 70 E. R. 1167; 134 R. R. 323; *Cookney v. Anderson*, (1863) 1 De G. J. & S. 365; 32 L. J. Ch. 427; 9 Jur. 736; 8 L. T. 295; 11 W. R. 629; 2 N. R. 140; 31 Beav. 452; 46 E. R. 146; 137 R. R. 234; *Reiner v. Marquis of Salisbury*, (1873) 2 Ch. D. 378; 24 W. R. 843; *In re Hawthorne, Graham v. Massey*, (1883) 23 Ch. D. 743; 52 L. J. Ch. 750; 48 L. T. 701; 32 W. R. 147; *Sirdar Gurdyl Singh v. Raja of Faridkote*, (1894) A. C. 670; 22 C. 222; 21 L. A. 171; 11 R. 340; 4 M. L. J. 267; 6 Sar. P. C. J. 503; 112 P. R. 189; 11 Ind. Dec. (n. s.) 149; *Boyse v. Colclough*, (1854) 1 K. & J. 124; 69 E. R. 396; 24 L. J. Ch. 7; 7 Eq. R. 78; 3 W. R. 8; 1'3 R. R. 44; *Carteslet v. Petty*, 2 Swan. 324; 36 E. R. 639; *Grimwood v. Bartels*, (1877) 46 L. J. Ch. 788; 25 W. R. 843; *Waite v. Bingley*, (1832) 21 Ch. D. 674; 30 W. R. 693; 51 J. Ch. 651, referred to.

Ewing v. Orr Ewing, (1853) 9 A. C. 54; 53 L. J. Ch. 435; 50 L. T. 401; 32 W. R. 573, distinguished.

Per *Phillips, J.*—The principle on which a suit can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action cannot be re-investigated, if the judgment was pronounced by a competent tribunal having jurisdiction. This principle applies alike to a judgment *in personam*, to a judgment *in rem*, and to a judgment or sentence of divorce or any other judgment having reference to status. [p. 410, col. 1.]

Godard v. Gray, (1870) 6 Q. B. 139; 40 L. J. Q. B. 62; 34 L. T. 89; 19 W. R. 348; *Castrique v. Imrie*, (1870) 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1; *DeCossé Brissac v. Rathbone*, (1861) 6 H. & N. 30; 30 L. J. Ex. 238; 158 E. R. 123; 123 R. R. 521; *In re Piercy, Whittham v. Piercy*, (1895) 1 Ch. 83; 64 L. J. Ch. 249; 13 R. 106; 71 L. T. 745; 43 W. R. 134, referred to.

A judgment, therefore, of a French Indian Court, removing trustees appointed by the Will of a testator for the administration of charities in respect of properties, the bulk of which is situate within its jurisdiction, and appointing others in their stead is a judgment virtually regulating the administration of a trust and conferring a status on the persons appointed as trustees. Such persons can sue for possession from the discharged trustees of trust property situate in British India in a Court having jurisdiction over it solely by virtue of the judgment of the French Court. The suit cannot be treated as one for the removal of trustees who are already removed by a competent Court but a suit based on a foreign judgment which has recognised plaintiffs' title to

administer the trust and to recover trust properties. [p. 410, col. 1.; p. 411, col. 1.]

The prohibition to adopt a son may be express or implied. Where a testator by his Will provided for the contingency of his having a son in these words, viz, "if by divine favour I have a child of the male sex" they mean only a natural son and do not even impliedly confer an authority to adopt. [p. 411, cols. 1 & 2.]

Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma, 22 M. 398; 21 A. 460; 26 I. A. 113; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 7 Sar. P. C. J. 330; 8 Ind. Dec. (n. s.) 288; *Patel Vandrayan Jekison v. Patel Manilal Chinnilal*, 15 B. 565; 8 Ind. Dec. (n. s.) 381; *Lakshmi Bai v. Sarasvatibai*, 23 B. 789; 1 Rom. L. R. 420; 12 Ind. Dec. (n. s.) 528; *Collector of Madura v. Mootoo Ramalinga Sathupathi*, 12 M. I. A. 397; 10 W. R. 17 (P. C.), 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389, referred to.

One S., a resident of Pondicherry left a Will *inter alia* bequeathing large properties for charities, the bulk of which was situate in Pondicherry and the rest in Madras. Defendants Nos. 1 to 3 and two others, who were executors under the Will, having obtained Probate in the Pondicherry Court, obtained Letters of Administration in the Madras High Court in respect of the property situate in Madras. After they had administered the estate, defendants Nos. 1 to 3 were removed from their office by a decree of the Pondicherry Court which appointed plaintiffs in their stead. The fourth defendant was the widow of the testator who adopted the 5th defendant and the 6th defendant was the natural mother of the 5th, all of whom were alleged to be in possession of the Madras properties. Plaintiffs instituted the present suit on the original side of the High Court for possession of the trust properties situate in Madras from defendants. Mr. Justice Wallis decreed the suit, holding that the judgment of the Pondicherry Court was binding on him. On appeal,

Held, per *Abdur Rahim Offg. C. J.*, (*Phillips, J.* dissenting), that the suit was not maintainable by reason *per se* of the judgment of Pondicherry Court, who authority could not extend to immoveables outside its jurisdiction [p. 408, col. 1.]

Appeal from the judgment of Mr. Justice Wallis, dated the 8th August 1913, in the Ordinary Original Civil Jurisdiction of this Court.

The Hon'ble Mr. S. Srinivas Aiyengar, (Advocate-General), and Messrs. K. Narayana Rao and C. V. Ananthakrishna Aiyar, for the Appellant.

Mr. V. Raghunatha Sastri, for the Respondent.

This appeal coming on for hearing on the 18th and 22nd August 1916, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—One Calve Sadasiva Chettiar who was a domiciled French subject residing at Pondicherry

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died there on the 26th May 1891 leaving his last Will and testament, dated 25th July 1889 and a codicil thereto, dated 20th May 1891. He left considerable property, moveable and immoveable, in Madras and in Pondicherry. The immoveable properties in Madras are said to be of the value of Rs. 1,50,000 and the moveables consisting of Government promissory notes, jewels and cash in Madras are stated to be of the value of Rs. 1,70,000. By his Will Calve Sadasiva Chettiar purported to dispose of the bulk of his properties in favour of various charities, mostly in Pondicherry and partly in the Presidency of Madras. The charities were to be conducted by a committee of management consisting of five members including defendants Nos. 1, 2 and 3, who were also appointed executors of the Will and the codicil. All the executors obtained Probate from the Court of first instance at Pondicherry and in August 1893, four of them obtained from this Court Letters of Administration limited to this Presidency with exemplification of the Probate issued by the Pondicherry Court and an English translation annexed thereto. Leave was given to the fifth executor C. Krishnaswami Chettiar to apply for a like grant if he so wished. But apparently he did not apply to this Court for Probate or Letters of Administration and had in fact instituted a suit on the 22nd October 1892 in the Court of first instance at Pondicherry alleging various acts of malversation and breaches of trust against 1st, 2nd and 3rd defendants in this suit and asking for their removal from the office of administrators and members of the committee of management. A final decree to that effect was passed in April 1904 and a new committee of management consisting of the plaintiffs in the present suit was appointed in place of the 1st, 2nd, and 3rd defendants. The 4th defendant is the widow of the deceased testator, the 5th defendant who is an infant is alleged to have been adopted by the widow and the 6th defendant is the natural mother and guardian *ad litem* of the 5th defendant. The plaintiffs seek in this suit for a declaration that they, as members of the committee of management are entitled to possession and management of the estate and effects of the late Calve Sadasiva Chettiar, for a decree directing the removal of defendants, Nos. 1, 2 and 3

from the office of administrators and members of the committee of management, for a declaration that the alleged adoption of the 5th defendant is not true or valid, for an account of the administration of the estate by the 1st, 2nd and 3rd defendants, for a declaration that certain deeds of gift executed by 1st and 2nd defendants in favour of the 4th defendant as guardian of the 5th defendant and another deed in favour of the 6th defendant purported to have been executed by the 4th defendant were fraudulently and collusively obtained and, therefore, null and void and for recovery of possession from the defendants of the immoveable property set out in the schedule.

The learned Chief Justice (then Mr. Justice Wallis) who tried the suit passed a decree declaring that the adoption of the 5th defendant was invalid, that the plaintiffs were entitled to possession of the property mentioned in the schedule against all the defendants, directed delivery of possession to the plaintiffs and declared that the deed of assignment in favour of the 4th defendant and the deed of gift in favour of the 6th defendant were not valid. He then ordered that the suit be referred to the Judge in chambers for the taking of an account of the rents and profits of the properties mentioned in the schedule.

The first question argued before us is whether the plaintiffs can maintain this suit. Their title as trustees is derived from an appointment made by the Pondicherry Court. The property with respect to which relief is mainly sought is immoveable property situate in the town of Madras of which the plaintiffs as trustees seek to obtain possession from the defendants. They also want a declaration that the 5th defendant who claims to be entitled to the properties by virtue of adoption, was not validly adopted. They seek other reliefs as well consequent upon a determination of their title to these properties. It is admitted at the Bar that so far as the collection of the outstandings and the payment of debts and dues is concerned, that has been completed. All that is left to administer are the trusts in favour of charities.

The learned Chief Justice disposes of the whole question of the plaintiffs' title in these words "A judgment of the *Cour d' Appel* removing the plaintiffs, in my opinion, is binding

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on the defendants (the word 'removing' should be appointing). It was not seriously contended it was not". I do not know what exactly is meant by the last sentence. The point was certainly strenuously argued before us. It had been raised in the written statement and formed the subject of an issue and the learned Advocate-General who appeared for the appellant, the 5th defendant in this suit, stated that he argued this question in the Court of first instance. The objection which is one of law goes to the root of the suit and if it is valid, we are bound to give full effect to it. It is not suggested that it was abandoned at the time of trial.

No authority has been brought to our notice which covers the exact point for decision. But there can be no doubt whatever that the principles which must guide us in this matter are well established and cannot be said to be open to any doubt. Story in his "Conflict of Laws" in section 586 lays down as a general proposition that "In order, however, to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the Court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties." In section 590, he states "The position that the sentence of a foreign Court is conclusive with respect to what it professes to decide is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter" and in section 591 "By the general consent of nations, therefore, in cases of immoveables, the judgment pronounced of the *forum rei sitae* is held absolutely conclusive..... On the other hand, a judgment in any foreign country, touching such immoveables, will be held of no obligation." Dicey enunciates the law in rule 81 in these words "The Courts of a foreign country have no jurisdiction (1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country, or (2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country." "This rule," he says "is merely an application of the more general principle that no Court ought to give a judgment the enforcement whereof lies beyond the Court's power, and especially if it would bring the Court into

conflict with the admitted authority of a foreign sovereign, or, what is the same thing, the jurisdiction of a foreign Court." Mr. Westlake in his treatise on "Private International Law" is equally explicit: "The principle of the *forum situs*, in its application to the land itself, is incontrovertible. Since only the authorities that exist on the spot can employ force to give possession or take it away, it would be idle for any foreign jurisdiction to make a direct attempt to determine the possession of land, or even the property on it, which would be unmeaning if disconnected from all immediate or future right to possession". The mere fact that the defendants are domiciled in foreign territory, and its Court has, therefore, jurisdiction *in personam* over them makes no difference, though it would be otherwise, to use Mr. Westlake's language "when something has been done by which the personal jurisdiction is called into action on the ground of obligation which properly belongs to it, and the determination as to the foreign land is necessarily incident to the determination which has to be made about the obligation" (for instance) where such obligation arises out of contract or trust. It need hardly be pointed out that what was sought in the case in the Pondicherry Court and what was decreed was not to compel the defendants Nos. 1, 2 and 3 to carry out the trust; but to remove them from the trusteeship. The propositions which are cited in these well-known authoritative text-books on "Private International Law" are entirely in accordance with what has been uniformly laid down by the Courts in England. The matter was very fully discussed by Mr. Justice Wright in *Companhia De Mocambique v. British South Africa Company* (1): "It seems plain that, in the view of most of the Judges whose language has been cited, there was a fundamental want of jurisdiction in the Common Law Courts of this country to determine directly questions of title to foreign land—a want not dependent merely on the law of venue, nor dependent even on the defect of power to enforce a judgment in another country." Then after pointing out that Courts of Equity have exercised jurisdiction *in personam* in cases of contract, fraud and trust, Mr. Justice Wright observes: "Although armed with much more effectual

(1) (1892) 2 Q. B. 358; 61 L. J. Q. B. 663.

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power of enforcing their decrees than were possessed by the Courts of Common Law, the Courts of Equity refused, with almost equal uniformity, the direct determination of title to foreign land". He sums up the law in this way "The proper conclusion appears to be that, speaking generally, and subject to qualifications depending on personal obligations, it is a general principle of jurisdiction, that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the Courts of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countries." He cites in support of this conclusion, the authority of Lord Hardwicke in *Bishop of Sodor and Man v. Earl of Derby* (2), of Lord Northington in *Pike v. Hoare* (3), of Shadwell, in *Tulloch v. Hartley* (4), of Lord Romilly in *Norris v. Chambers* (5), of Wood, V. C. in *Holmes v. Reg.* (6), of Lord Westbury in *Cookney v. Anderson* (7), of Malins V. C., in *Reiner v. Marquis of Salisbury* (8), of Kay, J., in *In re Hawthorne, Graham v. Massey* (9). The judgment of the Divisional Court in *Companhia De Mocambique v. The British South Africa Company* (1) was reversed on another point which does not arise in the present case by Lords Justices Fry and Lopes, Lord Esher M. R. dissenting from the Courts below, the claim for declaration having been abandoned by the appellants. In *Sirdar Gurdial Singh v. Raja of Faridkote* (10), the Privy Council observed that territorial jurisdiction existed always as to the lands within the territory. In *Hawthorne, In re, Graham v. Massey* (9), Kay J., emphatically states "I am not aware

of any case where a contested claim depending upon the title to immovables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here." In *Boyse v. Colclough* (11), it was held that a decree of the Court of Chancery in Ireland of the will after verdict upon an issue *devisavit vel non*, does not determine the validity or invalidity, so far as it relates to lands in England and cannot be pleaded in bar to a suit in this *i. e.*, the English Court. Vice Chancellor Page Wood observed: "The foreign Court in this case did not try, and could not try, the effect of the Will of the testator on lands in England..... They never could exercise any jurisdiction over this instrument as affecting the English estates." In *Pike v. Hoare* (3) already mentioned, a bill by an heir-at-law for an issue to try the validity of a Will made in England was dismissed principally because the lands lay in Pennsylvania. The Lord Chancellor observed: "A Will of lands lying in any of the Colonies is not triable in Westminster Hall." In *Carteret v. Petty* (12), partition of land situate in Ireland was disallowed on demurrer. Vice Chancellor Hall in *Grimwood v. Bartles* (13) held that the curator of a lunatic appointed by a foreign Court was not entitled to call for a transfer of a fund which represented the value of the estate situate in England and in *Waite v. Bingley* (14), the same learned Judge held that real property in England does not vest in the assignee under a foreign insolvency.

Much reliance was placed by the learned Pleader for the respondents on *Ewing v. Orr Ewing* (15) and *Ewing v. Orr Ewing* (16). In the first case, it was held that the English Court had jurisdiction to administer the trusts of the Will as to the whole estate both Scotch and English. In the first place the question so far as it can

- (2) (1751) 2 Ves. Sen. 337; 28 E. R. 217.
- (3) (1763) 2 Eden 132; 28 E. R. 867.
- (4) (1841) 1 Y. & C. C. O. 114; 62 E. R. 814.
- (5) (1861) 29 Beav. 246; 30 L. J. Ch. 285; 7 Jur. (N. S.) 59; 9 W. R. 259; 54 E. R. 621; 3 L. T. (N. S.) 720; 131 E. R. 551.
- (6) (1861) 31 L. J. Ch. 58; 2 Johns & H. 527; 8 Jur. (N. S.) 76; 5 L. T. 548; 10 W. R. 39; 70 E. R. 1167; 134 E. R. 323.
- (7) (1843) 1 De. G. J. & S. 365; 32 L. J. Ch. 427; 9 Jur. 786; 8 L. T. 295; 11 W. R. 629; 2 N. R. 140; 31 Beav. 452; 46 E. R. 146; 137 E. R. 234.
- (8) (1873) 2 Ch. D. 378 at p. 385; 24 W. R. 843.
- (9) (1883) 23 Ch. D. 743; 52 L. J. Ch. 750; 48 L. T. 701; 32 W. R. 147.
- (10) (1894) App. Cas. 670; 22 C. 222; 21 L. A. 171; 11 R. 340; 4 M. L. J. 267; 6 Sar. P. C. J. 503; 112 P. R. 1894; 11 Ind. Dec. (N. S.) 149.

- (11) (1854) 1 K. & J. 124; 69 E. R. 396; 24 L. J. Ch. 7; 7 Eq. R. 78; 3 W. R. 8; 103 E. R. 44.
- (12) 2 Swan. 324n.; 36 E. R. 639.
- (13) (1877) 46 L. J. Ch. 788; 25 W. R. 843.
- (14) (1882) 21 Ch. D. 674; 30 W. R. 698; 51 L. J. Ch. 651.
- (15) (1883) 9 A. C. 34; 53 L. J. Ch. 435; 50 L. T. 461; 32 W. R. 573.
- (16) (1885) 10 A. C. 453 at p. 505; 53 L. T. 826.

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be gathered from the report arose with respect* to moveable property; and the main ground on which the jurisdiction of the English Court was rested was the fact that some of the trustees resided in England and the others submitted to the process of the English Court and that the object of the suit was to enforce the personal obligation of the trustees to administer the trust. Lord Chancellor Selborne said: "The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction". In the Scotch case, the appeal to the House of Lords was from the judgment of the Scottish Court and it was held that the Court of the deceased's domicile, that is the Scottish Court, had not exclusive jurisdiction to administer the deceased's personality. It is difficult to see how the decisions in *Ewing v. Orr Ewing* (15) in any way help the respondents. They do not in any way purport to qualify a well established rule of International Law relating to jurisdiction over immoveable property. The plaintiffs in this suit are seeking possession of immoveable properties situate in British India solely by virtue of a judgment of the Pondicherry Court. That Court had no jurisdiction to determine any question of right or title to these properties. Their appointment as trustees by the French Court in no way binds this Court; and the only course open to them is to have their appointments recognised by this Court. That could not be done in this suit by reason of section 92 of the Code of Civil Procedure which lays down that any suit for the appointment of new trustees or for the administration generally of public trusts must be instituted with the sanction of the Advocate-General. The defendants Nos. 1, 2 and 3 who are the executors named in the Will and had as such obtained Letters of Administration with exemplification of the Probate annexed, from this Court could not be validly removed by the Pondicherry Court, and until the plaintiffs have them removed and get themselves

appointed by this Court in a suit properly instituted, they cannot maintain any action with respect to the trust-property involved in this suit. In that view of the law, it is unnecessary to consider the other questions raised in this appeal. The appeal will be allowed and the suit dismissed with costs in both the Courts.

My learned brother is of opinion that the decree of the Court of first instance should be confirmed.

Under section 36 of the Letters Patent, the appeal is allowed and the suit dismissed with costs in this and the Court of first instance.

PHILLIPS, J.—Plaintiffs were appointed trustees of certain charities instituted under the Will of one C. Sadasiva Chetti, husband of 4th defendant, and sue for various reliefs in connection with the trust-property. Defendants Nos. 1 to 3 and two others were the executors of the Will and having obtained Probate in Pondicherry, where the testator lived, obtained Letters of Administration in this Court in respect of the property in British India. After they had administered the estate, and it is admitted that the administration was completed, defendants Nos. 1 to 3 became trustees of the charity under the Will, but were subsequently removed from their office by a decree of the Pondicherry Court, which appointed plaintiffs in their stead.

The main contention put forward in this appeal by the learned Advocate-General, a contention that appears not to have been seriously pressed at the trial, is that the decree of the Pondicherry Court is not binding on Courts in British India and that consequently plaintiffs, not having been recognised as trustees in British Indian Courts have no right to bring a suit in respect of the trust, and that the removal of defendants Nos. 1 to 3 from trusteeship is equally invalid as they have been recognised as trustees by this Court and consequently the decree of the French Court cannot affect their status here. This last argument is based upon a fallacy for the trusteeship of defendants Nos. 1 to 3 has never been recognised by this Court. By the grant to them of Letters of Administration they were recognised as the executors of the deceased's estate, but it was not until the assets of the estate had been got in that they

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became trustees of the charity constituted under the Will and their position as executors of the Will is quite different from their position as trustees of the charity instituted under the Will. There is, therefore, no question of the order of the French Court which removed defendants Nos. 1 to 3 from trusteeship conflicting with the grant to them by this Court of Letters of Administration, and we have only to see whether the removal of defendants and the appointment of plaintiffs by the French Court is binding on Courts in British India. No doubt all rights over or in relation to immoveables are, generally speaking, governed by the *lex situs* but here we are not concerned with the law relating to any such rights, but have to consider whether the appointment of plaintiffs by a French Court as trustees in whom the immoveable property vests can be recognised here. "The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal..... In an action on a foreign judgment not impeached for fraud, the original cause of action is not re-investigated here, if the judgment was pronounced by a competent tribunal having jurisdiction". This is the principle enunciated by Lindley, L. J. *In re Henderson, Nouvion v. Freeman* (17). This general principle though stated in reference to a judgment *in personam* applies to every kind of judgment; it extends alike to a judgment *in personam* [*Godard v. Gray* (18)] to a judgment *in rem* [*Castrique v. Imrie* (19)] to a judgment or sentence of divorce, or any other judgment having reference to status (*Vide* Dicey's Conflict of Laws, pages 408 and 409), and in accordance with it the plaintiffs would be entitled to sue in Courts here on the strength of their status as trustees appointed by a foreign judgment, unless there is any reason to the contrary. I may refer also to *Bank of Australasia v. Nias* (20) and

De Cosse Brissac v. Rathbone (21), where it was held that a Court will not question the validity of a foreign judgment except upon a definite plea being raised of error, fraud, etc. In *Ewing v. Orr Ewing* (15) a suit was allowed to be brought in England against the executors and trustees of an estate left by a testator domiciled in Scotland and situated mainly in Scotland, the said executors having obtained Probate in Scotland and confirmation in England. In that case the executors and trustees were identical and had been recognised in English Courts, but in a subsequent case relating to the same estate—*Ewing v. Orr Ewing* (16)—Lord Selborne remarks: "It cannot make any difference as to the forum in such a case, whether the trustees, in whom the residuary estate is vested, are or not the same persons who, as executors, obtained Probate or confirmation. The rights of the plaintiffs, (in both countries) and the remedies against the defendants ought to be precisely the same so far as relates to the trust estate whether the defendants were original, or afterwards assumed, trustees, or were or were not executors as well as trustees."

The facts of the present case are not quite analogous but in *Ewing v. Orr Ewing* (16) the jurisdiction of an English Court to deal with a trust constituted in Scotland was recognised, and similarly there can be no objection to the converse proposition that a French Court can regulate the administration of a trust situated mainly in French territory and partly in British territory and that such administration will be recognised by British Courts. The Advocate General does not contend that, if plaintiffs were suing as possessing a certain status conferred by a foreign judgment, British Courts would not recognise that status, nor could he very well do so as the proposition that they could sue has frequently been affirmed (*Vide* Dicey's Conflict of Laws, Chapter XIX). In *In re Piercy, Whitwham v. Piercy* (22), a person domiciled in England left by Will lands

(17) (1887) 37 Ch. D. 244.

(18) (1870) 6 Q. B. 139; 40 L. J. Q. B. 62; 24 L. T. 89; 19 W. R. 348.

(19) (1870) 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1.

(20) (1851) 16 Q. B. 717; 20 L. J. Q. B. 284; 15 Jur. 967; 117 E. R. 1055; 83 R. R. 698.

(21) (1861) 6 H. & N. 301; 30 L. J. Ex. 238; 158 E. R. 123; 123 R. R. 521.

(22) (1895) 1 Ch. 83; 64 L. J. Ch. 249; 13 R. 106; 71 L. T. 745; 43 W. R. 194.

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in Italy to trustees to sell the same and, having invested the proceeds to hold the investments on certain trusts and it was held that the right of the trustees to sell the land is governed by the Law of Italy (*lex situs*) and that the validity of the trusts as to the proceeds of the land is governed by the Law of England (*lex domicilii*). Similarly in this case the administration of the trust is governed by the *lex domicilii*, i. e., French Law, and consequently the appointment of new trustees, which is part of the administration, is governed by the *lex domicilii* and the action of the foreign Courts would be recognised by British Courts. No direct authority for the proposition he puts forward has been cited by the learned Advocate-General, nor is there any direct authority to the contrary, but the principles enunciated above seem to be sufficient justification for rejecting the proposition. It is also very significant that the objection was not seriously pressed in the original trial by defendants Nos. 1 to 3, the old trustees, but is now put forward in appeal by 5th defendant alone, an alleged adopted son of 4th defendant, who, as I shall presently show, has no *locus standi* as his alleged adoption is not valid.

It is further contended that the present suit to remove the defendants Nos. 1 to 3 is not maintainable in this Court without the sanction of the Advocate-General under section 92 of the Code of Civil Procedure. An issue was framed on the point, but was not seriously pressed at the trial. It seems to me that this is not a suit for removal of trustees, for they have already been removed by the French Court, and as I have already pointed out they were not appointed trustees by the British Indian Courts. They were granted Letters of Administration and became trustees under the terms of the Will and not by appointment of Court. They were validly removed from office by the French Court and plaintiffs were appointed in their place and consequently this cannot be looked upon as a suit for removal of trustees. In fact the prayer to this effect in the plaint might well be ignored, as it does not affect the rest of the case. It is a suit based upon a foreign judgment which has recognised plaintiffs'

title to administer the trust and to recover trust-properties.

Had this Court recognised defendants Nos. 1 to 3 as trustees, and, as I have pointed out, it has not done so, the objection might hold good on the ground that the order of the French Court removing them would not affect the order of this Court appointing them and a decree for their removal would be necessary. Even so it is difficult to see that the judgment of the French Court would come under any of the exceptions (a) to (f) of section 13 of the Code of Civil Procedure and if it does not come within any of those exceptions, it is conclusive as between the parties.

The learned Advocate-General has also sought to impeach the finding of the learned Judge as to the validity of the adoption. The adoption has been found to be invalid on two grounds (1) that adoption is prohibited by the Will of the testator and (2) that the consent of the nearest *sapinda* was not sought or obtained. A perusal of the Will is sufficient to show that the testator did not want to adopt a son and was unwilling that one should be adopted after his death. He made provision for the disposal of all his property, mostly for charitable purposes, and also made provision for the event of a son being born. The words "if by divine favour I happen to have a child of the male sex" show clearly that a natural son and not an adopted son was contemplated, for he could not have an adopted child of the female sex. The subsequent references to a son must also mean "natural son." There is also a provision in the Will for a boy being brought into the family in certain events to look after the family house, but not as an adopted son. Even if a natural son were born the testator did not want him to succeed to the whole estate, but gave a direction that the son should carry out the terms of the Will, and made a special provision for the son's maintenance. All this is quite inconsistent with a wish to be represented by an adopted son. The contention that the prohibition to adopt must be express and not implied appears to be mainly based on an isolated sentence in the judgment of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu*

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Ramalakshammamma (23) which is itself not free from ambiguity, and is certainly no authority for the contention. It may perhaps be contended that in Bombay the prohibition must be express. [*Vide Patel Vandrayan Jekison v. Patel Manilal Chumilal* (24) and *Lakshmibai v. Sarasvatibai* (25)] but the widow's powers in regard to adoption are greater in that Presidency than in Madras, whereas *Collector of Madura v. Moattoo Ramalinga Sathupathy* (26) is authority for holding that an implied prohibition is sufficient, for in that case it was held that the prohibition was to be deduced from the circumstances. As regards the second ground it was not asserted in appeal that the consent of the nearest *sapinda* was obtained, but it was contended that the Hindu Law, as administered in Pondicherry, is the same as in Bombay, where consent of the *sapindas* to adoption is not necessary. This point was not raised at the trial and consequently there is no evidence to support it. No doubt it has been held in this Court that a widow's estate in Pondicherry is absolute and not a mere life-interest [*Vide Mailathi Anni v. Subbaraya Mudaliar* (27), and Original Suit Appeal No. 11 of 1902] and from this fact one Monsieur Sorg in a treatise on Hindu Law deduces an opinion that a widow can adopt without consent of the *sapindas*, but gives no authority for his opinion. On the contrary the decree of 29th December 1855 in French India expressly contemplates the consent of the relations being given (*Vide Article 2*). The materials for a right decision on this point are not before the Court, but on the materials available it would appear that there is no authority for the contention put forward. A further point is taken by respondents that there is no evidence of the factum of adoption, and this is so, for we have only proof of the adoption deed, said to have been executed

(23) 22 M. 398; 21 A. 460; 26 I. A. 113; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 7 Sar. P. C. J. 330; 8 Ind. Dec. (N. s.) 286.

(24) 15 B. 565; 8 Ind. Dec. (N. s.) 381.

(25) 23 B. 789; 1 Bom. L. R. 420; 12 Ind. Dec. (N. s.) 528.

(26) 12 M. I. A. 397; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

(27) 24 M. 650; 11 M. L. J. 309.

at the time of adoption, and defendants Nos. 2 and 6, who were in Court, have not attempted to prove the factum of adoption although they are said to have been present when it took place. The learned Judge's finding that the adoption is invalid must be confirmed.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 503 OF 1915.

May 26, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Le-Rossignol.

ARUR SINGH—DEFENDANT—APPELLANT
versus

SOLAKHAN SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Custom—Alienation by male proprietor—Suit by reversioners—Adverse possession—Limitation.

A collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father, but from or through the common ancestor who owned the land. Therefore, in cases governed by Article 144, Schedule I of the Limitation Act, limitation does not begin to run against a collateral till the right to sue accrues to him. [p. 413, col. 2.]

Sundar v. Salig Ram, 9 Ind. Cas. 300; 26 P. R. 1911, 33 P. W. R. 1911; 34 P. L. R. 1911, followed.

Kaka v. Labh Chand, 106 P. R. 1906; 162 P. L. R. 1906; 88 P. W. R. 1906, dissented from.

Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. s.) 591, distinguished.

One D S sold certain ancestral land to defendant on 10th August 1886. He died on 23rd February 1892, and plaintiff sued in 1914 to recover the land as his collateral. It was found that on the death of D. S. plaintiff's father was his nearest collateral entitled to sue. He died about five years before the institution of the suit:

Held, that limitation began to run as against the plaintiff on the death of his father and the suit was therefore, within time. [p. 414, col. 1.]

Second appeal from the order of the Additional District Judge, Lahore, dated the 26th January 1915, reversing that of the Subordinate Judge, 1st class, Lahore, dated the 28th of August 1914, and remanding the case to the first Court for further enquiry.

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The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

Messrs. Gokal Chand Norang, Nanak Chand and Kanshi Ram, for the Respondents.

JUDGMENT.—This is a suit by the collaterals of one Deva Singh for the possession of the land sold by him to the defendant, and the sole question for determination is whether the suit is, or is not, barred by limitation. The relevant dates are as follows:—The sale was effected on the 10th August 1886; Deva Singh died on the 23rd February 1892, and the present action was brought in February 1914. It is common ground that, as the alienor died before the enforcement of the Punjab Limitation Act of 1900, the rule of limitation applicable to the suit is that furnished by the Indian Limitation Act. There is no doubt whatsoever, that on the death of the alienor the plaintiffs' father Seva Singh was the nearest collateral entitled to sue for the possession of the property, and that his suit would now be barred by time. It appears that Seva Singh died about five years before the institution of the present suit, and the plaintiffs contend that their right to sue did not accrue until the death of their father.

The learned Counsel on both sides admit that Article 144 of the Limitation Act governs the suit, and it is plain that the *terminus a qua* under the said Article is the date when the possession of the defendant became adverse "to the plaintiff." The matter is, then, reduced to this; did the possession of the defendant become adverse to the plaintiffs on the death of their father Seva Singh, or on the death of the alienor when the cause of action to sue for possession accrued to Seva Singh. Now section 2 (8) of the Limitation Act lays down that the expression "plaintiff" includes any person from or through whom a plaintiff derives his right to sue; and it is manifest that if the plaintiffs derived their right to sue from or through Seva Singh, the defendant's possession which commenced adversely to Seva Singh in 1892 must be deemed to be adverse to the plaintiffs and their suit would be barred by limitation.

The subject is, however, fully discussed in the Full Bench judgment of this Court reported as *Sundar v. Salig Ram* (1) and it is pointed out therein that a collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father, but from or through the common ancestor who owned the land. There can be no manner of doubt that the ruling is directly applicable to the case, and that under the rule enunciated therein the plaintiffs' suit is not barred under Article 144 of the Limitation Act. It is further clear that *Kaka v. Labh Chand* (2) which laid down the proposition favourable to the defendant has been overruled by the Full Bench.

The learned Counsel for the appellant contends that the exposition of law in the aforesaid Full Bench ruling is erroneous; and he invites our attention to certain passages in *Boda v. Harnam* (3) and *Dheru v. Sidhu* (4), but we find that all the relevant authorities have been examined by the learned Judges who delivered the Full Bench judgment, and it would be an act of supererogation, if we repeat here what has already been stated by him *in extenso*. We admit that there is considerable force in the argument of the learned Counsel but the question is not *res integra*, and there is no sufficient reason to justify us in making a reference to the Full Court for a re-consideration of the whole question. The judgment of the Privy Council in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (5) cited by Mr. Muhammad Shafi has a direct bearing upon the point before us. That case related to the alienation of the hereditary office and the property attached to a religious trust and their Lordships decided that the possession delivered to the vendee was adverse to the vendor, and that the suit of the vendor's son to recover the hereditary managership and possession of the lands of the endowment was barred under Arti-

(1) 9 Ind. Cas 300; 26 P. R. 1911; 33 P. W. R. 191; 34 P. L. R. 1511.

(2) 106 P. R. 1906; 88 P. W. R. 1906; 162 P. L. R. 1906.

(3) 18 P. R. 1895.

(4) 56 P. R. 1903; 93 P. L. R. 1903.

(5) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. O. J. 67; 8 Ind. Dec. (N. S.) 591.

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cle 124 of the Indian Limitation Act, and that even if there were some distinction between the claim to the office and the claim for the property, in regard to the application of the said Article, the claim for the property would, in any case, be barred by Article 144. It will be observed that the endowment was held to be hereditary in the family of the vendor, and that the plaintiff was consequently treated as the heir to his father, from or through whom he derived his right to sue. This incidence of the son being the heir to his father is, as pointed out by the Full Bench, not applicable to the devolution of ancestral property under the Customary Law.

Accordingly we are constrained to hold that the defendant's possession did not become adverse to the plaintiff until the death of their father, and that their suit is within time. The result is that we dismiss the appeal, but leave the parties to bear their own costs in this Court.

Appeal dismissed.

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 979 AND 1712
OF 1914.

November 28, 1916.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Abdur Rahim and Mr. Justice
Srinivasa Aiyangar.

BALIDE KAMAYYA AND OTHERS—
DEFENDANTS, APPELLANT IN S. A. No. 979
OF 1914 RESPONDENTS IN S. A. No. 1712
OF 1914

versus

PRAGADA PAPAYYA AND ANOTHER—
PLAINTIFFS, RESPONDENTS IN S. A. No. 979
OF 1914 AND APPELLANTS IN S. A.
No. 1712 OF 1914.

Civil Procedure Code (Act V of 1908), ss. 11, 107, O. XXII, r. 11 O. XXIII, r. 1—Appeal—Withdrawal of suit, leave for—Appellate Court, powers of—Jurisdiction—Order giving leave 'to withdraw appeal with liberty to bring a fresh suit', effect of—Intention of Court—Res judicata—Decree, construction of—Order incorrect—Party, duty of.

By the Full Bench.—It is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. [p. 419, col. 1.]

Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row, 25 Ind. Cas. 388; 27 M. L. J. 244; 1 L. W. 613; 16 M. L. T. 186; *Ekmath v. Ranoji*, 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237, dissented from.

Afzal Begam v. Akbari Khanam, 28 Ind. Cas. 857; 37 A. 326; 13 A. L. J. 444; *Ganya Ram v. Data Ram*, 8 A. 82; A. W. N. (1886) C. 4 Ind. Dec. (n. s.) 1077; *Veera Reddy v. Akka Reddy*, 28 Ind. Cas. 487; *Chidambara Mudali v. Kozhandavelu Mudali*, 17 Ind. Cas. 395; (1912) M. W. N. 1003; *Jogodindro Nath v. Sarut Sunduri Debi*, 18 C. 322; 9 Ind. Dec. (n. s.) 215; *Kali Prasanna Sil v. Panchanan Nandi*, 33 Ind. Cas. 670; 23 O. L. J. 489; 20 C. W. N. 1000; *Tirupati v. Muthu*, 11 M. 322; 4 Ind. Dec. (n. s.) 224; *Radha Kishen Lall v. Radha Pershad Singh*, 18 C. 515; 9 Ind. Dec. (n. s.) 344; *Lakshmi Narasimha v. Atchanna*, 15 M. 240; 1 M. L. J. 750; 5 Ind. Dec. (n. s.) 518; *Tara-chand Megraj v. Kashinath Trimbak*, 10 B. 62; 5 Ind. Dec. (n. s.) 425; *Perumal v. Pichan*, 8 Ind. Cas. 268; 21 M. L. J. 574; (1910) M. W. N. 791; 9 M. L. T. 275; *Chhajju v. Khyali Ram*, 14 Ind. Cas. 175; 9 A. L. J. 378; *Robert Watson & Co. v. Collector of Rajshahye*, 13 M. L. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. (P. C.) 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 51], referred to.

Per Spencer, J.—Where, in an appeal by a plaintiff against a decree dismissing his suit, the Appellate Court permits him to withdraw his appeal with liberty to bring a fresh suit, the decree of the lower Court is wiped out and in effect set aside though nothing else is substituted for it and the institution of a fresh suit, pursuant to the order, is not barred as *res judicata*. [p. 420, col. 1.]

Ganga Ram v. Data Ram, 8 A. 82; A. W. N. (1886) 6; 4 Ind. Dec. (n. s.) 1077; *Jogodindro Nath v. Sarut Sunduri Debi*, 18 C. 322; 9 Ind. Dec. (n. s.) 215; *Jagdish Chaudhuri v. Tulshi Chaudhuri*, 16 A. 19; A. W. N. (1893) 189; 8 Ind. Dec. (n. s.) 13 and *Genda Mal v. Pirbhu Lal*, 17 A. 97 at p. 99; A. W. N. (1895) 17; 8 Ind. Dec. (n. s.) 387, referred to.

A decree should be given an effect which is intelligible and it should be presumed to be legally effective for obtaining the relief sought and granted. [p. 419, col. 2.]

Per Phillips, J. Contra.—An order of a Court of Appeal allowing a plaintiff appellant to withdraw the appeal with liberty to bring a fresh suit does not operate *per se* as a reversal of the lower Court's decree, or as wiping it out. The order amounts, in substance, to a striking off of the appeal, the decree of the Trial Court being left unaffected, and a fresh suit on the same cause of action is barred as *res judicata*. The order cannot be read in the light of what the Court might have intended. [p. 421, col. 1.]

Ganga Ram v. Data Ram, 8 A. 82; A. W. N. (1886) 6; 4 Ind. Dec. (n. s.) 1077; *Jogodindro Nath v. Sarut Sunduri Debi*, 18 C. 322; 9 Ind. Dec. (n. s.) 215; *Jagdish Chaudhuri v. Tulshi Chaudhuri*, 16 A. 19; A. W. N. (1893) 189; 8 Ind. Dec. (n. s.) 13 and *Genda Mal v. Pirbhu Lal*, 17 A. 97 at p. 99; A. W. N. (1895) 17; 8 Ind. Dec. (n. s.) 387, distinguished.

Robert Watson & Co. v. Collector of Rajshahye, 13 M. L. A. 160; 12 W. R. 43 (P. C.); 3 B. L. R. 48 (P. C.); 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 511; *Gulkandi Lal v. Manni Lal*, 23 A. 219; A. W. N. (1901) 66; *Tirupati v. Muttu*, 11 M. 322; 4 Ind. Dec. (n. s.) 224; *Sukh Lal v. Bhikhi*, 11 A. 187; A. W. N. (1889) 13; 6 Ind. Dec. (n. s.) 548, applied.

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Where an order of Court is drafted in such a way as to fail to give effect to the Court's intention, it is the duty of the party to apply to have it set corrected. [p. 421, col. 1.]

Second appeals against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in Appeal Suit No. 163 of 1913, preferred against that of the Court of the District Munsif of Sompeta in Original Suit No. 203 of 1912.

These second appeals coming on for hearing on 8th and 9th August 1916, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Mr. V. K. Srinivasa Aiyangar for Mr. C. S. Venkatachariar, for the Appellants and of Mr. K. V. L. Narasimham, for the Respondents in Second Appeal No. 979 of 1914 and of Mr. K. V. L. Narasimham, for the Appellants and of Mr. V. K. Srinivasa Aiyangar for Mr. C. S. Venkatachariar, for the Respondents in Second Appeal No. 1712 of 1914 and the cases having stood over for consideration till 15th August 1916, the Court (Spencer and Krishnan, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—Original Suit No. 430 of 1909 on the file of the District Munsif's Court of Sompeta was a suit brought for recovery of possession of certain lands. The suit was dismissed with costs as there was nothing on the record to show how the 1st defendant got title from the purchaser at Court auction and as the plaintiff's only title was that derived from the 1st defendant. The plaintiffs appealed and the District Judge permitted the appeal to be withdrawn with liberty to bring a fresh suit. As observed by the Subordinate Judge, the granting of permission "to withdraw the appeal" was a clerical error, and we must take it that what the learned District Judge intended was to set aside the decree of the Original Court and to permit the suit to be withdrawn. The appeal was allowed to that extent. The plaintiffs brought a fresh suit, Original Suit No. 203 of 1912 and succeeded generally both in the Original and Appellate Courts.

It is now contended in these appeals that an Appellate Court has no power to allow a suit to be withdrawn with liberty to file a fresh suit. In support of this, the appellants' Pleader relies on the decision in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1) and on the following observation in *Eknath v. Ranoji* (2): "It is clearly, we think, beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour." This observation was of the nature of an *obiter dictum* in that case. The correctness of the decision, so far as it decided that before the admission of the appeal the Appellate Court had no power to make an order of this nature, cannot be doubted. In *Afzal Begam v. Akbari Khanam* (3) the decision of this Court in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1) has been considered and dissented from. The learned Judges of the Allahabad High Court followed a previous decision to the same effect in *Ganga Ram v. Data Ram* (4) and they further relied on the practice of the Allahabad Courts to give such a permission even in appeal. In *Veera Reddy v. Akka Reddy* (5) Sadasiva Aiyar, J., sitting as a single Judge has doubted the correctness of the decision in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1).

The exercise of this power by virtue of section 107 clause (2), Civil Procedure Code (old section 582) by the Appellate Court as a matter of practice is conceded by the learned Judges who decided the case in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1). In *Ohidambara Mudali v. Kozhandavelu Mudali* (6), the power was exercised even in second appeal; but the jurisdiction of the Court to make such an order does not then seem to have been questioned, nor was it questioned in *Jogodindro Nath v. Sarut Sunduri Dobi* (7), in which the practice was recognised. In *Kali Prasanna Sil v. Pan-*

(1) 25 Ind. Cas. 388; 27 M. L. J. 244; 1 L. W. 613; 16 M. L. T. 186.

(2) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237.

(3) 28 Ind. Cas. 857; 37 A. 326; 13 A. L. J. 444

(4) 8 A. 82; A. W. N. (1886) 6; 4 Ind. Dec. (N. s.) 1077.

(5) 28 Ind. Cas. 437.

(6) 17 Ind. Cas. 395; (1912) M. W. N. 1003

(7) 18 C. 322; 9 Ind. Dec. (N. s.) 215.

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chanan Nandi (S), it was held that the fact that the plaintiff was not able to adduce all the evidence which he would have liked to adduce at the first hearing was not a good ground for an Appellate Court permitting the plaintiff to withdraw from the suit and bring a fresh suit and, therefore, such an order was without jurisdiction. Similarly in *Tirupati v. Muttu* (9), it was held that an order passed by an Appellate Court permitting a plaintiff to withdraw his suit with permission to bring a fresh suit was bad if no reasons were assigned for the order.

In the present case, the permission was granted in order to permit the plaintiffs to re-draft their plaint in such a manner as to contain certain necessary allegations for indicating more clearly what their father's title was, and this appears to me to be a good ground for the order in the circumstances of this case.

With due respect to the learned Judges, I am unable to follow the reasoning in *Choragudi Chinna Kotayya v. Raja Varadaraja Appu Row* (1).

As I understand the judgment, the main arguments are that the language of Order XXIII, rule 1, is such as to apply only to a pending suit and that after a suit has terminated in a decree, it is not open to any Court to grant the required permission; *secondly*, that if the word "appeal" is substituted for the word "suit" wherever it occurs, the rule will read "at any time after the institution of an appeal the plaintiff * * * may withdraw his appeal", and that this reading will not give the plaintiff the remedy he requires.

The answer to the first objection seems to be that when an appeal has been admitted the whole suit is re-opened and there is no certain finality about the decree in existence until the Appellate Court pronounces one.

The second objection is in my opinion, which I hold with due respect, based on a misconception of what section 107, clause 2, lays down.

Subject to certain conditions and limitations it declares that "the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred on and imposed by this Code on Courts of Original Jurisdiction in respect of suits instituted therein".

Rule 11 of Order XXII which says "in the application of this order to appeals, so far as may be, the word "plaintiff" shall be held to include an "appellant", the word "defendant" a "respondent", and the word "suit" an "appeal" does not occur in Order XXIII.

Therefore in considering what are the powers of an Appellate Court under Order XXIII, which deals with the withdrawal and adjustment of suits, there is no necessity to go through a strict process of altering the word "suit" into the word "appeal" wherever it occurs.

A comparison of the sections of the old Code dealing with this matter with the provisions of the new Code does, however, throw light on the question.

Section 375A which runs thus:—"Nothing in this Chapter shall apply to any application or other proceeding in any suit subsequent to the decree," with an explanation attached—"An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section" was added by Act VI of 1882, section 2 and has disappeared in the Code of 1908. In its place we have Order XXIII, rule 4 "Nothing in this order shall apply to any proceedings in execution of a decree or order."

The explanation to the old section in terms answered the objection that applications to withdraw the suit cannot be made in appeal because they are subsequent to the decree.

It recognized the practice of withdrawing suits with the Court's permission after they have reached the stage of appeal.

The new rule declares that the plaintiff cannot have this privilege when his suit has reached the stage of execution. This rule seems to have been introduced in consequence of the decisions in *Radha Kishen*

(5) 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1030.

(9) 11 M. 322; 4 Ind. Dec. (N. S.) 224.

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Lall v. Radha Pershad Singh (10) and *Lakshmi Narasimha v. Atchanna* (11) and *Tarachand Megraj v. Kashinath Trimbak* (12).

The fact that the exercise of the right when the suit is in the stage of appeal is not expressly negatived favours the theory that what is not expressly withdrawn may be presumed to continue to exist.

As cases not infrequently occur in which the exercise of the supposed power to withdraw suits with liberty to sue again is attempted, and as the question is of considerable importance, we refer for the decision of a Full Bench the question "whether an Appellate Court has the power for proper reasons to allow a suit to be withdrawn with liberty to file a fresh suit."

KRISHNAN, J.—I agree to the order of reference to the Full Bench as proposed by my learned brother.

The District Judge's order passed at the hearing of the present respondents' appeal, allowing their suit to be withdrawn with liberty to file a fresh suit must be taken to have in effect set aside the decree of the 1st Court dismissing the suit or annulled it and to have allowed the appeal to that extent though the order does not expressly say so. See the observations of Tyrrell, J. in *Ganga Ram v. Data Ram* (4).

The order was passed under rule 1, Order XXIII read with section 107, clause (2) of the new Code, which was in force at the time. The suit now in the second appeal before us was brought in pursuance of the leave so granted. Defendants (appellants) contend that the Appellate Court had no power whatever in any case to act under the rule referred to, that even if it could so act there were no proper grounds to justify its action, that it is open to them in the present suit to impugn the order on both the grounds above stated, that it should be treated as a nullity and that the present suit should be dismissed as barred by the previous suit on the same cause of action.

It will be convenient to consider first how far it is open to the appellants to impugn the order in this suit. It seems to me if the order had been passed with jurisdiction it is not open to us now to consider the propriety of it on the merits, where a Court which has power to act under rule 1, Order XXIII has exercised its discretion and passed an order under it, the fact that it was passed for insufficient reason does not, it seems to me, make the order one passed without jurisdiction. There is no question of defect of jurisdiction though the order may amount to an irregularity. This was the view taken in *Tirupati v. Muttu* (9). It was held that the propriety of the order could not be questioned in the 2nd suit in *Perumal v. Pichan* (13) and also in *Ohhazju v. Khyali Ram* (14). The only authority to the contrary cited before us is the case of *Kali Prasanna Sil v. Panchanan Nandi* (8). With all respect to the learned Judges in that case, I am unable to agree with the view that the jurisdiction of the Court to pass an order under the rule in question depends on the existence of proper grounds for the order allowing the withdrawal with liberty. Under the rule as enacted when the Court passing the order is satisfied that there are sufficient grounds it has the power to pass the order granting permission for a fresh suit; so that the erroneousness or insufficiency of the grounds on which the Court is so satisfied is not a matter affecting the jurisdiction of the Court. The weight of authority is against the view taken in the Calcutta case and I respectfully dissent from it, and follow the ruling of this Court with which I respectfully agree.

If, however, it is open to us to consider the propriety of the order of the District Judge now, the case in *Ganga Ram v. Data Ram* (4), already cited, is an authority for holding that there was proper ground in this case for the order made, as the plaintiff's first suit was going to fail for the formal defect that his plaint did not properly set out his title.

(10) 18 C. 515; 9 Ind. Dec. (N. S.) 344.

(11) 15 M. 240; 1 M. L. J. 750; 5 Ind. Dec. (N. S.) 518.

(12) 10 B. 62; 5 Ind. Dec. (N. S.) 425.

(13) 8 Ind. Cas. 263; 21 M. L. J. 574; (19:0) M. W. N. 791; 9 M. L. T. 275.

(14) 14 Ind. Cas. 175; 9 A. L. J. 373.

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If the appellants' contention that an Appellate Court has no power to act under rule 1, Order XXIII, its application being confined to the Court of first instance is correct, then the order in question here will be one passed without jurisdiction and must be treated as *non est*. The case cited in *Robert Watson & Co. v. Collector of Rajshahye* (15) is, I think, a sufficient authority for holding that an order passed without jurisdiction can be treated as a nullity in a subsequent suit. The question then is whether the Appellate Court had no power to act under rule 1, Order XXIII. The case in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1) supports the appellants' argument that no such power exists. With great respect to the learned Judges who decided that case I agree that the ruling should be re-considered. It was doubted in *Veera Reddy v. Akka Reddy* (5) and dissented from in *Afzal Begam v. Akbari Khanam* (3). The ruling in *Ganga Ram v. Data Ram* (4) which expressly held that the Appellate Court had such power under section 373, Civil Procedure Code, corresponding to the rule in question does not seem to have been brought to the notice of the Judges. No previous decisions are cited in support of their view except the case in *Eknath v. Ranoji* (2) which I shall consider later. Admittedly it is against the existing practice.

That decision holds on a consideration of the language of the rule that it cannot be extended to a suit in which a decree has already been passed; by this the learned Judges seem to mean that the exercise of the power is confined to a stage before the passing of any decree at all in the suit. I am unable to follow the argument that the language of the rule leads to such an inference. It may at the most point to a stage before a final and subsisting decree is passed in the case and not merely a first decree. The costs referred to in clause (3) are what the Court awards when passing the order. They cannot be said to have been provided for already unless there is a subsisting decree. The withdrawal of a part of the claim stands on the same footing as the withdrawal of

the whole: of course neither can be withdrawn if there is a subsisting decree. Where there is no subsisting decree I can see no difficulty at all in either case. Even apart from the language of the rule itself it is clear as explained by Tyrrell, J. in *Ganga Ram v. Data Ram* (4) a suit cannot be withdrawn after it has terminated in a final decree; for so long as that decree is subsisting and operative the withdrawal will be against the terms of that decree. I do not think the language of the rule means anything more.

A decree once passed by a Court can be set aside by that Court itself either on review or under Order IX, rule 13, if it was an *ex parte* decree; or its decree may be set aside by an Appellate Court and the case remanded for re-hearing. In all these cases in spite of the fact that a decree was once passed the suit again becomes pending in the trial Court and it cannot be contended that that Court could not act under the rule at that stage. It will thus be seen that the fact that a decree has once been passed is of no importance provided that it is not a subsisting decree when the permission for withdrawal is given.

Under section 107, clause (2) of the Code of Civil Procedure, the Appellate Court has the same powers as are conferred by the Code on the Court of Original Jurisdiction in respect of suits. As the first Court can act under rule 1, Order XXIII when there is no subsisting decree, the Appellate Court can also do the same provided it sets aside the decree of the first Court as it has power to do. The Appellate Court's power is derived from the section and not by a process of substituting the word "appeal" for the word "suit" wherever it occurs in rule 1, Order XXIII, as is suggested in the ruling under consideration.

With due respect it seems to me that the ruling in *Eknath v. Ranoji* (2) has been misunderstood in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1). In that case the District Judge gave leave under rule 1, Order XXIII, to the plaintiff before the admission of his appeal and without notice to the defendant. There was a subsisting decree of the first Court which the District Judge did not and was not in a position to set aside as the appeal had not even reached the

(15) 13 M. I. A. 160; 12 W. R. 43 (P. C.); 3 B. L. R. 48 (P. C.); 2 Suth. P. C. J. 169; 2 Sar. P. C. J. 600; 20 E. R. 511.

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stage of admission. The High Court was right in holding that the District Judge had no power to allow the suit to be withdrawn with liberty as there was a decree in defendants' favour. The language used in the High Court's judgment must be read with reference to the facts of the case.

I am, therefore, constrained to think that the ruling in *Choragudi Chinna Kotayya v. Raja Varadaraja Appa Row* (1) is not correct and that the Appellate Court has powers for proper reason to allow a suit to be withdrawn with liberty to bring a fresh suit.

I, therefore, agree to the reference as already stated.

These second appeals coming on for hearing as per above order, upon perusing the said Order of Reference and upon hearing the arguments of Mr. V. K. Srinivasa Aiyangar for Mr. C. S. Venkatachariar, for the Appellants and of Mr. K. V. L. Narasimham, for the Respondents in Second Appeal No. 979 of 1914 and of Mr. K. V. L. Narasimham, for the Appellants and of Mr. V. K. Srinivasa Aiyangar for Mr. C. S. Venkatachariar, for the Respondents in Second Appeal No. 1712 of 1914, the Court (John Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.) expressed the following

OPINION.

We agree with the learned Judges who made the reference that it is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

This second appeal coming on for hearing after the expression of the Opinion of the Full Bench on the 18th December 1916 and having stood over for consideration till this day, the Court (Spencer and Phillips, JJ.) delivered on the 22nd December 1916 the following

JUDGMENT.

SPENCER, J.—Now that the Full Bench has decided that leave to withdraw a suit with liberty to file a fresh suit may be given by an Appellate Court when reversing the decree of a lower Court, it is argued that, as the decree of the District Court did not in terms set aside the District Munsif's decree, there was no valid permission given to the plaintiff to bring the suit out of which this appeal has arisen.

I have already stated that, in my opinion,

what the District Judge intended evidently was to set aside the decree of the Original Court and to permit the suit to be withdrawn, and my learned brother Krishnan, J., has expressed it as his opinion that it must be taken to have actually had that effect. The petition to withdraw and the order of the District Judge are not on the record. So it is not known whether the order passed by the Judge was to set aside the decree of the District Munsif and dismiss the suit. But taking the decree as it stands, I find no meaning in saying that the appeal is withdrawn with liberty to bring a fresh suit, considering that it was the plaintiff who was appealing and that it would not have served his purpose to withdraw his appeal without also withdrawing his suit that had been dismissed in the first Court.

I think we must give the decree an effect which is intelligible, and the only effect of the sentence ordering the withdrawal of the appeal which would be consistent with the rest of the decree is, that it put an end to the decree which had been passed by the District Munsif. Otherwise the District Judge had no power to give leave to the plaintiff to bring a fresh suit. *Omnia presumuntur rite esse acta*. We should, if possible, presume that his decree was legally effective, and that he was not deliberately making it impossible for the plaintiff to get the relief sought and granted. I think the proper answer to the present contention may be found in the judgments of Straight and Tyrrell, JJ., in *Ganga Ram v. Data Ram* (4) who say in a similar case that the Judge's order meant to set aside and did set aside the decree of the Court of first instance, though this was not done in express terms, and that it must be treated and regarded as one disposing of the suit and the appeal before the Judge.

As stated in *Jogodindro Nath v. Sarut Sunduri Debi* (7) an order of an Appellate Court giving leave to withdraw an appeal and to withdraw the suit with liberty to bring a fresh suit does not merely set aside the first Court's decree, as the term is used in its ordinary sense; it does not substitute anything for the decree which is set aside, but it simply wipes it out and leaves the parties to the determina-

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tion of the rights in a subsequent suit, and what is done with regard to the first Court's decree is merely ancillary to the rest of the order, which is not a decree. This view was adopted and followed by the Allahabad High Court in *Jagdish Chaudhri v. Tulshi Chaudhri* (16) and *Genda Mal v. Purbhu Lal* (17). Such is the ordinary effect of an order made under rule 1 of Order XXIII of the Code of Civil Procedure and there can be no doubt that the order in question purported to be an order under the said rule and not under any other provision of law.

I consider, therefore, that the learned District Judge intended to and did by his decree, wipe out the District Munsif's decree when he gave leave to the plaintiff to bring a fresh suit. The defendants took no steps to have the order giving this leave set aside or revised as being illegal owing to the existence of the first Court's decree dismissing the suit, as they might have done, if they wished to treat the first Court's decree as still subsisting.

My learned brother is of opinion that this appeal should be allowed. Under section 98 of the Civil Procedure Code, it is dismissed with costs.

PHILLIPS, J.—In this case the question referred to the Full Bench was "whether an Appellate Court has the power for proper reasons to allow a suit to be withdrawn with liberty to file a fresh suit." It has been answered in the affirmative, but with one important modification, that is, that an Appellate Court has such power "when reversing the decree of the lower Court." In the present case the decree of the District Court was as follows:—"that the appeal be and the same hereby is withdrawn with liberty to bring a fresh suit etc." Costs of the appeal were ordered to be paid by appellant, but no order was passed as to costs in the lower Court nor was the lower Court's decree reversed. It is contended for appellants that the effect of the Appellate Courts' decree is to wipe out the lower Court's decree, and that, we must take it as having that meaning. In *Ganga Ram v. Data Ram* (4) Straight, J., (16) 16 A. 19; A. W. N. (1893) 189; 8 Ind. Dec. (N. S.) 13.

(17) 17 A. 97 at p. 99; A. W. N. (1895) 17; 8 Ind. Dec. (N. S.) 387.

held that an order of the Appellate Court allowing a suit to be withdrawn must be held to have put an end to the decree and Tyrrell, J., concurred in this view. The point, however, that they were considering was whether such an order amounted to a decree. The cases in *Jagdish Chaudhri v. Tulshi Chaudhri* (16) and *Genda Mal v. Purbhu Lal* (17) were also cases in which the same question was in issue. In *Jogolindro Nath v. Sarat Sundari Debi* (7) where again the right of appeal was in question, the Court remarked: "We do not think that this order (that is, an order giving leave to withdraw the appeal and the suit with liberty to bring a fresh suit) is in any sense a decree. The setting aside or annulling of a decree by the Appellate Court, as it has been done in this case, does not set aside the decree as the term is used in its ordinary sense but simply wipes it out and leaves the parties to the determination of their rights in a subsequent suit and what is done with regard to the first Courts' decree is merely ancillary to the rest of the order." The order appealed against is not quoted in the report, but from the language of the judgment it would appear that it did expressly set aside or annul the decree of the lower Court and it would appear that in none of these cases was the appeal alone allowed to be withdrawn.

On the other hand in *Robert Watson & Co. v. Collector of Rajshahye* (15) *et seq* where a suit was dismissed with leave to bring a fresh suit and it was found that the leave was granted in the exercise of an improper discretion, it was held that the dismissal of the suit was effective as *res judicata*.

In *Gulkandi Lal v. Manni Lal* (18) where a suit was dismissed in pursuance of a compromise, and no leave to bring a fresh suit was obtained, nor were the terms of the compromise embodied in the decree, it was held that a fresh suit was barred and that it was incumbent on the plaintiff to see that the Court did its duty and recorded a proper order in the suit. In *Triupa'i v. Muttu* (9) a District Judge passed an order in appeal "withdrawn with permission to institute a fresh suit on the same cause of action," and while holding that leave

(18) 23 A. 219; A. W. N. (1901) C6.

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was improperly given it was observed that the decree passed by the Munsif had not been set aside and was still operative. Where a wrong order has been passed by a Court it does not necessarily give a party a right, and we see in *Sukh Lal v. Bhikhi* (19) where a suit was dismissed with liberty to bring another suit for possession of one-third of the plaint property, and it was held that the District Munsif had no power to make the reservation and the subsequent suit was barred by *res judicata*. We see in the cases where leave to bring a fresh suit has been wrongly given that the rest of the order dismissing the suit is held to be valid. These authorities have no very direct bearing on the question which we have really to consider, that is, whether the District Judge's order can be said to have been passed "when reversing the decree of the lower Court." It is contended that the opinion, expressed by my learned brother Krishnan, J., in the order of reference, that the District Judge intended to set aside the lower Court's decree, and must be deemed to have done so, is final, but if this were so there would be no force in the words added in the answer of the Full Bench, "when reversing the decree of the lower Court," which, in my opinion, have the effect of re-opening the question, even if it could be deemed to have been decided. As the District Judge's order stands it does not in any way affect the District Munsif's decree, for it merely allows the appeal (not the suit) to be withdrawn and makes an order as to costs in the Appellate Court. No provision is even made for payment of costs in the District Munsif's Court and I am, therefore, of opinion that at least as far as those costs are concerned the District Munsif's decree was not set aside by the Appellate Court. In fact the decree, as it is, amounts merely to striking off the appeal. I think it very likely that the District Judge intended to set aside the lower Court's decree but he has not done so, and if the order is drafted in such a way as to fail to give effect to the Court's intention, it was the duty of the party to apply to have it corrected. As the order does not reverse the lower Court's decree I do not think that it is

(19) 11 A. 187; A. W. N. (1889) 13; 6 Ind. Dec. (N. S.) 548.

open to us now to read it in the light of what we think was the intention of the Judge. I would, therefore, allow the appeal holding, that as the original decree has not been reversed it is still valid and effective as *res judicata*.

Appeal dismissed.

V.R.P.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 65 AND 331 OF 1914.

October 31, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

MUHAMMAD ABDUL GHANI AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

BALMOKUND SUKUL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXIII, rr. 1, 3, difference between proceedings under—Withdrawal of suit on compromise—Duty of Court.

The difference between proceedings under rules 1 and 3, of Order XXIII, of the Civil Procedure Code, lies in the fact that under rule 1 a Court is dealing with the plaintiff only and under rule 3 a Court is dealing with the plaintiff and defendant together, and is considering whether there has been any agreement made between the plaintiff and defendant for an adjustment of the claim. As soon as a suit is instituted and a summons served upon the defendant, the defendant is entitled to claim any costs that he incurs by entering appearance. If by any agreement outside the Court a concession is made by the plaintiff on the one hand with regard to his claim and a concession made by the defendant on the other with regard to his costs, then there are present all the elements of a compromise. [p. 422, col. 2.]

Appeal from a decision of the 2nd Sub-Judge, Mozaffarpur, dated the 17th November 1913.

Messrs. *Lachminarain Sinha and Ganesht Dut Singh*, for the Appellants.

Messrs. *Syed Hassan Inam, Baidya Nath Narain Singh and Sira Nandan Rai*, for the Respondents.

JUDGMENT.—In this case Sheikh Muhammad Abdul Ghani and another were plaintiffs Nos. 1 and 2 and Suba Chondbry and another were plaintiffs Nos. 3 and 4 in a suit for a declaration that the *kobala* executed by the Mahomedan plaintiffs in favour of the defendants was void for want of consideration.

The plaint set forth that on the date of filing it the Mahomedan plaintiffs had

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parted with all their right, title and interest in the property in favour of the plaintiffs Nos. 3 and 4 and that, therefore, the plaintiffs Nos. 3 and 4 would conduct the suit against the defendants.

On the 8th of September 1913 the 4th of November was put down as the next date for trial. On the 15th of September a petition was filed by the Mahomedan plaintiffs to the effect that they had been soundly brought to task by their friends in the village for instituting a suit in which they had no possible chance of success and that their conscience smiting them upon this criticism of their conduct by the villagers they went to the defendants who were graciously pleased to allow them to withdraw the suit and had in return for that withdrawal agreed to exempt them from the costs for which the plaintiffs Nos. 1 and 2 would in the end have been liable. The order passed upon this petition was 'put up on the date fixed'. On the date fixed, 4th of November, the petition was put up, and it was after a full discussion and examination of witnesses on behalf of the plaintiffs, held on the 17th November, that the plaintiffs Nos. 1 and 2 had in fact entered into an agreement with the defendants whereby the plaintiffs Nos. 1 and 2 should abandon the whole of their claim to the property in suit and the defendants on the other hand should abandon all claims that they might be entitled to press in the matter of costs. The suit of the defendants Nos. 1 and 2 was accordingly dismissed in terms of the petition filed. The plaintiffs Nos. 3 and 4 were then told to proceed with their suit and after waiting for half an hour the Subordinate Judge dismissed their suit also. In due course the plaintiffs Nos. 1 and 2 appealed to this Court against the order declaring that the agreement filed was within the terms of Order XXIII, rule 3, and the plaintiffs Nos. 3 and 4 filed a petition for re-hearing, on the ground, that they were taken by surprise on the 17th of November. The lower Court upon this petition of the plaintiffs Nos. 3 and 4 for restoration of the suit came to the conclusion that they had full knowledge that their case would be taken up as soon as the position of the plaintiffs Nos. 1 and

2 had been declared and that they had ample opportunities for instructing their Pleaders on the date on which the suit was struck off the file. It, therefore, dismissed the application for the restoration of the suit. Against this order also the plaintiffs Nos. 3 and 4 appeal.

Dealing first with the case of plaintiffs Nos. 1 and 2 the position taken by the Vakil for the appellant is that if the proceedings were proceedings under Order XXIII, rule 1, then the order of the learned Subordinate Judge was bad, but that if they were in fact proceedings under Order XXIII, rule 3, then they appear to be in order and cannot be assailed in appeal. The difference between proceedings under rules 1 and 3 of this order lies in the fact that under rule 1 a Court is dealing with the plaintiff only and under rule 3 a Court is dealing with the plaintiff and defendant together, and is considering whether there has been any agreement made between the plaintiff and defendant for an adjustment of the claim. As soon as a suit is instituted and a summons served upon the defendant; the defendant is entitled to claim any costs that he incurs by entering appearance. If by any agreement outside the Court a concession is made by the plaintiff on the one hand with regard to his claim and a concession made by the defendant on the other with regard to his costs we have then all the elements of a compromise. In the case before us it is admitted by the plaintiffs that they had agreed in the presence of the defendants to give up their right in the property in suit and that the defendants had agreed in the presence of the plaintiffs to give up their right to costs.

We are satisfied that the proceedings in this case fell under Order XXIII, rule 3, and that the order of the learned Subordinate Judge was a proper order.

The appeal of the plaintiffs Nos. 1 and 2 must be dismissed with costs. Pleader's fee five (5) gold mohurs.

With regard to the position of the plaintiffs Nos. 3 and 4 we have it that the 4th of November was the date fixed for the hearing of the suit as a whole and that on the 4th of November it was recorded that parties were ready. They went on from

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day to day knowing that the proceedings regarding the adjustment of the plaintiffs' claim (plaintiffs Nos. 1 and 2) was only a part of the contest and that they would be required to proceed forthwith with the main case as soon as the question of the compromise had been decided. This is clear from the fact that on the 17th November four witnesses were present on behalf of plaintiffs Nos. 3 and 4.

In his examination-in-chief the plaintiff Suba Choudhry clearly says that there were two Pleaders who were instructed in the case, Babu Sham Nandan and Babu Jogendra Chandra Mukherji. He ran to Jogendra Chandra Mukherji. That gentleman said "I know nothing about your case so go to your Pleader Sham Nandan." He then ran to Sham Nandan who said "I know nothing about your case." From these statements it is quite clear that the plaintiffs Nos. 3 and 4 did not on the 17th of November take the ordinary precaution of instructing Pleaders at all in spite of the fact that they knew that the case would be taken up that day. Such neglect must be regarded as gross and inexcusable. To condone such neglect would be to paralyse the efficient administration of justice. We have no hesitation in supporting the learned Sub-Judge in the attitude taken by him. The suit was rightly struck off the file and the appeal must be dismissed with costs. Pleaders' fee five (5) gold mohurs.

Appeal dismissed.

OUDD JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 169 OF 1915.

June 30, 1916.

Present:—Mr. Stuart, J. C.

BAKHTAWAR KHAN AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

FAROOQ AHMAD AND OTHERS—DEFENDANTS
—RESPONDENTS.

Muhammadan Law—Sunni sect—Will, interpretation of—Bequest, subject to condition, effect of

Among *Sunni* Muhammadans if a testator devises property subject to a condition, the devise must be treated as unconditional and as conferring a complete title upon the legatee.

Second appeal from the decree of the Additional Judge, Fyzabad, dated the 19th July 1915, reversing the order of the Munsif, Fyzabad, dated the 16th May 1914.

Mr. *Muhammad Was'm*, for the Appellants.

Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—This is a suit brought on the basis of a Will made by a *Sunni* Muhammadan. No question now arises as to the validity of the Will or the enforceability of its terms. The parties have previously been in dispute upon these points, but they have now agreed that the Will should be treated as valid and that its terms should be enforced. It is in the first place necessary to interpret the terms of the Will which have bearing upon the matter in dispute. I have considered the terms carefully and have arrived at a conclusion that the testator devised certain landed property to his widow *Musammât Bandi*.

He made the devise subject to two conditions, the *first*, being that she was to have no power to transfer the property in question and the *second* being that she was to hold it for life, that is to say, that it would not descend to her heirs. He added further that on her death the property would devolve on a certain Zahur Ahmad. I do not accept the contention of the learned Counsel for the appellants that the terms of the Will should be interpreted as meaning that he devised the property to Zahur Ahmad with a usufruct for life to *Musammât Bandi*. If I had accepted that contention many points of law would have arisen to which I need not advert. As I do not accept it, but find that the property was devised to *Musammât Bandi* subject to two conditions, the legal point for decision is comparatively simple. There can be no doubt as to the fact that according to the law governing dispositions amongst *Sunni* Muhammadans the effect of a disposition, such as I find this disposition to have been, is to confer complete proprietary title. Under the principles of that law such a disposition must be complete. If it is not complete it is not a disposition and it is well-established law that where the testator endeavours to affix conditions on to the disposition it is treated as unconditional and the conditions are treated as null and void. This is the

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view which was taken by the learned Additional Judge and it is the correct view.

I, therefore, dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 221 OF 1916.

November 27, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Roe.

Musammat NAINA KOER AND OTHERS—

DEFENDANTS—APPELLANTS

versus

GOBARDHAN SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 157, 159, 32 (2)—Chaukidar's diary, entries of births and deaths in, made by third persons at the request of chaukidar, admissibility of.

A *chaukidar* who was an illiterate person got other people to make entries in his diary for him relating to the birth and death of a certain person. The persons who made these entries were called at the trial and deposed that they had made the entries at the request of the *chaukidar*. The *chaukidar* was dead at the time of the trial.

Held, that the entries were not admissible in evidence under section 32 (2) but were admissible under section 157 and possibly also under section 159 of the Evidence Act. [p. 425, col. 1.]

Sheonandan Singh v. Jeonandan Dusadh, 1 Ind. Cas. 376; 13 C. W. N. 71, distinguished.

Second appeal from a decision of the District Judge, Mozaffarpur, dated the 13th December 1916.

Sir Ali Imam, for the Appellants.

Mr. Pugh, for the Respondents.

JUDGMENT.

CHAMEIR, C. J.—This is a second appeal in a suit brought by the respondents for possession of certain property which at one time belonged to one Ramudar Singh. In order to succeed in their suit the respondents had to prove that Ramudar Singh had a son, Ram Prasad Singh, who survived his father. The first Court (the Subordinate Judge of Mozaffarpur) held that the respondents had failed to prove that Ramudar Singh had a son at all. But

on appeal the learned District Judge held otherwise; in his opinion the evidence adduced by the respondents proved that Ramudar Singh had a son, Ram Prasad, and that Ram Prasad survived his father.

Various questions have been mooted by Counsel for the appellants. The only question which we can consider in second appeal is the question whether the District Judge was right in admitting in evidence certain entries in the diary of a deceased *chaukidar*. Before the Subordinate Judge it seems to have been contended that the entries were admissible under section 35 of the Evidence Act. The Subordinate Judge held that they were not. On appeal the District Judge agreed with the Subordinate Judge that the entries were not admissible under section 35 but he held that they were admissible under section 32, sub-section (2) of the Evidence Act. He considered that they were statements made by the *chaukidar* in the ordinary course of business and in support of that view he referred to the case of *Sheonandan Singh v. Jeonandan Dusadh* (1). That case is by no means on all fours with the present case and I do not consider it necessary to express any opinion as to the correctness of the decision in it. In my opinion the entries in the diary in question are not admissible under section 32, sub-section (2) for according to the evidence those entries were not made by the *chaukidar* at all. According to the evidence the *chaukidar* who was an illiterate person got other people to make entries in his diary for him. The persons who made the entries relating to the birth and death of Ram Prasad Singh were called at the trial and they both deposed that *they made the entries* at the request of the *chaukidar*. It is, therefore, unnecessary to consider the question which has been argued before us, namely, whether or not the entries in the diaries were made in the ordinary course of business within the meaning of section 32, sub-section (2). But, in my opinion, the entries are admissible in evidence under either section 157 or section 159 of the Evidence Act or possibly

(1) 1 Ind. Cas. 376; 13 C. W. N. 71.

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under both those sections. As already explained, the writers of the entries in question were produced as witnesses at the trial; the diary was put into the hand of each of these witnesses and each of them attested the entry made by him in the diary. It is quite clear that the entries are admissible under section 157 and if the witnesses had been more carefully examined, it would perhaps have been possible to hold that the entries were admissible under section 159 also. The evidence of one of the witnesses leaves it very doubtful whether he was using the diary for the purpose of refreshing his memory. The evidence of the other witness leaves very little doubt on the subject.

It was contended by Counsel for the appellants that even if this Court held that the entries were admissible under section 157 or under section 159 of the Evidence Act it should not accept the findings of fact arrived at by the learned District Judge. Counsel for the respondents, on the other hand, urged that even if we hold that the entries were not admissible we should accept the findings of fact recorded by the learned District Judge because his findings rest not only on the entries in the *chaukidar's* diary but also upon oral and other documentary evidence. I think there can be no doubt that the learned Judge attached considerable importance to the entries in the diary. But, in my opinion, we ought to accept the learned Judge's findings though I cannot agree with him that the entries in the diary are admissible under section 32, sub-section (2) of the Evidence Act. The learned Judge accepts the evidence of the persons who were called to attest the entries in the diary. He also definitely accepts the evidence of the Police constable who was called to prove the initials of a constable which appear in the diary. It is, therefore, quite clear that the learned Judge was satisfied that the diary was not a recent fabrication and that it was in existence at the time that the entries were made. The importance of the entries lies in the fact that they are contemporaneous records of the birth and death of Ram Prasad Singh. I feel no doubt that if the learned District Judge had admitted the

entries under section 157 or under section 159 of the Evidence Act he would have accepted the respondent's case as true.

In these circumstances I think that we ought to accept the findings of the learned District Judge and, accepting them, I would dismiss the appeal with costs.

ROE, J.—I agree. I am strongly impressed by the fact that if the objection now raised had been taken before the learned Subordinate Judge and had been pressed at the time the witness Sunder Lal was giving his testimony in regard to the birth of a son to Ramudar Singh, it would have been brought out in such a form that there could have been no room for doubt, that he was himself cognizant of the birth of that son, and had at or about the time of that birth made a statement in writing regarding it. I, therefore, concur in the order proposed and would dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT. SPECIAL BENCH.

REFERENCE IN SPECIAL CIVIL APPEAL FROM
ORDER No. 174 OF 1915.

July 12, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir Asutosh
Mookerjee, Kt., Mr. Justice Chitty,
Mr. Justice Fletcher, Mr. Justice Teunon,
Mr. Justice Chaudhuri and
Mr. Justice Walmsley.

Kumar PRAFULLA KRISHNA DEB AND
OTHERS — PLAINTIFFS — APPELLANTS

versus

NOSIBANNESSA BIBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Appeal—Suit for rent not exceeding Rs. 100 in value
—Order of District Judge in execution, whether
appealable, when not relating to questions of title—
Bengal Tenancy Act (VIII B. C. of 1885), s. 153.*

There is no appeal to the High Court against an order passed in execution of a decree in a rent suit, not exceeding Rs. 100 in value, the order not deciding any question relating to title to land or some interest in land as between parties having conflicting claims thereto or to any of the matters specifically referred to in section 153 of the Bengal Tenancy Act. [p. 427, col. 2.]

Reference to a Special Bench by N. R. Chatterjea and Richardson, JJ, before whom

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the appeal came on for hearing against the order of the District Judge of Tipperah, dated the 29th January 1915, affirming that of the Munsif. at Comilla, dated the 31st August 1914.

ORDER OF REFERENCE.

The question raised in this appeal is whether a decree for rent obtained by a person who was the landlord when he obtained it, can enforce the decree against the holding in arrears under the special provisions of the Bengal Tenancy Act, after he has ceased to be the landlord.

The appellants as *ijaradars* brought a suit for arrears of rent and obtained a decree while they were *ijaradars*. Subsequent to the decree, however, they ceased to be *ijaradars* and they applied for execution of the decree as a decree for rent by attachment and sale of the holding in arrears under the provisions of the Bengal Tenancy Act.

The Court of first instance held that the decree-holders cannot avail themselves of the provisions of sections 65 and 163 of the Bengal Tenancy Act and cannot proceed against the holding in arrears, and accordingly dismissed the applicant. That order was confirmed on appeal by the District Judge, and the decree-holders have appealed to this Court.

The question involved in the case was considered by a Full Bench of this Court, and the Full Bench was of opinion that if at the time when a suit for arrears of rent is instituted and a decree made, the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of section 65 of the Bengal Tenancy Act, and executing the decree against it. [See *Khetra Pal Singh v. Kritarthamoyi Dassi* (1).]

The question has also been recently considered in the case of *Arthur Henry Forbes v. Maharaj Bahadur Singh* (2), by the Judicial Committee of the Privy Council.

The learned Pleader for the appellants contends that the Full Bench decision has

only been distinguished and not overruled by the judgment of the Privy Council as held by the Courts below, and that the general observations made in the judgment must be taken as applicable to the facts of that case.

It is true that in that case the landlord had transferred his interest before he instituted the suit for arrears of rent, and their Lordships in referring to the Full Bench decision upon which this Court relied, pointed out that in the latter case, the landlord did not part with the property, and put an end to the relationship of landlord and tenant until after the decree in his suit for rent, and that this Court had fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based upon facts different from those with which they had to deal. But after pointing out that the decision of the Full Bench was inapplicable to the facts of that case, their Lordships proceeded to consider the broad question "whether the special right created in favour of the landlord under section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached." After observing that section 65 is not happily worded, and gives no indication as to when the rent becomes a "first charge"—whether from the nature of the claim or after it has been ascertained and made the subject of a decree—and that "the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord," their Lordships considered the general scope of the Act as well as of the Chapter in which the section occurs. Referring to sections 65 and 66 of the Act their Lordships observed: "The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced," that "a reference to

(1) 33 C. 566; 10 C. W. N. 547; 3 C. L. J. 470.

(2) 23 Ind. Cas. 632; 41 C. 926; 18 C. W. N. 747; 15 M. L. T. 380; (1914) M. W. N. 397; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059 (P. C.).

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section 148, clause (h) clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord: "...To acquire the right which the section gives not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests vested in him. In other words, the right to bring the tenure or holding as the case may be to sale exists so long as the relationship of landlord and tenant exists," and came to the conclusion that "it is the existing landlord alone who can execute the decree: the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself."

It will be seen, therefore, that the principle upon which the judgment of their Lordships proceeds, *viz.*, that in order to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure or holding must have the landlord's interest vested in him: that the right to bring the tenure or holding to sale exists so long as the relationship of landlord and tenant exists, and that it is the existing landlord alone who can execute the decree, applies equally to a case where the landlord ceases to be landlord after he obtains a decree for arrears of rent, and before he seeks to enforce it against the tenure or holding, as to a case where he ceases to be landlord before he institutes his suit for rent. In either case there is no relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced.

The principle, therefore, upon which the decision of the Full Bench is based, is inconsistent with that upon which the judgment of the Judicial Committee in the case of *Arthur Henry Forbes v. Maharaj Bahadur Singh* (2) proceeds. That being so, we think that the question whether the decision of the Full Bench of this Court in the case of *Khetra Pal Singh v. Kritarthamoyi Dasi* (1), is still good law, should be decided by a Special Bench.

Babu Jogendra Nath Mukherji (with him

Babu Bankim Chandra Ghose), for the Appellants.

At the hearing before the Special Bench the Court intimated that it was unnecessary to dispose of the reference as no appeal lay to the referring Judges, and delivered the following

JUDGMENT.

SANDERSON, C. J.—This is a matter which has been referred to us by Mr. Justice N. R. Chatterjea and Mr. Justice Richardson before whom the appeal came.

In our opinion there was no right of appeal to those learned Judges for the reason that the order from which the appeal was filed was an order in a suit instituted by a landlord for the recovery of rent. The order was passed by a District Judge, and the amount claimed in the suit did not exceed Rs. 100 and the order did not decide any question which related to title to land or some interest in land as between parties having conflicting claims thereto or to any of the matters specifically referred to in section 153 of the Bengal Tenancy Act. Under these circumstances we are of opinion that no appeal lay from the order of the District Judge to the High Court. If this matter had been brought to the notice of the two learned Judges no doubt, they would not have sent this matter by way of reference to us. As a matter of fact only one of the parties was represented before them, and no doubt, through that, this point was not noticed by the two learned Judges.

The matter having been referred to us, it is now our duty in view of the opinion which we hold, to dismiss the appeal.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 38 OF 1916.
March 30, 1916.

Present:—Mr. Lindsay, J. C.

JIWAN LAL AND OTHERS—DEFENDANTS—
APPLICANTS

versus

RADHA NATH DASS—PLAINTIFF—
OPPOSITE PARTY.

*Companies Act (VII of 1913), s. 171—Jurisdiction—
Suit, maintainability of.*

JIWAN LAL v. RADHA NATH DASS.

Where, after a Bank had been ordered by a Court to be wound-up, a person sued both the voluntary and the official liquidators of the Bank for recovery of his pay for his employment by the voluntary liquidators for the period prior to the winding up order:

Held, that section 171 of the Companies Act applied to the case and that the suit could not be entertained without the leave of the Court conducting the liquidation proceedings.

Application against the order of the Additional Judge, Small Cause Court, Lucknow, dated the 22nd November 1915.

Babu Ajit Prasad, for the Applicants.

Babu Prabhat Chandra Gupta, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Small Cause Courts Act. The question which has been raised is whether the Court below had jurisdiction to entertain the plaint. The claim was made by one Radha Nath against certain persons who were both the voluntary Liquidators and Official Liquidators of a company known as the Kathiawar Ahmadabad Banking Corporation Limited. It is an admitted fact that this company is now being wound-up under the orders of the District Judge of Ahmadabad. The case for the plaintiff was that after the Bank had gone into voluntary liquidation and before steps were taken to have the company wound-up by the Court he had been engaged by the defendants Nos. 1 and 2, the voluntary liquidators, and that the period of his employment ran from the 1st of November 1913 to the 21st of March 1914 at the rate of Rs. 55 a month. The Official Liquidators were apparently joined inasmuch as at the time of the institution of this suit a winding-up order had been made by the Court. An objection was taken to the jurisdiction of the Court below based upon the provisions of section 171 of the Indian Companies Act (VII of 1913). That section lays down that when a winding-up order has been made no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. The learned Judge held that this section did not apply to the case and he was of opinion that he was vested with jurisdiction to decide the suit. In my opinion, this decision of

the Court below was wrong. There can be no doubt that at the time this suit was brought a winding-up order had been made and, therefore, the provisions of section 171 are necessarily applicable to the case. It is no answer to this plea to say that the period for which the plaintiff rendered the services in respect of which he is claiming was anterior to the date upon which the winding-up order was made for generally every claim against a company which is being wound-up relates to some period prior to the date of the making of the order. The Judge of the Court below was further of opinion that the suit was not governed by the provisions of this section because it was not a suit against a company. It was merely, he said, a suit against the voluntary liquidators. This argument cannot be accepted for it is quite clear that voluntary liquidators have no legal existence apart from the company which appointed them and it is plain beyond all doubt that the suit was being brought against the company and not against the liquidators in their individual capacity. Section 218 of the Act lays down that all costs, charges and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company. It is impossible to hold, therefore, that this suit was not a suit, against the company. The law, I think, is clear and this suit ought not to have been entertained without the leave of the Court which is conducting the liquidation proceedings. I must allow the application therefore, and discharge the decree of the Court below. I direct that the suit be dismissed with costs to the defendants. The applicants will have their costs here in revision.

Application accepted.

SIVASUBRAMANIA AIYAR v. SUBRAMANIA AIYAR.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 2062 OF 1914.

August 15, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

SIVASUBRAMANIA AIYAR—PLAINTIFF

—APPELLANT

versus

SUBRAMANIA AIYAR—DEFENDANT—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Vendor and purchaser—Direction to pay consideration to third party—Vendor's charge, whether lost—'Contract to the contrary', inference of.

A vendor of immoveable property does not lose his statutory charge for unpaid consideration by a direction to pay it to a third person. The charge is for the purchase-money and it is immaterial that it is not directly payable to the purchaser. Such a direction is not a 'contract to the contrary' within the meaning of section 55 (4) of the Transfer of Property Act. [p. 432, col. 1; p. 433, col. 1.]

Abdulla Beary v. Mammali Beary, 5 Ind. Cas. 87; 33 M. 446; 7 M. L. T. 376, *Webb v. Macpherson*, 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238; 8 Sar. P. C. J. 554 (P. C.), dissented from. *Jersey (Earl) v. Briton Ferry Floating Dock Co.*, (1869) 7 Eq. 409, considered.

Per *Seshagiri Aiyar, J.*—If the direction is communicated to the proposed payee a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. Where it is not shown that the third person looked to the vendee for payment and where the vendor has to pay the third party himself the lien attaches to the property to the extent of that payment. [p. 433, col. 1.]

There are three classes of charges known to English Law (a) equitable charge founded on contract, (b) equitable lien enforced by Courts of Equity and (c) the common law lien which enables the vendor to keep back possession until he is paid. The Legislature in India, in order to avoid these confusions, has enacted a simple rule of law in section 55 of the Transfer of Property Act and it would be introducing an element of uncertainty if the interpretation of this unambiguous section is made to depend upon the English decisions. [p. 432, col. 2; p. 433, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 417 of 1913, preferred against that of the District Munsif, Namakkal, in Original Suit No. 37 of 1913.

This second appeal coming on for hearing on the 5th April 1916, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the

arguments of Counsel for both sides and the case having stood over for consideration till the 13th April 1916, the Court (Kumaraswami Sastri and Phillips, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

The appellant sold certain lands to the respondent for Rs. 2,700-0-0 and the sale-deed recited that the amount was left with the vendee for payment to the mortgagee of other lands belonging to the appellant—the words used being “to pay off the principal and interest due to Mr. T. V. Seshagiri Aiyar on his mortgage.” This was on 7th January 1901, but the respondent paid nothing to the mortgagee until 26th November 1903, by which time the mortgage-debt amounted to Rs. 3,401-4-9. The respondent paid only Rs. 3,000 and the appellant had subsequently to discharge the balance due, and seeks to enforce his claim for Rs. 401-4-0 and interest thereon from 26th November 1903, and to charge it upon the property sold to the respondent under section 55 of the Transfer of Property Act. The lower Courts have held that no charge exists and have dismissed the suit as barred by limitation on the authority of the decision in *Abdulla Beary v. Mammali Beary* (1). Under section 55 (4) of the Transfer of Property Act a vendor has a charge upon the property sold for the balance of unpaid purchase-money in the absence of a contract to the contrary and this, as pointed out by their Lordships of the Privy Council in *Webb v. Macpherson* (2), is a statutory charge and different in origin and nature from the vendor's lien given by Courts of Equity in England to an unpaid vendor, and consequently the number of English cases cited are to be regarded as useful only for the purpose of illustration, and it was held that an express contract, or at least something from which an express contract can be implied, must be found in order to exclude the charge given by the Statute, and further that the charge is not excluded by any contract, covenant or agreement

(1) 5 Ind. Cas. 87; 33 M. 446; 7 M. L. T. 376.

(2) 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238; 8 Sar. P. C. J. 554, (P. C.).

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with respect to the purchase-money which is not inconsistent with the continuance of the charge. In *Abdulla Beary v. Mammali Beary* (1), it was held that, when the sale was in consideration of a promise to pay to a stranger, it was a mere covenant the breach of which must be compensated in damages, and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise. The case in *Webb v. Macpherson* (2) was considered, but the Judges remarked: "Notwithstanding that decision.....we may on the authority of the English cases [See also *Earl of Jersey v. Briton Ferry Floating Dock Company* (3) and *In re Brentwood Brick and Coal Company* (4)] whose weight is still left unimpaired, hold that the conveyance was in consideration of covenants to pay in the future and not for purchase-money payable to the vendor in which latter case alone the charge created by the Statute can attach." Finally the learned Judges say that upon the finding that there was no purchase-money payable to the vendor, the plaintiff had no charge. So far as we understand the judgment, the finding that, when the vendor gets in return for his conveyance a promise to pay the purchase-money or a part thereof to a third person to whom the vendor is under an obligation to pay, it is perfectly safe to say that there is a contract to the contrary negating the charge in the vendor's favour, is based on the authority of English cases which treat of a vendor's equitable lien in England, and the basis of the inference of implied contract to the contrary is that there was no purchase-money payable to the vendor, the consideration of the contract being a covenant and not purchase-money. It is, however, significant that in section 55 (4) of the Transfer of Property Act the charge is said to be in respect of the purchase-money, and not of purchase-money payable to the vendor. There would apparently be a charge whether the purchase-money was payable to the vendor or to a third party, i. e., so long as anything which can properly be called purchase-money remains unpaid. Can it be said

that money to be paid to a third party as consideration for the contract is not purchase-money? If, as we think, it is so, then under section 55 of the Transfer of Property Act the vendor has a charge for any balance unpaid, and this cannot be excluded except by a contract to the contrary. The case in *Abdulla Beary v. Mammali Beary* (1) was followed in *Siva Subramania Mudaliar v. Gnanasammanda Pandara Sannadhi* (5), where Benson and Sundara Aiyar, JJ., held that a vendor who has directed the purchase-money or a part thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third party under the agreement. No reason is given as to why such a condition as to payment should be considered to amount to a waiver of lien, and with all deference it appears to me that a vendor would usually wish to retain his statutory charge, whether the money was to be paid direct to him and then by him to a creditor, or whether it was to be paid direct by the vendee to the creditor. There being no contract between the creditor and the vendee, the vendor's liability to the creditor continues and he would naturally wish to retain in his power a right given to him to enforce the payment of the money by the vendee, and, therefore, as pointed out by the Privy Council in *Webb v. Macpherson* (2), in order to exclude the charge there must be a contract which is inconsistent with the existence of the charge and as pointed out in *Kampiah Pillai v. Hari Row* (6), the intention of the vendor must be considered in ascertaining whether the charge still exists. As against the authority of these two cases we have *Ramakrishna Ayyar v. Subrahmanya Ayyar* (7), a case very similar to the one now under discussion and there it was held that the purchaser had a charge for unpaid purchase-money. The charge was taken for granted in a similar case in *She Noandan*

(3) (1869) 7 Eq. 409.

(4) (1876) 4 Ch. D. 562; 46 L. J. Ch. 554; 36 L. T. 343; 25 W. R. 481.

(5) 10 Ind. Cas. 98; 21 M. L. J. 359; 10 M. L. T. 71.

(6) 11 Ind. Cas. 880; 21 M. L. J. 849; 10 M. L. T. 189.

(7) 29 M. 305.

SIVASUBRAMANIA AIYAR v. SUBRAMANIA AIYAR.

Lal v. Jainul Abdin (8), and it was further held that the charge was not personal to the seller, but could be transferred with the debt. In *Meghraj Vaish v. Abdullah Khan* (9), a charge for purchase-money payable to creditors was enforced not only against the purchaser but also against a transferee with notice. In *Gur Dayal Singh v. Karam Singh* (10), on the other hand it was observed that the agreement of the vendee to pay a creditor was the consideration, and that the amount payable to the creditor was not part of the purchase-money, but the case was mainly decided on the ground that the property was not in the hands of a buyer but of his transferee. In view of these conflicting decisions we think it advisable to refer to a Full Bench the following question:—

Is a contract to forego the vendor's charge for unpaid purchase-money to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is agreed to be paid by the purchaser to a third party on behalf of the vendor?

This second appeal coming on for hearing on the 3rd August 1916, on the question referred for the decision of the Full Bench, upon perusing the Order of Reference and upon hearing the arguments of Mr. A. V. Visvanatha Sastri, for Mr. G. S. Ramachandra Aiyar, for the Appellant and of Mr. N. Rajagopalachari, for the Respondent and the case having stood over for consideration till this day, the Court (Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ.) expressed the following

OPINION.

ABDUR RAHIM, OFFG. C. J.—The question referred to us must be answered in the negative. Section 55, sub-section 4, clause (b) of the Transfer of Property Act says that in the absence of a contract to the contrary, the vendor shall have a charge upon the property in the hands of the buyer for the amount of the purchase-money or any part thereof remaining unpaid. In

this case the vendor has asked the purchaser to pay the unpaid purchase-money to a certain creditor of his. It is not alleged that the creditor accepted the liability of the purchaser of the property in substitution of the vendor's own liability. But the purchaser as between himself and the vendor has accepted the obligation to pay the purchase-money according to the vendor's direction. It has been held by the Privy Council in *Webb v. Macpherson* (2), that the statutory charge created by section 55 of the Transfer of Property Act is not to be negatived except where there is a contract to the contrary, either express or arising by necessary implication. They point out that this charge is different, in its origin and nature, from the vendor's equitable lien under the English Law. They also observe that "the charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take purchase-money by instalments, nor is it excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge". It is difficult to see how a direction to the purchaser to pay the purchase-money to the vendor's creditor is inconsistent with the existence of the charge. This is the view taken by the Allahabad High Court in *Har Chand v. Kishori Singh* (11) and in *Meghraj Vaish v. Abdullah Khan* (9). It is argued, however, that in this Court the contrary view has prevailed in *Abdulla Beary v. Mammali Beary* (1) which has been followed in *Siva Subramania Mudaliar v. Gnanasammanda Pandara Sannadhi* (5). The learned Judges who decided the former case state in their judgment that, by the terms of the contract under their consideration, the purchase-money was not payable to the plaintiff and he had no right of action to recover it. That is, however, not the position involved in the present case. It has been held in *Sheo Nandan Lal v. Jainul Abdin* (8) that the vendor's charge for unpaid purchase-money is not a mere personal right but is capable of being transferred to a third person and in

(8) 29 Ind. Cas. 869; 42 C. 849; 19 C. W. N. 899.

(9) 25 Ind. Cas. 2(8); 12 A. L. J. 1034.

(10) 35 Ind. Cas. 289; 14 A. L. J. 304; 35 A. 254.

(11) 7 Ind. Cas. 639.

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Ramakrishna Ayyar v. SubrahmanĪa Ayyen (7), it has been ruled that a suit to enforce the charge is governed by twelve years' limitation. A vendor's lien or charge is not lost by the mere taking of personal security. [See *Kampiah Pillai v. Hari Row* (6) and *Mackrell v. Symmons* (12).] There is no doubt a distinction, on principle as well as authority, as pointed out by the Privy Council in *Webb v. Macpherson* (2) between a conveyance or sale in consideration of a covenant to pay a sum of money in the future, and a sale in consideration of money which the purchaser covenants to pay. Here the consideration for the sale is money, payable by the purchaser, only he has agreed with the vendor to pay it to a third person.

The learned Judges who decided *Abdulla Beary v. Mammali Beary* (1) seem to hold in one part of their judgment that where the purchase-money is to be paid to another, that is necessarily inconsistent with the vendor retaining the charge. There is nothing in section 55, sub-section 4, clause (b) to suggest that for the charge to arise or to subsist, the purchase-money must be payable to the vendor himself and not, by his direction, to a third person. If the above case holds otherwise, I am of opinion that it was wrongly decided. I may mention that the decisions in *Ramakrishna Ayyar v. SubrahmanĪa Ayyen* (7) and *Gopala Aiyar v. Ramaswami Sastrigal* (13) are in accordance with the view I have expressed.

SESHAGIRI AIYAR, J.—I agree with the conclusions of the learned Judges who made the reference that the vendor's lien is not lost by a direction to pay the purchase-money to a third person. The charge is for the purchase-money and it is immaterial that that money is not directly payable to the vendor. As was pointed out by the learned Vakil for the appellant, the Statute itself by section 55, (5) (b), enables the vendor to direct it to be paid to any person he names. The obvious inference is that the purchase-money does not lose its character by the direction to pay another.

(12) 2 White & Tudor's Leading Cases 964 (Eighth Edition 946); 15 Ves. Jun. 329; 10 R. R. 85; 33 E. R. 778.

(13) 10 Ind. Cas. 320; 22 M. L. J. 207; 10 M. L. T. 496.

The main argument of Mr. Rajagopala Chariar was that where there is a breach of the direction to pay a third person, the right of the vendor, who is compelled to pay himself, is only to sue for damages for breach of contract, and that consequently it must be deemed that there is a contract to the contrary when the direction to pay a third person was given. It cannot be contended that the lien is personal. [See *Sheo Nandan Lal v. Jainul Abdin* (8).] The right to the unpaid money as well as the charge therefor can be validly assigned to a stranger. It is not clear, therefore, why the direction to pay a third person should deprive the vendor of his charge. The decision of the Judicial Committee in *Izzat-unnisa Begam v. Kunwar Pertab Singh* (14) was strongly relied upon. In that case the auction-purchaser bought the property subject to encumbrances. The encumbrances were found to be invalid. Thereupon the judgment-debtor sued to recover the amount of the encumbrances by which the purchaser was benefited, and claimed a charge for it on the lands sold. Their Lordships held that when property is sold subject to encumbrances, the vendor whether in a private or Court-sale retains to himself only a claim to be indemnified against the encumbrancers proceeding against him. It was also held that the vendor was not entitled to the benefit of the finding that the encumbrances were invalid. The purchaser took the risk and was consequently entitled solely to the advantage. I fail to see how this pronouncement is an authority against the plain provisions of section 55 (4) (b).

The learned Judges of this Court in *Abdulla Beary v. Mammali Beary* (1) based their conclusion largely upon English decisions notwithstanding the caution of the Judicial Committee in *Webb v. Macpherson* (2), that the charge under the Transfer of Property Act "is different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor." There are three classes of charges known to English Law (a) equitable charge founded on contract;

(14) 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143 (P. C.); 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 33 I. A. 203.

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(b) equitable lien enforced by Courts of Equity; and (c) the common law lien which enables the vendor to keep back possession until he is paid: (19 Halsbury's Laws of England, paragraph 20). The Legislature in India, in order to avoid these confusions, has enacted a simple rule of law; and with all deference to the learned Judges who decided *Abdulla Beary v. Mammali Beary* (1), it seems to me it would be introducing an unnecessary element of uncertainty into this country, if the interpretation of an unambiguous section were made to depend upon English decisions. I do not, therefore, think that the English cases quoted for the respondent as showing that the rule of law in England is not as stated in *Abdulla Beary v. Mammali Beary* (1), need be considered.

Only one other argument need be noticed. It was broadly contended that after giving the direction to the purchaser to pay the money to a third person, the vendor had no right to countermand it. Of course, if the direction had been communicated to the proposed payee, a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. I do not think that *Gopala Aiyar v. Ramaswami Sastrigal* (13) lays down that an uncommunicated direction to a third party disables the vendor from claiming the money. On the other hand *Siva Subramania Madaliar v. Gnanasammanda Pandara Sannadhi* (5) is a direct authority to the contrary.

In the present case, it is not shown that the third person looked to the vendee for payment. *A fortiori*, therefore, when the vendor had to pay the third party himself, the lien attached to the property to the extent of that payment. I answer the question in the negative and hold that *Abdulla Beary v. Mammali Beary* (1) was not rightly decided.

PHILLIPS, J.—In this case, I have already expressed my views in the Order of Reference and I have heard nothing in the arguments which have now been addressed to us to induce me to change my

opinion. I agree, therefore, in answering the question in the negative.

This second appeal coming on for hearing after the expression of the opinion of the Full Bench, the Court (Seshagiri Aiyar and Phillips, JJ.) delivered on the 19th September 1916 the following

JUDGMENT.—Following the decision of the Full Bench the decrees of the Courts below must be reversed and the suit should be remanded to the Court of first instance for disposal on the merits.

Costs will abide the result.

Reference answered in the negative.

V. R. P.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3633 OF 1913.

April 27, 1916.

Present:—Mr. Justice Mullick.

Moulvi Syed MUHAMMAD RAFI Saheb—

DEFENDANT—APPELLANT

versus

Syed MUHAMMAD ASKARI—PLAINTIFF—RESPONDENT.

Mortgage—Redemption—Suit by prior mortgagee—Execution—Sale—Puisne mortgagee's right to redeem—Irregularities in execution proceedings, effect of.

Plaintiff-mortgagee obtained a decree on foot of his mortgage, and in execution thereof purchased the property in dispute, and obtained delivery of possession. Subsequently, defendant, puisne mortgagee, obtained a decree against the same property, and in execution purchased it himself, and got registration of his name in the Collectorate register. Plaintiff sued for declaration of title and confirmation of possession, or in the alternative for recovery of possession. Defendant set up a right to redeem plaintiff's mortgage, and also alleged that he was not bound by the sale in execution of the latter's decree, as his name did not appear in the execution proceedings:

Held, (1) that defendant's right to redeem continued up to the confirmation of sale in plaintiff's favour; [p 434, col. 2.]

(2) that the omission of defendant's name from proceedings in execution of plaintiff's decree did not render the sale a nullity and that the defendant was, therefore, bound by it. [p. 434, col. 2.]

Bibijan Bibi v. Sachi Bewah, 31 C. 863; 8 C. W. N. 684; *Mulkarjun v. Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216; 7 Sar. P. C. J. 739 (P. C.), relied upon.

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Khairaj Mal v. Daim, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734, distinguished.

Second appeal from a decision of the Subordinate Judge, Saran, dated the 27th June 1913, reversing that of the Munsif, Siwan, dated the 9th December 1912.

Mr. Muhammad Fakhruddin (Government Pleader), for the Appellant.

Mr. Khurshaid Husain, for the Respondent.

JUDGMENT.—The plaintiff is a prior mortgagee in respect of a four-annas four-pies share in *Mouza Nawadih*, which was the property in suit. He got a decree upon his mortgage-bond on the 31st of May 1897, brought the property to sale, purchased it himself on the 4th of July 1900, and obtained delivery of possession.

The defendant is the father of one Amir, who was a second mortgagee not only of *Nawadih*, but also of another property. Amir appears to have died after delivery of possession to the plaintiff and the defendant appears to have obtained a decree upon Amir's mortgage on the allegation that Amir was his *benamidar*. The date of the defendant's decree is the 5th of April 1902. He alleges that he executed the decree, bought the property at auction and obtained registration of his name in the Collectorate.

The plaintiff sues for declaration of title and confirmation of possession or in the alternative for recovery of possession, dating his cause of action from the 4th of February 1911, on which date he came to know that the defendant's name had been registered in the Collectorate.

The Munsif decreed the suit, but he gave the defendant permission to redeem by paying the plaintiff Rs. 81-2-3 with interest from 31st of May 1897 (the date of the plaintiff's decree) up to the 4th of July 1900 (the date of his purchase). In appeal the Subordinate Judge also decreed the suit, but he has held that the defendant was not now entitled to redeem as he had not done so before the order absolute in the plaintiff's mortgage suit. The present second appeal is preferred by the defendant.

The Munsif found that Amir was not the *benamidar* of the defendant. There was a cross-appeal on this point before the Subordinate Judge which has been dismissed without adjudication, because the learned Subordinate Judge has assumed the position most favourable to the defendant, namely, that Amir was really his *benamidar*. If Amir was not the *benamidar* of the defendant, the defendant is obviously a trespasser and has no title to the property. But upon the assumption made by the learned Subordinate Judge, let us see whether the learned Subordinate Judge is right. The learned Subordinate Judge states that the defendant was bound to redeem before the order absolute. This view, in my opinion, is wrong. The right of redemption continued till the confirmation of sale, *Bibijan Bibi v. Sachi Bewah* (1).

The defendant next contends that as no notices were issued upon him in the execution proceedings in connection with the decree on which the plaintiff bases his title, he is not bound by the sale and by the plaintiff's purchase, which passed to the plaintiff only the right, title and interest of the mortgagors and not the defendant's equity of redemption. He relies upon *Khairaj Mal v. Daim* (2). But the reason of decision in that case was that the person whose property was sold was not at all a party to the suit, and their Lordships of the Privy Council observed that a sale held in execution of a decree in a suit not properly constituted is not voidable but is a nullity. In the present case Amir was a party to the suit and the decree was obtained after service of summons upon him. The omission of his name in the execution proceedings was merely an irregularity. The sale, even though the mortgagee creditor was himself the purchaser, could not be considered a nullity. *Malkarjun v. Narhari* (3) is conclusive authority upon this point, although in that case the purchaser was a third party. The defendant's only remedy was by

(1) 31 C. 863; 8 C. W. N. 684.

(2) 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734.

(3) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; Bom. L. R. 927; 27 I. A. 216; 7 Sar. P. C. J. 739.

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an application to set aside the sale under the provisions of the Civil Procedure Code, but such an application would now be barred. He might also have brought a suit for redemption, but that also would be barred. As his right to redeem is barred, he ought not to be allowed to exercise that right as a defendant in the present suit for recovery of possession. In my opinion the plaintiff's sale being a valid sale and binding upon the defendant, the defendant has no answer to the suit. The decision of the learned Subordinate Judge decreeing the suit is correct and the appeal is dismissed with costs.

Appeal dismissed.

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 OUDH JUDICIAL COMMISSIONER'S
 COURT.

SECOND CIVIL APPEAL No. 21 OF 1915.

March 15, 1916.

Present:—Mr. Lindsay, J. C.

JAGAN NATH AND ANOTHER—PLAINTIFFS—
 APPELLANTS

versus

BINDESHWARI PRASAD, MINOR,

UNDER THE GUARDIANSHIP OF

Musammat BISHNA—DEFENDANT—

RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 31—
 Judgment of Appellate Court, contents of—Evidence,
 appreciation of.*

In writing a judgment a Court should not quote the judgment of some other Court nor refer to the opinion of that other Court as its own, but ought to give its own reasons for its finding and to set out in its judgment its appreciation of the evidence which it is bound to consider. [p. 435, col. 2; p. 436, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated the 22nd October 1914, reversing the order of the Officiating Subordinate Judge, Gonda, dated the 20th June 1914.

Mr. A. P. Sen and Babu Basudeo Lal, for the Appellants.

Babu Aditya Prasad, for the Respondent.

JUDGMENT.—(January 12th, 1916.)—The important question for decision in this case is on what date a separation took place between the members of the family to which the parties in this suit belonged. The suit

was brought by two plaintiffs Jagan Nath and Mathura against a nephew of theirs named Bindeshwari for possession of a certain share in a certain property, the allegation being that that property had been acquired by the defendant's father Ram Dhan at the time when the plaintiffs and Ram Dhan were joint in estate. This man Ram Dhan died in August 1912 and the case for the defendant was that a separation had taken place some 15 or 16 years before the suit was filed. The Court of first instance after consideration of the evidence came to the conclusion that the plaintiffs' version of the affair was correct and that the separation had not taken place till about the year 1907.

This finding has been reversed in appeal by the learned District Judge and now the plaintiffs have come up in second appeal before me. I am bound to say that the judgment of the lower Appellate Court in this case is of an unsatisfactory character. I have nothing whatever to say regarding the learned Judge's observations with regard to the weight which should be attached to the statements of the witnesses who deposed in favour of either party. He has come to the conclusion that the oral evidence in the case is worthless and I must accept that finding. There was, however, a great deal of documentary evidence in the case, no less than 24 documents being produced on behalf of the plaintiffs and four documents on behalf of the defendant, and, as the learned Judge observed, the decision of the case depended upon the weight which was to be attached to these documents. A number of pages of the learned Judge's judgment is given to the enumeration of the documents produced on either side and after this enumeration the learned Judge proceeds to say that "after carefully considering all this evidence he can only come to the conclusion that the view of the facts taken by Mr. Sloan is quite right." I object most strongly to this method of writing a judgment, in which the Judge quotes the judgment of some other Court and refers to the opinion of that other Court as his own. It was the business of the learned Judge to give his own reasons for his finding and to set out in his judgment his appre-

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ciation of the evidence which he was bound to consider. I have, as I have said, nothing before me but a mere catalogue of the documents and I am unable to ascertain from the judgment in what light these documents were regarded and what probative value they possessed in the learned Judge's eyes. The case will, therefore, go back to the learned Judge, who will come to a finding of fact after writing a proper judgment in accordance with the provisions of the Code of Civil Procedure. The documentary evidence is the only evidence which is to be considered on remand. This case is to be put again after receipt of the finding of the lower Court. The finding should be returned within one month from the date of the receipt of this order of remand.

JUDGMENT.—This case has been up before me already and by my order dated the 12th of January 1916 it was returned for a finding as to the date on which separation took place between the members of the family to which the parties to this suit belong. The learned Judge had already with reference to the oral evidence in the case remarked that it was of no value and he was, therefore, asked to come to a finding on this point after due consideration of the documentary evidence in the case. His finding is to the effect that in the year 1901 in which the property now in dispute was acquired by one Ram Dhan under a decree for pre-emption, the members of the family had separated. Consequently it follows that if this finding be accepted the plaintiffs can have no share in the property now in dispute. The finding of the learned Judge is a finding of fact and is binding here in second appeal and the result, therefore, is that the present appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS APPEAL No. 345
OF 1915.

September 13, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Krishnan.

ABDUL RAHIM SAHIB—PLAINTIFF—
APPELLANT

versus

P. GANGATHARA AIYAR—DEFENDANT—
RESPONDENT.

Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43 to 49—City Civil Court Act (Mad. Act VII of 1891), s. 12—'Suit for trying title,' meaning of—Order in ejectment by Presidency Small Cause Court—Subsequent suit in City Civil Court for declaration of permanent occupancy right Jurisdiction—Practice.

The order of a competent Court passed with jurisdiction cannot be interfered with except in the manner provided therefor by the Legislature, unless such order is vitiated by fraud. [p. 437, col. 1.]

In the case of an order passed under Chapter VII of the Presidency Small Cause Courts Act, the Legislature has provided the remedy by suit under sections 46 to 49 of the Act and except in the manner therein provided, no suit will lie in any Court to supersede such order. If possession has been delivered, section 46 (1) will apply and the resulting suit, which would necessarily be one for trying title must be filed in the High Court under section 49. The expression "suit for trying title" in section 49, clause (1), of the Act includes a suit in which any title, which the party aggrieved by the ejectment order alleges, whether as a full owner or as a holder of a limited right, has to be tried and decided. In both classes of suits, the High Court is the forum prescribed and the City Civil Court is substituted for the High Court by section 12 of the Madras City Civil Courts Act only under section 31 (a) of the Presidency Small Cause Courts Act dealing with execution against immovables, but not under any other section. [p. 437, cols. 1 & 2.]

Defendant applied for and obtained under section 41 of the Presidency Small Cause Courts Act an order to eject plaintiff from a piece of land upon which he had constructed a building. Plaintiff set up a right of permanent occupancy. The ejectment order was not carried into effect. Meanwhile the plaintiff filed a suit in the City Civil Court, Madras, to declare his right of permanent occupancy and got the proceedings stayed. The City Civil Judge held that he had no jurisdiction to set aside an order passed by the Presidency Court of Small Causes and returned the plaint for presentation to the proper Court.

Held, that the order was right. [p. 437, col. 2.]

Practice cannot confer jurisdiction, however long-continued it may be. [p. 438, col. 1.]

Appeal against the order of the City Civil Court, Madras, in Original Suit No. 262 of 1915.

Mr. K. Duraiswami Aiyangar, for the Appellant.

Mr. T. Varadappa Naicker, for the Respondent.

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JUDGMENT.

KRISHNAN, J.—This is an appeal against an order of the City Civil Court, Madras, returning for presentation to the proper Court the plaint in Original Suit No. 262 of 1915, filed in that Court by the plaintiff-appellant. The defendant had applied under section 41 of the Presidency Small Cause Courts Act for an order of ejectment against the plaintiff and had obtained an order under section 43 of that Act. The plaintiff in his plaint alleges that he has a permanent right of occupancy on the land and is not liable to be ejected under the order of the Small Cause Court, and prays for a declaration of that right and for an injunction restraining defendant from executing the order of ejectment or in the alternative for a decree directing defendant to eject plaintiff only on payment of Rs. 1,500, the value of the superstructures erected by him on the land. At the time he filed his suit the ejectment order had not been executed and as he obtained a temporary injunction from the City Civil Court, the execution of that order was stopped. As the learned City Civil Judge has observed, the suit was evidently intended to have the order of the Small Cause Court superseded by the decree prayed for.

When a Court is given jurisdiction by Legislature to do certain acts or pass decrees or orders in certain matters, its action cannot be set aside by any other Court unless the Legislature itself authorises it. Orders and decrees of Courts are usually liable to be set aside by superior Courts in appeal or in revision, where powers to do so are conferred on those Courts by the Legislature. In some cases certain orders are declared to be subject to a right of suit. Cf. section 73 and Order XXI, rule 103, of the Civil Procedure Code, 1908. The order of a competent Court passed with jurisdiction cannot be interfered with except in the manner provided therefor by Legislature, unless, of course, such order is vitiated by fraud.

In the case of an order passed under Chapter VII of the Presidency Small Cause Courts Act the Legislature has provided the remedy by suit under sections 46 to 49 of the Act; and except in the manner therein

provided, no suit will lie in any Court to supersede such an order. Section 46 declares in clause 1 that a person obtaining possession of any property under the chapter, when he was not entitled to such possession at the time he applied for it, shall not be protected from a suit by any person aggrieved thereby and in clause 2 that the application for an order for possession by such a person even though he had not obtained possession is itself an act of trespass. Section 47 shows that a suit for compensation for such trespass is to be filed in the High Court; it also provides how proceedings in the Small Cause Court may be stayed pending such suit, whether the ejectment order had been passed or not, provided it had not been executed and possession given. If possession had been delivered, section 46, clause (1), will apply and the resulting suit which would necessarily be one "for trying the title" must be filed in the High Court under section 49. The expression "suit for trying the title to the property" includes, as I understand it, a suit in which any title which the party aggrieved by the ejectment order alleges, whether as a full owner or as a holder of a limited right, has to be tried and decided.

In both the classes of suits provided for under sections 47 and 49, the High Court is the forum prescribed and no other Court including the City Civil Court has, therefore, jurisdiction to entertain or try such suits. The City Civil Court is substituted for the High Court by section 12 of the City Civil Court Act only under section 31 (a) of the Presidency Small Cause Courts Act dealing with execution against immoveables, but not under any other section.

From the allegations in the plaint it is clear that plaintiff's case was one falling under clause (2) of section 46 and his remedy was a suit in the High Court. The application for a temporary injunction made to the City Civil Court and the suit in that Court were both not maintainable.

It was suggested that the present plaint might be treated as one for a bare declaration of permanent occupancy right having no reference to the ejectment order and thus cognisable by the City Civil Court. It is sufficient to say that that is not the nature of the plaint; nor will a suit for

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such a declaration lie under section 42 of the Specific Relief Act in the circumstances, as the plaintiff was a party to the ejectment order.

It is urged that suits of the kind filed by the plaintiff have, as a matter of long practice, been in the City Civil Court and tried and decided by it. It is to be regretted that this question of jurisdiction was not raised before or considered by the City Civil Judge; but practice cannot confer jurisdiction, however long-continued it may be. I, therefore, dismiss the appeal against order with costs.

OLDFIELD, J.—I concur.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 76 OF 1914.

July 19, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

Pandit RAJENDRA NARAIN—DEFENDANT

—APPELLANT

versus

THE DEPUTY COMMISSIONER,
BAHRAICH, FOR NANPARA ESTATE

—PLAINTIFF—RESPONDENT.

Mortgages, consolidation of—Redemption, postponement of—Clog on equity of redemption.

Where a subsequent mortgage-deed does not create any charge on the property previously mortgaged but merely postpones the redemption of the previous mortgage till the redemption of the subsequent mortgage, such covenant as to postponement of redemption does not amount to a contract of consolidation so as to render one transaction irredeemable without the redemption of the other, and may amount to an unreasonable clog on the equity of redemption.

Gaya Din Singh v. Har Karan Singh, 22 Ind. Cas. 132; 16 O. C. 267, *Ganga Ram v. Kirtarth Rai*, 9 Ind. Cas. 319; 33 A. 393; 8 A. L. J. 158, *Rajmal Motiram v. Shivaji Anandray*, 27 B. 154; 4 Bom. L. R. 966; *Durga Singh v. Muhammad Raza Husain Khan*, 25 Ind. Cas. 912; 17 O. C. 313, referred to.

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 24th November 1913, modifying the order of the Munsif, Bahraich, dated the 31st March 1913.

Babu Rudra Dat Sinha, for the Appellant.

Mr. H. S. Gupta and Babu Nagendra Nath Ghoshal, for the Respondent,

JUDGMENT.—This was a suit for redemption of a mortgage. The subsequent deeds set up in defence do not create any charge on the *zemin-dari* property previously mortgaged. They merely postpone the redemption of the previous mortgage till 1333 *Fasli*. The evidence advances made on the security of a house and as pointed out in *Gaya Din Singh v. Har Karan Singh* (1) and *Ganga Ram v. Kirtarth Rai* (2), a covenant postponing redemption till another deed is redeemed does not amount to a contract of consolidation, so as to render one transaction irredeemable without the redemption of the other. The postponement of the period of redemption in this case was, moreover, according to the findings of the Courts below, secured by undue influence. Such postponement operates, having regard to the severe terms of the subsequent advances, the amount due on which has run up to a very high figure, as an unreasonable clog on the equity of redemption without any corresponding advantage to the debtor and cannot be enforced. *Rajmal Motiram v. Shivaji Anandray* (3) and *Durga Singh v. Muhammad Raza Husain Khan* (4). The onus was rightly thrown on the defendant-appellant. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

- (1) 22 Ind. Cas. 132; 16 O. C. 267.
- (2) 9 Ind. Cas. 319; 33 A. 393; 8 A. L. J. 158.
- (3) 27 B. 154; 4 Bom. L. R. 966.
- (4) 25 Ind. Cas. 912; 17 O. C. 313.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2675 OF 1913.

May 8, 1916.

Present:—Mr. Justice Mullick.

KALRU GARHI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

JANGLI CHOUDHRI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Non-occupancy raiyat's interest, whether heritable—Custom.

In the absence of custom a non-occupancy raiyat's interest is heritable. [p. 439, col. 1.]

Midnapore Zamindari Company v. Hrishikesh Ghosh, 25 Ind. Cas. 562; 19 C. L. J. 505; 18 C. W. N. 828; 41 C. 1108, followed.

BALKISHEN v. RAJ BAHADUR.

Second appeal from a decision of the District Judge, Bhagalpur, dated the 12th May 1913, affirming that of the Subordinate Judge, Bhagalpur, dated the 8th June 1913.

Mr. *Susil Madhab Mullick* for Mr. *Sailendra Nath Palit*, for the Appellants.

JUDGMENT.—The first party plaintiffs are the landlords; the second party plaintiffs are lessees from the first party. The first party defendants are the heirs of one Masudan who was a non-occupancy *raiyat* in respect of the lands in suit.

The second party defendants are transferees of a portion of the non-occupancy holding from the first party.

The plaintiffs sued for ejectment, on the ground that Masudan having died and the holding not being heritable they were entitled to re-enter. Both the Courts below decreed the suit in full with mesne profits against all the defendants. The present second appeal is preferred by the first party defendants only.

The Courts below have proceeded on the view of the law that was supposed to be the correct view before the case of the *Midnapore Zemindari Company v. Hrishikesh Ghosh* (1), but the Full Bench in that case decided that in the absence of custom a non-occupancy *raiyat's* interest was heritable. The plaintiffs are bound by this decision which, although passed subsequent to the decision of the learned District Judge against which the present second appeal has been preferred, states the law as it has always been since the passing of the Bengal Tenancy Act. The plaintiffs, therefore, have no cause of action and the whole suit must be dismissed with costs in both the lower Courts.

The second appeal before me is allowed without costs, as there is no appearance for the respondents.

Appeal allowed.

(1) 25 Ind. Cas. 562; 19 C. L. J. 505; 18 C. W. N. 828; 41 C. 1108.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 164 of 1914.

August 20, 1915.

Present:—Mr. Lindsay, J. C.

BALKISHEN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RAJ BAHADUR AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Appeal, second—Finding of fact—Circumstantial evidence.

A finding of fact, although based merely upon circumstantial evidence, cannot be questioned in second appeal, unless it is vitiated by some illegality or irregularity. [p. 439, col. 2; p. 440, col. 1.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 21st March 1914, modifying the order of the Munsif, Kaisarganj, dated the 30th June 1913.

Babu *Ishwar Prasad*, for the Appellants.

Mr. A. P. Sen, for the Respondents.

JUDGMENT.—The only question for decision in this appeal is, whether or not the finding of the Court below to the effect that a certain *patti* in which were situated two Nos. 698 and 699 old (present No. 1023) had been divided between the parties by a private partition, is supported by evidence. The case for the plaintiffs was that there had been a private partition of this *patti* and that they were entitled to exclusive possession of these two plots. The defence, on the other hand, was that the *patti* had never been divided and that the property was held by the defendants and the plaintiffs in coparcenary. The Court of first instance found against the plaintiffs on the question of partition. It was of opinion that no private partition had been proved. The result was that the plaintiffs' suit with regard to these two numbers was dismissed. The plaintiffs appealed and the appeal was disposed of by the Subordinate Judge of Bahraich. He differed from the conclusion reached by the Munsif and held that there was evidence to show that a private partition had taken place. Having come to this conclusion he reversed the decree of the Court of first instance and gave the plaintiffs a decree for these two numbers.

The finding of fact arrived at by the learned Subordinate Judge is bind.

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ing upon me, unless the appellants' learned Counsel can show that it is vitiated by reason of some irregularity or illegality. The case which has been put forward before me is that there was no legal evidence on the record to support the Subordinate Judge's finding. The Subordinate Judge went into the evidence at a considerable length and analysed all the evidence, oral, documentary and circumstantial, which was put before him. He admits in his judgment that there is no oral evidence to support the case of partition except the statements of the plaintiffs' witness No. 6 and one of the plaintiffs himself. He did not think that the plaintiffs' evidence was of any particular value. In this connection all he could say was that he had heard about the partition having taken place and as regards the plaintiffs' witness No. 6 his statement was contradictory of the statement made by the plaintiffs. Then as regards the documentary evidence the learned Subordinate Judge has put it on the record that the revenue papers do not appear to have recognised the private partition alleged by the plaintiffs, and in this connection he refers to the entries in the revenue papers for certain years. But on the strength of certain circumstantial evidence which was before him he came to the conclusion that, notwithstanding that the oral evidence of the plaintiffs on the question of partition was vague and that the documents produced by the plaintiffs did not establish the partition at all, there must have been some sort of private partition between the co-sharers. He referred in the first place to the fact that in the year 1911 three of these defendants brought a case in the Revenue Court for the resumption of a *muafi* plot No. 570. A copy of the plaint filed in that case is on the record and it shows that two of these defendants Kuar Bahadur and Jawala Prasad alleged in that application that the plot No. 570 had been granted many years ago by way of *muafi* to the defendants. They stated that they desired to resume this plot and made a prayer accordingly. It was also brought to the notice of the Subordinate Judge that some of these defendants had been

dealing with plots situated in this *patti* by selling them, and in these circumstances he naturally asked himself the question how such transactions were possible if no partition had taken place as was the story of the defendants. He thought that this circumstantial evidence was very strong to show that partition had taken place, although it had not been recognised by the Revenue Authority and although there were no entries in respect of it to be found in the village papers. I do not think it is possible to contend, after what I have stated, that there is legal evidence on the record to support the finding of the Court below that the *patti* which is in dispute had been privately partitioned. It is argued that there is nothing to show that these particular plots were allotted to the plaintiffs, assuming that any private partition had taken place. However, the way I look at the matter is this. The Court had before it two stories, one of the plaintiffs in which they had said that a private partition had taken place in the course of which these plots were assigned to them, and the other of the defendants who denied that any partition had been effected and who affirmed that the plots were still held in co-parcenary. The circumstantial evidence led the Subordinate Judge to the conclusion that the defendants' story was untrue and that the plaintiffs' story must be true, and this being so it seems to me that the claim of the plaintiffs to these plots in dispute was rightly decreed. I can see no reason for interference with the judgment of the Court below. This appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 2777 of 1914.
May 5, 1916.
Present:—Mr. Justice Mullick.
RAM LOCHAN KOER—APPELLANT
versus
JAGERNATH MISSEK—RESPONDENT.
Bengal Estates Partition Act (VIII B. C. of 1876)—

RAMLOCHAN KOER v. JAGERNATH MISSEK.

Partition of holding—Consent of tenant—Abandonment, what constitutes.

There is nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies without the consent of the tenants and on general principle there is no reason why such a partition should not be made.

There is in this respect no difference between a partition under the Estates Partition Act and a partition made by a Civil Court.

Protab Chandra Das v. Komala Kanta Shaha, 10 C. W. N. 818, relied on.

Where a holding has been split up, a sale by the tenant of an entire plot that has been separated constitutes abandonment which entitles the landlord to re-enter.

Second appeal from a decision of the District Judge, Darbhanga, dated the 18th June 1914, confirming that of the Munsif, 1st Court, Madhubani, dated the 17th January 1914.

Mr. *Lachmi Narayan Sinha*, for the Appellant.

Mr. *Tribhuban Nath Sakay*, for the Respondent.

JUDGMENT.—The second party defendants were the joint holders of a holding measuring 2 *bighas* odd situated within the estate of the plaintiff and his co-sharers, the defendants 3rd party.

By a Civil Court partition the estate was broken up. There was a further partition by private arrangement with the result that the holding was divided into two portions one of which, measuring 17 *cottas* and 8 *dhurs*, fell into the *patti* of the plaintiff. The second party defendants subsequently sold this plot of 17 *cottas* and 8 *dhurs* to the defendant first party. The plaintiff thereupon sued the defendant first party (the purchaser) for ejectment on the ground that there had been a complete abandonment of the entire holding by the registered tenant. There was a plea that the registered tenant had re-purchased the land and re-entered into possession, but that case has been disbelieved, and the only point taken before me now in this second appeal preferred by the defendant second party is, that as there has been an abandonment of only a portion of the holding, the landlord cannot re-enter.

It is contended that the partition among the landlords cannot affect the registered tenants without their consent and, that although in respect of a partition under

the Estates Partition Act a tenancy may be split up into various separate tenancies without the consent of the tenant, yet such a result does not follow upon a Civil Court partition without the consent of the tenant. In *Protab Chandra Das v. Kamala Kanta Shaha*(1) it was held that there was nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies and on general principle the Court did not see any reason why such a partition could not be made. I see no difference in the matter of the partition of a tenancy between a partition under the Estates Partition Act and a partition made by a Civil Court.

So far as the landlord and tenant are concerned their position in the matter is the same in both partitions. If, therefore, the Civil Court assigned to the plaintiff a holding of 17 *cottas* and 8 *dhurs* at a certain rental as being his exclusive property the defendant second party would, in my opinion, be bound by that apportionment. But in this case there is a further reason why the partition should be upheld. It has been found by the learned Munsif, and affirmed by the learned District Judge by implication, that the second party defendants have accepted the splitting up of the whole tenancy by payment of rent according to the Civil Court's apportionment. That being so the consent of the tenant is established.

It is not open to the tenant in second appeal to say that he did not consent to the partition of the holding. Therefore, the learned District Judge is right in finding that an entire holding was sold by the second party defendants and that such sale constitutes abandonment.

The decree for ejectment, therefore, of the transferee first party defendant is correct. The appeal is dismissed with costs.

Appeal dismissed.

(1) 10 C. W. N. 818.

MANOHAR LAL v. SAKINA BEGAM.

OUDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL No. 49 OF 1913.

March 22, 1916.

Present:—Mr Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

Babu MANOHAR LAL—PLAINTIFF—
APPELLANT

versus

Musammat SAKINA BEGAM, MINOR,

UNDER THE GUARDIANSHIP OF

Saiyid ZAKIR MEHD¹, AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Principal and agent—Agent, authority of, scope of—
Presumption—Waiver—Construction of document—
Mortgage-deed, interpretation of—Interest, covenant
to pay, on default of payment of instalment.*

Where an agent has authority to receive money on behalf of his principal, it may be presumed that he has authority to do every lawful thing which is necessary in connection with that act, *e g.*, accepting money in payment of a particular instalment or waiving the default made in paying an overdue instalment. [p. 443, col. 2.]

Bank of Bengal v. Ramanathan Chetty, 32 Ind. Cas. 419; 20 C. W. N. 329; 30 M. L. J. 232; 3 L. W. 210; 19 M. L. T. 176; (1916) 1 M. W. N. 150; 14 A. L. J. 217; 23 C. L. J. 348; 18 Bom. L. R. 387; 9 Bur. L. T. 1; 43 C. 527, referred to.

Where under the terms of a mortgage-deed the mortgage-money was payable by certain specified instalments and the mortgagee was empowered to recover the entire money due to him with a certain rate of interest thereon if three instalments remained unpaid on the dates fixed therefor:

Held, that both the time and the amount formed the essence of the contract, and that if the payments of three instalments, consecutive or otherwise, were deficient in amount or were made beyond time, such payments would be ineffective to prevent the mortgagee from enforcing the covenant, unless it was shown that he had waived the defaults. [p. 443, col. 1.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 7th February 1913.

Syed Nabi Ullah and Babu Basudeo Lal, for the Appellant.

Syed Wazir Hasan and Syed Shahenshah Husain Rizwi, for the Respondents.

JUDGMENT.—These are cross-appeals arising out of a suit brought for the recovery of money, due on a mortgage effected by Saiyid Ali in favour of the plaintiff on the 1st February 1901. The defendants are the heirs or the representatives-in-interest of the deceased mortgagor. The mortgage-deed was executed in lieu of Rs. 25,000 to pay up the purchase-money due by the

mortgagor to the plaintiff on account of the sale by the latter of the village Bhakrauli and of his rights under a decree dated the 15th of June 1895; and the material covenants in the mortgage-deed were that the mortgagor shall pay the said sum by the instalments specified in the deed of mortgage, that if any instalment was not paid on the date fixed, the mortgagee shall have power to realize the same, and that if three of the instalments, specified therein, remained unpaid on the dates fixed therefor, the mortgagee shall have power without any regard to the instalments fixed to realize the entire sum due to him with interest thereon at the rate of 1 per cent. per mensem and the costs of the suit from the mortgagor. The village Bhakrauli purchased by the mortgagor and another village Kharai, belonging to him from before, were hypothecated in the said deed as security for the payment of the aforesaid instalments. The allegation of the plaintiff was that the mortgagor paid Rs. 18,500 between the 14th May 1901 and 17th July 1910, but none of the instalments was paid on the due date and that, therefore, the plaintiff became entitled to recover the entire amount due to him with interest thereon at 1 per cent. per mensem on the 1st May 1901. The date last mentioned is obviously incorrect, because if none of the instalments was paid on the due date, the cause of action, according to the plaintiff's account, must have accrued much earlier, but if as is now admitted the payment of the first five instalments was accepted, though made after the due dates, by the plaintiff, the cause of action could not have accrued earlier than the 1st May 1907. The defence was that the plaintiff had accepted the payment of the first ten instalments and waived the defaults due to the delays in paying the same, that he accepted Rs. 1,500 in part payment of the 11th instalment, and that the plaintiff had no cause of action to sue for the entire money.

There is no dispute between the parties either as to the dates or as to the amounts of the payments. The question is only one as to waiver and the right interpretation of the covenant entitling the plaintiff to call in the entire money due on the mort-

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gage. The learned Subordinate Judge found that the plaintiff accepted the first seven instalments and condoned the delays in the payment of the same, and that there was no such waiver in respect of the subsequent instalments. He, therefore, gave a decree to the plaintiff for the recovery of the balance due on the mortgage.

The learned Counsel, who appears for the plaintiff, has argued that the defaults in the payment of the sixth and seventh instalments were not waived by the plaintiff, and that the plaintiff was consequently entitled to claim interest on the mortgage-money from the 1st May 1906 and at all events from the 1st May 1907. On behalf of the contesting defendants it is urged that no right to interest has accrued to the plaintiff. There were other pleas taken by the parties in their memoranda of appeal, but they were expressly abandoned at the hearing.

We agree with the learned Subordinate Judge that the payments of the sixth and seventh instalments were accepted by the plaintiff, and that the delays in the payment thereof were condoned by him. It is conceded on his behalf that the delays in the payment of the first five instalments were waived by him when he granted a registered receipt to Saiyid Ali in satisfaction thereof on the 7th November 1904 (Exhibit A1). The sixth instalment was for Rs. 2,000 and was payable in April 1905. The plaintiff admittedly received that sum from defendant No. 3 on the 18th July 1905 and gave a receipt signed by him in evidence thereof at Fyzabad. The seventh instalment was payable in April 1906, and it is not disputed that defendant No. 3 paid that sum to Mangli Prasad, the general agent of the plaintiff, on the 7th June 1906. On that date Mangli Prasad took back the receipt for Rs. 2,000 granted by the plaintiff to defendant No. 3 on the 18th July 1905, and executed a consolidated registered receipt for Rs. 4,000, acknowledging the receipt of the sixth and seventh instalments on the dates specified therein, and delivered the same to defendant No. 3 (Exhibit A2). The plaintiff alleges that his agent Mangli Prasad had authority to give a receipt for the money received but he had no authority to accept the money in payment of a par-

ticular instalment or to waive the default but he admits having received the sum of Rs. 2,000 paid by defendant No. 3 from Mangli Prasad and has not produced the receipt for Rs. 2,000 granted by him on the 18th July 1905, which, according to the registration endorsement on the consolidated receipt (Exhibit A2), was returned to Mangli Prasad. It was summoned from him. The non-production of the receipt raises a presumption against the plaintiff, and there are sufficient circumstances to indicate that the plaintiff knew that a consolidated receipt for Rs. 4,000 had been granted and that nothing more than the amount of the overdue instalment was then intended to be claimed. The plaintiff acknowledges that he was told by Mangli Prasad that defendant No. 3 had got the receipt for the money paid by him registered; and in a post card, sent by Mangli Prasad to defendant No. 3 on the 6th August 1906 (Exhibit A 29), there is a significant statement by Mangli Prasad to the effect that his master was not willing to allow the costs of the registration of the receipt to be deducted and had directed him to recover the same from him. The power-of-attorney executed by the plaintiff in favour of Mangli Prasad has not been produced, but from the admitted fact that Mangli Prasad had authority to receive the money, it might be presumed that he had authority to do every lawful thing which was necessary in connection with that act. On previous occasions, moneys had been realized from time to time on account of overdue instalments, and every such payment was accepted in full satisfaction of the instalment on account of which it was made. In *Bank of Bengal v. Ramanathan Chetty* (1), where an agent of a firm carrying on a general money-lending business, who had express authority "to borrow money from any Bank or Banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons," guaranteed a loan made to a constituent of the firm by a third party, it was held by their Lordships of

(1) 32 Ind. Cas. 419; 20 C. W. N. 329; 30 M. L. J. 232; 3 L. W. 20; 19 M. L. T. 176; (1916) 1 M. W. N. 150; 14 A. L. J. 217; 23 C. L. J. 348; 18 Bom. L. R. 387; 9 Bur. L. T. 1, 43 C. 527.

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the Privy Council that the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to its constituents. We are satisfied in this case, both from the circumstances and the previous course of dealings, that the agent did not exceed his authority in accepting the payment of the instalment on behalf of his master and that the plaintiff acquiesced in what his agent had done when he received the money and objected only to the defrayal of the cost of registration by him.

We also agree with the construction put by the learned Subordinate Judge on the covenant contained in the mortgage-deed entitling the plaintiff to recover the money due on the mortgage with interest thereon at 1 per cent. per mensem, if three instalments remained unpaid on the dates specified therefor. Both the time and the amount formed the essence of the contract, and if the payments of three instalments, consecutive or otherwise, were deficient in amount or were made beyond time, such payments would be ineffective to prevent the plaintiff from enforcing the covenant, unless there was evidence to show that the defaults were waived. There is no such evidence in this case in regard to the instalments which fell due after April 1907. The contesting defendants sent thereafter Rs. 4,000 on the 5th May 1908, Rs. 2,000 on the 14th June 1910 and Rs. 1,500 on the 17th July 1910, all in currency notes, by registered post, to the plaintiff, but the plaintiff, while receiving the money, did not accept those payments towards any particular instalment.

The appeal and the cross-appeal, therefore, fail and are dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 329 AND 330 OF 1914.

August 7, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

THEVARAYA REDDY AND OTHERS—
DEFENDANTS NOS. 1 TO 6—APPELLANTS IN L. P. A. No. 329 AND RESPONDENTS IN L.P.A. No. 330

versus

VENKATACHALA PANDITHAN

AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 7 TO 9 & 11 AND PLAINTIFF'S ASSIGNEE—

RESPONDENTS IN L. P. A. No. 329 AND
APPELLANTS IN L. P. A. No. 330.

*Transfer of Property Act (IV of 1892), ss. 83, 84—
Deposit of mortgage amount in Court—Withdrawal,
while litigation pending as to rightful heirs of deceased
mortgagee, effect of—Interest, cessation of, on deposit
after suit—Civil Procedure Code (Act V of 1908), O.
XXII, r. 3—Deposit and tender, distinction between.*

A deposit made in Court under section 83 of the Transfer of Property Act, to be effective, must remain in Court until the mortgagee or his successor-in-interest has been enabled or is in a position to draw it. [p. 445, col. 2; p. 446, col. 2; p. 447, col. 1.]

Where the mortgagee is dead, and the mortgagor, not being sure of the person entitled to the mortgage money, deposits it in Court but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money, and is, therefore, not entitled to cessation of interest. [p. 445, col. 2; p. 446, col. 2; p. 447, cols. 1 & 2.]

Krishnaswami Chettyar v. Thippa Ramaswami Chettyar, 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89, referred to.

Where the amount is paid after the institution of a suit by the mortgagee, the amount deposited should be deducted from the principal and interest allowed only for the balance. [p. 445, col. 2; p. 446, cols. 1 & 2; p. 447, col. 2.]

Per Seshagiri Aiyar, J.—There is no analogy between tender and deposit. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person. In the case of a tender the person to whom it is made can have no claim for interest and no grievance if it is refused. A deposit, on the other hand, is ordinarily made when the debtor is in doubt as to who is the rightful claimant, and leaves it to the Court to hand the money over to the true owner. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined. The term 'deposit' implies that the money is in the hands of the Court until it is paid to the creditor. [p. 446, col. 1.]

Per Phillips, J. - Obiter—When notice of the deposit is sent to the mortgagee through Court, and he refuses to accept it, it amounts to a tender through Court and interest ceases to run just as in the case when a mortgagee refuses a tender out of Court.

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There is no provision in the Transfer of Property Act, whereby interest is again to run if the deposit is withdrawn after the mortgagee has refused to receive it. The cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered, and this penalty is not remitted because he changes his mind when it is too late. [p. 447, col. 1.]

The principle of the decision in *Krishnaswami Chettyar v. Thippa Ramaswami Chettyar*, 8 Ind. Cas. 763, 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89, disapproved.

Appeals, under clause 15 of the Letters Patent, against the judgments of Mr. Justice Ayling and Mr. Justice Tyabji, respectively, reported as 25 Ind. Cas. 96, in Second Appeal No. 881 of 1913, and the memorandum of cross-objections therein, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge, Trichinopoly, in Appeal Suit No. 108 of 1912, on the file of the District Court of Trichinopoly, transferred to the file of the Court of the Temporary Subordinate Judge, Trichinopoly (Original Suit No. 414 of 1910, on the file of the Court of the District Munsif of Kulitalai).

Mr. K. R. Rangasami Aiyangar for Mr. C. V. Ananthakrishna Aiyar, for the Appellants.

Mr. T. K. Venkatarama Sastriar, for the Respondents.

JUDGMENT.

IN APPEAL NO. 329 OF 1914.

ABDUR RAHIM, OFFG. C. J.—The only question in this appeal is whether the appellants, having deposited the money due from them on the mortgage under section 83 of the Transfer of Property Act, can claim exemption from interest under section 84 although they withdrew the amount afterwards. The money was left in Court for a year or more but the title of the respondents as legal representatives of the mortgagee was then in dispute. The suit which settled their right was not decided until after the appellants had withdrawn the money. Section 84 says: "When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the

tender, or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be". The Legislature has drawn a distinction between the case of a tender and a deposit as to the date from which interest shall cease to run. And this apparently for good reasons—a tender in order to be valid must be made to the person entitled to receive the money. But when only a deposit is made the mortgagor must do something more. He must do all that has to be done in order to enable the person entitled to the money to receive it. Where the mortgagee, as in this case, is dead and the mortgagor, not being sure as to who are the persons entitled to succession and thus unable to make a valid tender, deposits the money in Court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such cases the mortgagor cannot claim the benefit of section 84, for the money having been withdrawn before the persons entitled to it had established their right, it must be taken that so far as they are concerned the deposit had never been made. The deposit in order to be effective under section 84 must remain in Court until the mortgagee or his successor-in-interest has been enabled or is in a position to draw it. This is the interpretation put upon section 84 in *Krishnaswami Chettyar v. Thippa Ramaswami Chettyar* (1), which has been followed by Ayling, J. I may mention that we are not concerned here with the question whether that case was rightly decided upon its facts, for it is possible that the mortgagor there, had in addition to the deposit, also made a valid tender.

It appears, however, that after the suit was instituted the mortgagor again deposited the amount in Court. In calculating the interest from that date the amount deposited should have been deducted from the principal, and interest allowed only

(1) 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89.

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on the balance. To that extent, the decree will be varied; otherwise the appeals will be dismissed but in the circumstances of the case without costs. The respondent will be entitled to interest at 6 per cent. on the amount decreed from the date of the decree of this Court. Time for payment will be six months.

IN APPEAL NO. 330 OF 1915.

This appeal is dismissed.

SESHAGIRI AIYAR, J.—I entirely agree with the learned Officiating Chief Justice. The main argument of Mr. Rangaswami Aiyangar was that as no money is left outstanding in the case of a tender, the Legislature did not intend that in a deposit the money should be continuously in Court till drawn out. There is no analogy between the two. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person. In the case of the person to whom the tender is made, the latter can have no claim for interest and can have no grievance if it is refused, as he had the option and right of claiming payment at once and has not availed himself of them. On the other hand, a deposit is ordinarily made when the debtor is in doubt, as to who is the rightful claimant. He wants to absolve himself from future liability by leaving it to the Court to hand the money over to the true owner. Nobody may be in a position to apply for payment immediately as in the case of a tender. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined. I am also of opinion that the term 'deposit' implies that the money is in the hands of the Court until it is paid to the creditor. It may not infrequently happen that between the deposit originally made and the time when the true owner is ascertained the debtor has become insolvent or incapable of meeting his obligations. This would be a good reason for expecting that the money must be in Court. Further, if the debtor wants to escape liability for payment of interest, I do not see why he should not allow the money to be in Court. The fact

that in a tender, there may be advantageous circumstances is no ground for departing from the obvious intent of the Legislature in the case of deposits.

Stress was laid on the clause "has done all that has to be done by him to enable the mortgagee to take such amount out of Court". If the money is not in Court's deposit, I do not think it can be said that the requirements of this clause are satisfied by an original deposit and its withdrawal. If the money is not in Court, as soon as the rights of the parties have been pronounced upon, an application will have to be made for depositing the money again in Court. A further application to draw it out will have to follow. It seems to me that the debtor will not be doing all he can if he has withdrawn the money.

I am of opinion that *Krishnaswami Chettyar v. Thippa Ramaswami Chettyar* (1) was rightly decided. Whether on the facts the judgment might have been different is not what we have to consider. I consider that the principles enunciated are sound.

It was sought to be argued that every deposit implies an antecedent tender and as in the present case, notice of deposit was given to all the possible claimants, the deposit must be regarded as a legal tender. It is clear that the right to the money was disputed and, therefore, none of the creditors was in a position to claim the money, and that is the essence of tender. I see no force in this contention.

I agree that under Order XXIV, rule 3, of the Code of Civil Procedure, interest was not allowable upon the sum paid into Court after the institution of the suit. I agree with the order as to costs.

PHILLIPS, J.—I agree with Ayling, J., that this appeal should be dismissed, but unlike him I am not prepared to agree with the ruling in *Krishnaswami Chettyar v. Thippa Ramaswami Chettyar* (1), for in that case a mortgagor deposited money in Court and sent notice to the mortgagee, who refused to accept the amount. This in effect amounted to a tender through Court and section 84 of the Transfer of Property Act lays down very clearly that when the tender has been made, interest ceases to run. It also ceases to run when the mortgage money has been

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deposited in Court and the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of Court. When, therefore, the mortgagee has been in a position to draw the money from Court and has refused to do so, interest ceases to run just as in the case when the mortgagee refuses a tender out of Court. So far as I can see, there is no provision in the Act whereby interest is again to run if the deposit is withdrawn after the mortgagee has refused to receive it. The cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered, and this penalty is not remitted because he changes his mind when it is too late. With all respect, therefore, I venture to differ from the reasoning of the judgment in *Krishnaswami Chettyar v. Thippa Ramasawmi Chettyar* (1).

In this case, however, the circumstances are different. One of the mortgagees died and there was a dispute as to who were his legal representatives. If, therefore, the mortgagors had made a tender to one of the two sets of claimants they ran the risk of tendering to the wrong person, in which case the tender would not be valid. To avoid this difficulty, or for some other reason, the mortgagors deposited the amount in Court, but it was not drawn because of the dispute as to the rights of the respective claimants. Until that dispute was settled the mortgagees could not draw the money out of Court, for the Court was not in a position to know who were the rightful mortgagees. It is, however, contended that this dispute did not affect the mortgagors as they had done all that they had to do to enable the mortgagees to draw the money. No doubt they had taken all the active steps necessary, but because they withdrew the deposit before the dispute was settled, the mortgagees were unable to draw the amount prior to the settlement of the dispute; the mortgagees could not draw the money because of the dispute, and after settlement they could not draw it because the money was not there. If the mortgagors had left the money in Court until the dispute was settled, they would have done all they had to do when the deposit was made and notice issued to the mortgagees; but as they failed to leave

the deposit in Court sufficiently long to enable the mortgagees to draw the amount they failed to do all that they had to do, and consequently interest did not cease to run.

A further objection is taken that interest has been allowed on the amount deposited after this suit was filed. This is clearly wrong as under Order XXIV, rule 3, of the Code of Civil Procedure interest on the amount deposited ceases as soon as plaintiff receives notice of the deposit. I, therefore, agree in the order proposed.

Decree varied.

V. R. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 32 OF 1914.

July 3, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge.

SHAM SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

GAMAN, MINOR, THROUGH WAZIRA AND
OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11.—Res judicata—“Allegus contraris non-audiendus,” applicability of—Widow, alienations by—Reversioners, suit by—Suit, subsequent, by reversioners to redeem mortgage by widow, whether barred Cause of action.

A claim for possession by way of denunciation of alienations made by a previous holder of land is based on a different cause of action from a claim for redemption. [p. 448, col. 1.]

Therefore, a suit for redemption of a mortgage by the representatives of the mortgagor is not barred, either by the rule of *res judicata* or by the maxim “*Allegus contraris non-audiendus*”, simply because the plaintiffs in a previous suit, as reversioners of the mortgagor, denounced alienations made by the latter. [p. 448, col. 1.]

Pala Mal v. Maya, 146 P. R. 1890; *Kanhya Lal v. Charati Lal*, 4 P. R. 1899 and *Badar Din v. Bura Mal*, 4 P. R. 1903, distinguished.

Second appeal from the decree of the Divisional Judge, Amritsar, dated the 12th of November 1913, reversing that of the Munsif, 1st class, Amritsar, dated the 10th December 1912, decreeing the claim.

Mr. Nand Lal, for the Appellants.

Rai Bahadur Pandit Sheo Narain, for the Respondents.

JUDGMENT.—(1) The past history of the case has been sufficiently stated in the

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judgment of the lower Courts. The Chief Court judgment in revision referred to in Mr. Waring's judgment was passed in *Kala v. Musammat Lachhmi* (1). That Divisional Judge having now dismissed the plaintiffs' suit with costs throughout, the disappointed party has appealed and I have heard the arguments. The learned Divisional Judge decided the case on the basis of the principle of "*allegus contrarius non audiendus*." Mr. Nand Lal on behalf of the plaintiffs contests the applicability of this principle, and Mr. Sheo Narain, who appears for the respondents, is obliged to admit the strength of the adverse contention. It seems to me quite clear that the plaintiffs are not barred because they in the first instance sued as reversioners and denounced alienations made by the widow, *Musammat Nandi*, and now sue on the ground that as representatives of the mortgagor they are entitled to redeem. As Mr. Sheo Narain does not join issue on this point, it is not necessary to discuss it seriously.

(2) But Mr. Sheo Narain proceeds to deal with the other question decided by the lower Appellate Court, *viz.*, whether the rule of *res judicata* bars the present suit. Mr. Waring decided that it did not, but Mr. Sheo Narain argues that it does. I have carefully considered the previous litigation in this case, and, in my opinion, it is quite clear that section 11, Civil Procedure Code, has no application whatever. A claim for possession by way of denunciation of alienations made by the previous holder of the land is necessarily based on a different cause of action from a claim for redemption. This seems to me obvious, and, therefore, it is hardly necessary to discuss at length Mr. Sheo Narain's argument based on Explanation IV of section 11. I may, however, remark that the three rulings upon which the learned gentleman relies in connection with this point, *viz.*, *Pala Mal v. Maya* (2), *Kanhya Lal v. Charati Lal* (3) and *Badar Din v. Bura Mal* (4), do not really support his contention. In

the first of these cases it was held that a plaintiff could not be allowed to sue for land as heir by custom and then, upon the dismissal of that suit, file another suit claiming as heir by Hindu Law. It is obvious that there the cause of action was the same in both the cases, *viz.*, title by inheritance. In *Kanhya Lal v. Charati Lal* (3) again the claim was not made on the score of inheritance. The difference in the two suits was that whereas in the first K. L. claimed to be heir as the son of the adopted son of the previous holder of the property, in the second suit K. L. was put forward as being one of the heirs by *collateral relationship*. It was properly held there under the old Civil Procedure Code that Explanation 11, section 13, of that Code barred the second suit, inasmuch as the plaintiff in the first case could have stated, and should have stated, both the above alleged relationships. Lastly in *Badar Din v. Bura Mal* (4) it appears that the defendant in the first suit said he was a mortgagee and objected to the attachment of certain property, but subsequently withdrew his mortgage-deed and put forward a deed of sale; and in execution proceedings the objection founded on the deed of sale was found to be sound and the property was released from attachment. The decree-holder, however, brought a suit for declaration and was successful and proceeded to execute his decree. The previous defendant aforesaid having died, his son then objected to the attachment and put forward the aforesaid mortgage-deed, and it was held by the Chief Court that the defence could not be raised. The distinction between that case and the present one is clear.

(3) The lower Appellate Court has not decided any other point in the case, and I find in the grounds of appeal to that Court, *e.g.*, grounds Nos. 2, 3 and so forth, that there are other questions requiring decision. According to the usual practice it is more convenient that those questions should be decided by the lower Appellate Court, which has disposed of this appeal in a summary manner upon a preliminary point. I, therefore, accept this appeal, set aside the judgment and decree of the lower Appellate Court and under Order XLI, rule 23, Civil Procedure Code, remand the

(1) 12 Ind. Cas. 576; 167 P. W. R. 1911; 1 P. L. R. 1912.

(2) 146 P. R. 1890.

(3) 4 P. R. 1899.

(4) 4 P. R. 1903.

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case for decision on the grounds of appeal which have not been disposed of. Stamp on appeal may be refunded and other costs may be costs in the case.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 164 OF 1915.

January 24, 1916.

Present:—Mr. Stuart, A. J. C.

Pandit CHANDI DAYAL—DEFENDANT No. 2

—APPELLANT

versus

GANESH PRASAD—PLAINTIFF, AND ANOTHER
—DEFENDANT No. 1—RESPONDENTS.

Mortgage, suit on, against mortgagor and co-mortgagee—Mortgage-money paid to co-mortgagee who had authority to receive it—Decree, whether can be passed against co-mortgagee

Where in a suit by a co-mortgagee against the mortgagor and the other co-mortgagee, a *pro forma* defendant, it was found that the mortgagor had paid up the full amount due on the mortgage to the *pro forma* defendant, who was entitled to receive the money on behalf of both the co-mortgagees, and the Court passed a simple money-decree in favour of the plaintiff against the *pro forma* defendant:

Held, that the suit must be dismissed and that the decree could not stand.

Appeal from the decree of the District Judge, Hardoi, dated the 22nd February 1915, confirming the order of the Munsif, Shahabad, dated the 10th December 1914.

Pandit Makhan Lal Misra, for the Appellant.

Babu Hargobind Das, for Respondent No. 1.

JUDGMENT.—Ganesh Prasad and Chandi Dayal are brothers. Khargu executed on 4th January 1910 a deed of mortgage in favour of Ganesh Prasad and Chandi Dayal. On 23rd July 1914 Ganesh Prasad alone sued Khargu and asked for a decree not against Khargu personally but against the mortgaged property on the foot of this mortgage, to be passed in favour of himself and Chandi Dayal whom he joined as a defendant. He joined Chandi Dayal as a defendant, because he asserted that Chandi Dayal refused to join as plaintiff. The case thus stood, and the only relief asked for was a relief against the mortgaged property in favour of Ganesh Prasad

and Chandi Dayal. Khargu pleaded that he had paid the amount due on the mortgage to Chandi Dayal. Chandi Dayal admitted that he had received the amount due on the mortgage. The learned Munsif found that Chandi Dayal had received the amount from Khargu and that he was entitled to give a satisfactory acquittance of the amount due as he was general agent of Ganesh Prasad. On this finding the suit clearly ought to have been dismissed. The suit was on the foot of a mortgage. It was found that the mortgagor had paid up the full amount due on the mortgage to one of the mortgagees, who on the Munsif's finding was entitled to receive the money on behalf of both. The Munsif, however, arrived at the extraordinary decision that, although the amount had been paid up under the mortgage, it was his duty to pass a simple money-decree in favour of the plaintiff-mortgagee against the co-defendant-mortgagee. This he had never been asked to do in the plaint. No Court-fee had been paid to cover such relief and such a relief could not have been possibly added on the averments in the plaint, as Chandi Dayal was a defendant *pro forma* and the plaintiff had actually asked that a decree should be passed in favour of Chandi Dayal. The learned Munsif, however, proceeded to pass a decree against him. The learned District Judge has upheld the decision of the learned Munsif for reasons which I find difficult to follow. It is sufficient to say that the action of the Munsif is absolutely insupportable and that the decree against Chandi Dayal must be set aside.

I, therefore, allow the appeal and direct that the decree against Chandi Dayal be set aside. The suit against the mortgaged property has already been dismissed and as the plaintiff did not appeal against this dismissal to the District Judge its dismissal is final. The respondent Ganesh Prasad will pay his own costs and those of Chandi Dayal in all three Courts.

Appeal allowed.

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PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 401 OF 1913.

May 11, 1916.

Present:—Mr. Justice Atkinson and

Mr. Justice Kingsford.

NAWAGARH COAL CO., LTD.—PLAINTIFFS

—APPELLANTS

versus

BEHARI LAL TRIGUNAIT AND OTHERS—

DEFENDANTS—RESPONDENTS.

Minerals and mines, right to—Grant—Severance of tenement—Ownership of sub-soil, vesting of, in grantor—Presumption—Sanad or deed of grant, loss of—Evidence of grantee's user of surface—Lost grant, presumption on basis of—Entry, grantor's right of, to work mines—Wrongful user of right, remedy for—Injunction—'Moghuli,' meaning of.

In the absence of an express grant of the sub-soil, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights and the same are not vested in them. [p. 454, col. 1.]

Where, prior to the date of a grant of land, both the ownership and the right of property in the surface as well as the sub-soil were vested in the grantor as one entire tenement, the presumption is that, at the time of the grant, there was a severance of the surface rights from the property in the sub-soil. The surface rights with their incidents became vested in the grantee and the mines and minerals in the grantor as owner of the sub-soil as if there had been a reservation of them in his favour. The grantor's rights are the same as those of a fee simple freehold owner of land in England who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. [p. 454, col. 1.]

Hari Narayan Singh Deo v. Sriram Chakravarti, 6 Ind. Cas. 785; 37 C. 723; 14 C. W. N. 746 (P. C.); 11 O. L. J. 653; 7 A. L. J. 633; 8 M. L. J. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 I. A. 136; (1910) M. W. N. 309; *Durga Prasad Singh v. Brojo Nath Bose*, 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 432; (P. C.); (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133; *Kunja Behari Seal v. Raja Durga Prasad Singh*, 25 Ind. Cas. 819; 42 C. 346; 20 C. L. J. 304; 19 C. W. N. 203, referred to.

By reason of the said presumption and of the severance of the tenement and the reservation that must be deemed to arise in favour of the grantor, the latter has the right by implication to enter on the land for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights. [p. 454, cols. 1 & 2.]

The principles of the law governing free holds and not copyholds should be applied to the case. It is only under the copyhold law where there is no reservation or custom proved that a deadlock occurs and neither landowner nor tenant can work the mines. Under the law applicable to free hold land, there can be no deadlock, for if the mines be excepted, the grantor has an implied right to work them as incidental to such exception; if there be no exception, then that right is with the grantee as the owner of the surface and sub-soil. [p. 454, col. 2; p. 455, col. 1.]

Eardley v. Granville, (1876) 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528, disapproved.

Batten Pool v. Kennedy, (1907) 1 Ch. D. 266; 76 L. J. Ch. 162; *Ramsay v. Blair*, (1876) 1 App. Cas. 701, referred to.

If, in working the mines and extracting the minerals, the grantor or his assignees cause damage to the owners of the surface, there is ample power in the Court to injunct them and prevent them from so doing. [p. 456, col. 2.]

The presumption of a grant in favour of a person in the nature of a lost grant, which means presuming a lawful origin to support long and continuous user and enjoyment of the property, can be made only on the basis of the actual user exercised and enjoyed by such person. [p. 452, col. 1.]

Where the original *sanad* or grant is lost or not produced, and the evidence establishes only user by the grantee as permanent tenure-holder of the surface rights of a *mouza* by cultivation of land, building of houses or excavation of tanks, no presumption can be made in his favour of a lost grant to exercise mineral rights in the *mouza*. [p. 452, col. 2.]

The term 'moghuli' appearing in a rent receipt is a word of doubtful meaning and at best imports no more than that the rent assessed represented a proportion of the Government revenue. [p. 452, col. 2.]

First appeal from a decision of the Additional Subordinate Judge, Manbhum, dated the 4th June 1913.

Sir S. P. Sinha (with him Messrs. N. N. Sarcar, P. R. Das, B. Bosu, Manmatha Nath Mukerji, Kunj Behari Sen, Durga Charan Banerji, Uma Chandra Lala and Panna Lal Chatterji), for the Appellants.

Mr. Pugh (with him Messrs. A. Sen, Lalit Mohan Ghose, Sisir Kumar Mitra and Lalit Krishna Mitta), for the Respondents.

JUDGMENT.—This is an action in which the Nawagarh Coal Company, Limited, as plaintiffs, claim a declaration of their title in the underground mines and mineral rights in *Mouza Kumarjuri*, which rights, they allege, became vested in them under a lease dated the 2nd of October 1899. This lease was granted to plaintiffs by the Deputy Commissioner of Manbhum as Manager on behalf of the Raja of Katras, and it purports to demise to the plaintiffs all the mines and the mineral rights in the sub-soil of 22 *mouzas* which are set forth in the lease itself, subject to the restrictions and conditions therein contained. The second part of the plaintiffs' claim is conversant with a claim for a declaration that they should be entitled to enter upon the *mouza* of Kumarjuri and prospect for

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and work all such mines and minerals as may be found there; and that the defendants may be restrained by injunction from hindering or preventing them from exercising the legal rights which they claim to possess relative thereto. The Raja of Katras is the *zemindar* or proprietor of *Parganna Katras* and that fact is not disputed. At the time when this lease was granted in 1899, his property was being administered under the Encumbered Estates Act and the lease was granted by the Deputy Commissioner of Manbhum under the Act as the Manager on behalf of the Raja. It was the duty of the Deputy Commissioner to manage the estate until such time as the Raja himself was released from his disqualification and became entitled to enjoy the rents and profits of his property; and it appears that immediately after the estate had been discharged from the operation of the Encumbered Estates Act, the Raja himself approved of and confirmed the lease of the 2nd of October 1899 granted by the Manager in favour of the plaintiffs.

We have stated shortly what the plaintiffs' case is, and we shall now set forth similarly the various defences put forward. The defendants' first claim is that they were granted by one of the Raja's predecessors-in-title, by a document dated the 21st of March 1830, a *moghuli brakhmottar* grant of the *Mouza Kumarjuri*; and that by that grant they became permanent tenure-holders; and that all rights in the surface and in the sub-soil of this village were vested in them under and by virtue of that grant; and that they had for all purposes in this *mouza* a permanent and hereditary interest, subject to the payment of a small *moghuli* rent of Rs. 17 per annum; that by that grant they were entitled to exercise all the mineral rights in the sub soil and that they were in fact the owners of the mines. They also claim to be owners of *Mouza Chaitudih*, but as to this *mouza* we can find no document of title. They claim that they have been in possession of *Chaitudih* in the same way and under the same tenure as *Kumarjuri*. This will be apparent in the first place from the statement in Exhibit R, the *patta* of 1891

made by the Trigunait in favour of Doctor Saise, at line 5, page 691 of the paper-book, and in the second place, from the deposition of Behari Trigunait at line 12, page 763. However, the significant thing is, that with regard to *Chaitudih* they do not claim the mineral rights; and for fifteen or sixteen years the plaintiffs in this suit have been, as admitted by Behari at line 10, page 763, of his evidence, in possession of that village by working coal there without let or hindrance from the defendants.

The *sanad* of 1830 upon which the defendants base their claim is not forthcoming. It appears from the judgment of the year 1890 by the Road Cess Deputy Collector, Exhibit 6, at page 40, that the document was produced before him and that he disbelieved its genuineness. His judgment was upheld by two Appellate Courts. The Trigunait witnesses affirm that this *sanad* was made over to the agents of the East India Coal Co. in 1899. According to one witness, it was made over to Messrs. Smith and Turnbull; according to the other, it was made over to Kapileswar and Makhan. None of these four persons have been called to corroborate that evidence, and if it were true, the Assistant Manager of the East India Coal Co., who was a witness for the defendants, would, undoubtedly, have been in a position to produce the document. What he did produce was the copy, Exhibit L, and it is clear from his deposition at page 749 that it was this copy, and not the original *sanad*, which was made over to his Company by the defendants. This copy was made in the year 1891.

The conclusion from these facts is, that the original document was suppressed by the defendants. In any case there being no evidence of its loss, the Subordinate Judge rightly refused to admit the copy as evidence, or to allow secondary evidence of its contents to be given.

Now as to the nature of the interest of the defendants in *Kumarjuri*, it was contended by the appellants that the defendants were merely tenants of the cultivated land.

There is, however, no suggestion throughout the evidence, oral and documentary, to the

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effect that the Raja was ever in possession of any portion of the village during the last 10 years, with the exception of an obviously unreliable statement by the witness Darpan Lal at page 790. There can be no doubt whatever that throughout this period the defendants and their predecessors have held the entire village as a tenure under the Raja. The *phaisala* of 1835, Exhibit T 1, at page 706, the Raja's *goshwara* paper of 1843, Exhibit 41 at page 16, and the Raja's road cess returns of 1895 and 1910 are conclusive upon this point. The documents indicate that since the year 1835 the Trigunaitis have consistently claimed the village as their *brahmottar*, whereas the Raja has variously described the tenure as *ijara* and *jama* and the village as *mal* or rent-paying, in contradistinction to *brahmottar*.

It appears clear that the rent has remained the same throughout the period of the defendants' occupation.

There is no plea in the defendants' written statement of a lost grant; and we are asked now, by reason of their failure to establish legal proof of their title, to presume a grant in their favour on the basis of a lost grant. They have never asked that their written statement might be amended with reference to any such claim; and the fact that the learned Subordinate Judge found a lost grant in favour of the defendants was the work of his own fertile imagination rather than the wish and desire of the defendants. However, if we are asked now, as we have been asked and pressed strongly by Mr. Pugh, to presume a grant in favour of the defendants in the nature of a lost grant, which means presuming a lawful origin to support long and continuous user and enjoyment of property, we are of opinion that we should presume a grant on the basis of the user exercised and enjoyed by the defendants. The alleged user of the defendants of certain mineral rights is hazy, uncertain and unsatisfactory. However, fortunately documents do not lie; and as we have been pressed to presume a grant in defendants' favour we think we should presume the following grant: namely, a grant to the defendants, as permanent tenure-holders, of the surface rights only of *Mouza* Kumarjuri. Whether

they are *brahmottardars* or not is by no means certain. The papers indicate that almost continuously from 1835 this claim has been strenuously contested and, except for one entry in the books of the Raja, there seems very little to show that they were *brahmottardars*. The *jamabandi* of 1890 has an entry in it in which mention is made of a *brahmottar* and that is admitted, and that seems to be the high water-mark of the strength of the evidence upon which the defendants can rely in support of their claim. We shall not determine whether they are *brahmottardars* or not. Mr. Pugh attaches great significance to the use of the word *moghuli* in some of the rent receipts. *Moghuli* is a word of doubtful meaning and at the best imports no more than that the rent assessed upon the defendants represented a proportion of the Government revenue.

The user which the defendants have enjoyed is very accurately set forth in their own statement at pages 663 and 664 of the paper-book. This document is dated the 12th June 1890 and is "the humble petition of Behari Lal Trigunait", one of the defendants in this action. It was filed as an answer to the claim of the *zamindar* at the time to the underground rights in both Kumarjuri and Chaitudih; and in paragraph 2 the defendants carefully define what their user has been, and they say that there are no coal mines in the said two *mouzas*. "But it will be satisfactorily proved that the *mouzas* have all along been in our possession by the use and occasional sale of coal that is seen on the surface." There is, however, no oral evidence of any sale. The defendant Behari Trigunait, while asserting that he takes coal for fuel, admits at page 763 of his evidence that the mouth of the pit has been closed. The evidence suggests at the most that the defendants have taken small quantities of coal from the outcrop for domestic purposes and for burning lime alone; and for no other purpose. That does not, to our minds, appear to convey the impression that they ever exercised the mineral rights in the *mouza*. On the other hand it is clear that the coal they used was that seen on the surface of the incline near the river. We are satisfied that the defendants' user of the *mouza* was merely confined to

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the enjoyment of the surface rights whether by cultivation of land or building of houses or excavation of tanks. One other matter as to the user of the defendants is of importance. On the 27th July 1890 a question arose as to who was liable to pay cess on the value of the minerals of this Mouza Kumarjuri. The Raja contended that he was the owner and liable for the cess; the defendants contended that they were the owners and liable for the cess; and they relied, then as now, upon this grant of the 21st March 1830. Mr. Pugh wants us to refer to this judgment only to see what had been decided, and not for the purpose of examining the grounds and reasons for the decision. We decline to yield to that contention and we consider we are entitled to look at the conclusions and reasons upon which that judgment was based. It was held by the Deputy Collector, twice affirmed on appeal, that the mineral rights of this Mouza Kumarjuri were not vested in the defendants but that they were vested in the Raja, and that the Raja alone was liable for cess:

Defendants' second contention is that even if they have not got the mineral rights vested in them but merely the surface rights, and even if the mines and the minerals are vested in the Raja, he (the Raja) cannot work them—nor can his assignees work them—without the defendants' consent because they, being the tenure-holders of the surface, have the right to exclude any person who enters upon their land without their consent. We shall deal with this aspect of the defendants' case at a later stage.

The third defence put forth by the defendants is that arising under the Statute of Limitation, but this has not been expressly pleaded.

Now prior to and at the time of the grant Mouza Kumarjuri was vested in the Raja and his predecessors as *zamindars*. If a grant is to be presumed in favour of the defendants it must be consistent with their user. The mineral rights were never in contemplation of the parties in 1830, nor do we believe the defendants ever exercised any mineral rights whatsoever. Thus we have a grant by the *zamindar* of the surface rights of a village containing 380

bighas at the abnormally low rent of Rs. 17 per annum and we must presume, in the absence of the original document, having regard to the evidence before us, that only the surface rights were conveyed to the defendants as presumed grantees. We think that it has been conclusively held by the Privy Council that in such a case the mines and minerals and the property in the sub-soil remain, and must be presumed to remain, the property and in the possession of the *zamindar*. At any rate, prior to the date of the grant both the right of property and ownership in the surface and the right of property and ownership in the sub-soil were vested in the *zamindar*. At the time of the grant there must be presumed to have been a severance of the surface rights from the property in the sub-soil. The surface rights with their incidents became vested in the defendants as tenure-holders; and the mines and minerals in the Raja as the owner of the sub-soil. If there was any doubt as to the interpretation to be put upon the decision of the case of *Hari Narayan Singh Deo v. Sriram Chakravarti* (1) as decided by the Privy Council, it has been entirely removed by the decision of the Privy Council in the later case of *Durga Prashad Singh v. Brojo Nath Bose* (2), in which it was laid down finally and conclusively, in a case almost identical in its facts with the present one, that it must be presumed that the mines and mineral rights remain the property of the Raja as *zamindar* thereof and that the same are thus vested in him as such. In this connection it is of vital importance to notice that in the case of *Sriram Chakravarti v. Hari Narain Singh Deo* (3) the Subordinate Judge who tried the case made a declaration in favour of the Raja, declaring him entitled to the underground minerals, and awarding him *khas* possession of the same. This was the order upheld on appeal by the Privy Council, and I

(1) 6 Ind. Cas. 785, 37 C. 723; 14 C.W.N. 746; (P.C.); 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. J. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 I. A. 136; (1910) M. W. N. 309.

(2) 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 432; (P. C.); 19 2) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133.

(3) 33 C. 54; 10 C. W. N. 425; 3 C. L. J. 59,

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think their Lordships clearly intended to decide that as the *zamindar* was entitled to the sub-soil mineral rights, he was also entitled to possession of the same. This is the law, and legal effect can only be given to it by holding that at the date when the grant was made, or is presumed to have been made, there was a severance of the right and property in the surface from the right and property in the sub-soil, both of which had antecedently been vested as one entire tenement in the Raja and his predecessors as *zamindars*. Mr. Pugh sought to contend that on the facts of this case, the character of the defendants' tenure is such that it could be distinguished from the cases of *Hari Narayan Singh Deo v. Sriram Chakravarti* (1) and *Durga Prashad Singh v. Brojo Nath Bose* (2), but we think that the decision of Mr. Justice Fletcher in the case of *Kunja Behari Seal v. Raja Durga Prasad Singh* (4) prevents him from taking advantage of any such argument and that in fact, having regard to the Privy Council cases to which I have referred, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights and the same are not vested in them. Therefore, if there be a severance in the tenement, the tenure-holder taking the surface rights, the rights in the sub-soil must be taken to remain in the *zamindar* as if there had been a reservation of the mines in his favour; otherwise it would be impossible to give legal effect or meaning to the decisions of the Privy Council. If the mines are presumed to be vested in, and to be the property of, the Raja, his rights must be just the same as those of a fee simple freehold owner of land according to English Law who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. We hold that by reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja, the latter had, as incident to his rights of property and ownership in the mines, the right by

implication of law to enter upon the surface of the tenure-holder's *mouza* for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights. Mr. Pugh argued that even though we may hold that the mineral rights remain in the Raja, nevertheless his clients, the defendants, being in possession of the surface, could prevent the landlord from working the mines without their (the defendants') consent; and he has relied very strongly on Mr. Justice Mukerjee's judgment in *Prince Mahomed Buktyar Shah v. Rani Dhojmani* (5) in support of that argument; and certainly that judgment at first sight would give one the impression that he was right. But we feel satisfied that the learned Judge in some way misapplied the English Law governing copyholds to that applicable to the case of owners and tenants of freehold land in England. A copyholder has certain rights in excess of the ordinary tenant of freehold land. The case referred to [*Eardley v. Granville* (6)] clearly distinguishes between the rights of a copyholder and the rights of an ordinary lessee or tenant on a freehold estate. A virtual severance having been effected by the exception of the mines, the lessee or grantee of the surface gets no possession of the sub-soil. It is, therefore, the principles of freehold and not copyhold law which are to be applied, the distinction being, that under the latter there is no division into strata and the tenant obtains possession of the entire surface and sub soil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is this distinction which appears to us to have been lost sight of by Mookerjee, J., in the ruling under reference. It is only under the copyhold law, and where there is no reservation or custom proved, that a deadlock occurs and neither landlord or tenant can work the mines. Under the law applicable to freehold land, there can be no deadlock, for if the mines be excepted, the grantor has an implied right to work them

(4) 25 Ind. Cas. 819; 42 C. 346; 20 C. L. J. 304; 19 Q. W. N. 203.

(5) 2 C. L. J. 20.

(6) (1876, 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

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incidental to such exception; if there be no exception then that right is with the grantee as the owner of the surface and sub-soil. The case of *Batten Poole v. Kennedy* (7) clearly shows that where a tenement is severed, the person in whose favour the reservation is made is the absolute owner of the sub-soil; and in *Ramsay v. Blair* (8) the rights of such a person are clearly dealt with and laid down, and it is there stated that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property. Sir S. P. Sinha's argument on the first aspect of the case has convinced us of its soundness and accuracy.

The third defence put forward by the defendants was one of adverse possession. They claim to have been in adverse possession so long that even if they are not entitled by grant, they have succeeded in prescribing a title for themselves as against the Raja as their landlord. However, on the question of fact, we have no difficulty in disposing of this issue. We think that the defendants in December 1891, in making a lease of the mineral rights of Kumarjuri to Dr. Walter Saise, were demising property of which they were not the owners and over which they had no control; and if his assignees, the East India Coal Company, did enter and work the coal mines, as they apparently did in 1895, they did so as trespassers and not under a legal claim or title. Thus up to 1899 they were in possession as trespassers and from 1899 onwards they were not in possession of the mines or minerals up to March 1911, when the acts were committed giving rise to the cause of action in this suit.

The Subordinate Judge has, we think, dealt with the plaintiffs' evidence of possession in a somewhat intemperate and unreasonable manner. The witness Fleischer was no doubt in some respects unreliable, but his evidence regarding the possession of the Nawagarh Company of the Mouza Kumarjuri from 1899 to 1904 as corroborat-

ed by the cash books is of a most convincing nature. These books are clearly genuine and they exhibit a series of payments for excavation of inclines, erection of huts and other purposes indicative of occupation by the plaintiff Company during that period. There is documentary evidence showing that the Company was put into possession of the village under the orders of the Deputy Commissioner in March 1899, and the order of the High Court in April 1900 at page 710 indicates that the Company was at that time in possession. Subsequent to 1904 the Company do not appear to have exercised any possessory rights upon the surface of the village, but they were extracting the coal in Kumarjuri from an incline in the neighbouring village of Malkera.

Under these circumstances, and in view of the fact that there was no adverse possession by the defendants, no cause of action arose until the plaintiff was obstructed in March 1911. The defendants can only succeed in establishing adverse possession by the joint act of themselves and the East India Coal Company. Thus it will be seen that from March 1899 to March 1911 neither the defendants nor the East India Coal Company worked, or sought to work, the coal or mineral rights in Kumarjuri. It appears to us, therefore, perfectly clear that the defendants have acquired no title by adverse possession to the mines or minerals of Kumarjuri.

Are the plaintiffs entitled to succeed in this action?

The Raja has the mineral rights, as we have held, in the village of Kumarjuri; he has, as incident to that right, the right to go upon the land and take the minerals; and has by the lease of the 2nd of October 1899 assigned to the plaintiffs all the rights which he himself possessed. That lease gives the plaintiffs, during the term to which it extends, all the rights of the Raja to the mines and minerals coupled with the legal implication which should be attached to these rights, viz., a right to enter on the surface of the mouza by way of necessity to work the mines. It is contended for the defendants that by the express terms of the lease itself, there are certain restrictions and

(7) (1907) 1 Ch. D. 256; 76 L. J. Ch. 162.

(8) (1876) 1 App. Cas. 701.

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conditions imposed which prevent the plaintiffs from working the mines; and that, therefore, they are not entitled to the declaration sought in this action.

The argument is that by clause 3 of part 2 of the lease the plaintiffs have merely power and liberty to enter upon lands in direct possession of the Raja himself in order to exercise the mineral rights vested in them; and that accordingly by this clause the plaintiffs' rights were strictly limited and by no means co-extensive with those the Raja enjoyed.

The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease, unless the intention is apparent. That the intention was to enlarge, and not to restrict, is indicated by the fact that, if the lease were construed in the manner contended by Mr. Pugh, the lessees would obtain thereunder no rights whatever in the village by reason of there being no land in the Raja's *khas* possession. In our opinion, clause 3 of part 2 merely determines the compensation to be paid to the Raja in the event of the plaintiffs' acquiring land, whether permanently or temporarily, in connection with their mining operations. The clause, therefore, was inserted with a totally different object from that for which Mr. Pugh contends.

Part 3 is headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges." We think that part 3 must be construed as only restricting the liberties and privileges conferred by part 2, and not as any restriction upon the general right of access which is implied by law as between the Raja and the defendants and which right, so far as the Raja is concerned, is now vested in the plaintiffs. The cases of *Earl of Cardigan v. Armitage* (9) and *Bartlett v. Downes* (10) are directly in point.

Therefore, we think that the plaintiffs are entitled to the mineral rights under the lease of the 2nd of October 1899 and that they are entitled to enter the *muzai* of Kumarjuri to bore and do all acts

(9) (1833) 2 B. & C. 197; 3 D. & R. 414; 26 R. R. 313; 107 E. R. 356.

(10) (1825) 107 E. R. 561; 5 D. & R. 526; 3 L. J. K. (o. s.) 90; 3 B. & C. 616; 27 R. R. 436; 1 C. & P. 522.

reasonably incident to the enjoyment of their property in the mines and minerals, and that if in the development of the mines and the extraction of the minerals they cause damage to the defendants or others by subsidence of the soil or injury to the houses or tanks therein and thereon, there is ample power to injunct them and to prevent them from so doing. In our opinion, neither the Raja nor the East India Coal Company are necessary to be joined as parties, to entitle the plaintiffs to maintain this action.

On the 21st of March 1911, therefore, the defendants illegally obstructed the plaintiffs in the exercise of their lawful rights and the plaintiffs are, therefore, entitled to the full measure of relief which they claim in this action. We, accordingly, set aside the judgment of the learned Subordinate Judge and decree the plaintiffs' suit in the form of prayer (1) in the written plaint and grant an injunction in the form of prayer (2), with costs of this action against the defendants in both Courts.

Appeal decreed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 228 OF 1915.

August 10, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Krishnan.

Sree Mahant PRAYAG DOSS JEE

VARU—DEFENDANT—APPELLANT

versus

RAVUR CHENGAMA NAIDU AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Mortgage—Prior and puisne incumbrances—Decree for sale in first mortgagee's suit and purchase by decree-holder—Puisne mortgagee, non-joinder of, in suit—Renewal of puisne usufructuary mortgage after first mortgagee's decree, effect of—Merger—Suit for possession by auction-purchaser, maintainability of.

A first mortgagee purchased the mortgaged properties in execution of the decree passed in the suit on his mortgage, to which a second usufructuary mortgagee was not made a party. The latter got a renewal of his mortgage after the said decree. The first mortgagee decree-holder brought a suit for possession under Order XXI, rule 103, Civil Procedure Code, against the owner and the second usufructuary mortgagee:

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Held, that, in the absence of proof of any intention on the part of the usufructuary mortgagee to give up his security under the first deed, he must be presumed to have intended to keep it alive and he was entitled to rely on it against the plaintiff's decree and the sale thereunder. [p. 461; col. 2.]

Held, also, that, the defendant being in the position of a puisne mortgagee with possession and the plaintiff in that of a first mortgagee who had purchased the property in execution of the decree on his mortgage to which the puisne mortgagee was not a party, the plaintiff's suit for possession must fail. [p. 462, col. 1.]

The question whether previous incumbrances paid off or renewed are to be treated as still kept alive or as extinguished against *mesne* incumbrancers is one of intention of the parties to the transaction, and where there is no clear evidence of that intention from express declarations or attendant circumstances parties must be presumed to have intended what is for their benefit: the mere fact that the incumbrance has been paid off or renewed does not decide the question. [p. 458, cols. 1 & 2.]

Gokuldas Gopaladas v. Purnmal Premsukh Das, 10 C. 1035; 11 I. A. 12; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 *Crosbie Hill v. Sayer*, (1908) 1 Ch. 866; 77 L. J. Ch. 466; 99 L. T. 267; 24 T. L. R. 442; *Liquidation Estates Purchase Co. v. Wyloughby*, (1896) 1 Ch. 726; 65 L. J. Ch. 486; 74 L. T. 228; 44 W. R. 612, referred to.

Where a subsequent incumbrancer alleges that a prior incumbrance has been extinguished by payment or renewal, it must be clearly established by cogent evidence, whether direct or inferential, that the person making the payment or taking the renewed deed, deliberately and with the knowledge that it was to his benefit to keep the prior incumbrance alive, elected to extinguish it for all purposes; otherwise the presumption that a man intends what is to his benefit should be allowed to prevail. [p. 460, col. 2.]

The principle under which protection is granted to persons renewing prior incumbrances against intervening incumbrancers applies also to cases of intervening decrees under which property has been sold. [p. 460, col. 2.]

In a usufructuary mortgage possession is an essential part of the security and what is kept alive is not merely the security but the rights of the mortgagee on the property under the deed. [p. 462, col. 1.]

Tenison v. Sweeney, 1 Jo. & Lat. 710; 7 Ir. Eq. R. 511; *Goluknath Misser v. Lalla Prem Lal*, 3 C. 307; 1 Ind. Dec. (N. S.) 753 *Alangaran Chetti v. Lakshmanan Chetti*, 20 M. 274; 7 M. L. J. 87; 7 Ind. Dec. (N. S.) 195; *Yellapaddi Mahalakshammal v. Srimon Madhva Siddhantha Oonahini Nidhi*, 11 Ind. Cas. 86; 35 M. 64; 10 M. L. T. 169; 21 M. L. J. 81; (1912) M. W. N. 24 *Bhowani Koer v. Matlura Prasad*, 7 C. L. J. 1; *Jennings Estate, In re*, 15 Irish Rep. 27; *Subramania Pillai v. Palaniappa Mudali*, 21 Ind. Cas. 97; 26 M. L. J. 94; 14 M. L. T. 585, referred to.

Appeal against the decree of the Court of the Subordinate Judge, North Arcot, in Original Suit No 50 of 1914.

The Advocate-General and Mr. S. Gopalaswami Iyengar, for the Appellant.

Messrs. T. V. Venkatarama Aiyar and R. Ananthanarayana Iyer, for the Respondents.

This appeal coming on for hearing and having stood over for consideration, the Court delivered the following

JUDGMENT.

ABDUR RAHIM, Offg. C. J.—I agree in the judgment which my learned brother is going to read.

KRISHNAN, J.—In this appeal we have a case of competition for possession between a first mortgagee who purchased the properties in execution of his own mortgage-decree against the owner and a second usufructuary mortgagee, whose mortgage was before the decree and who was not a party to the 1st mortgagee's suit or decree but who had taken a new usufructuary mortgage after the date of the decree from the owner.

The material facts on which the question in this case arises are undisputed and are these. The plaint lands were part of the *zemindari* of Karvetnagar. The then Raja and his eldest son executed a simple mortgage-deed, Exhibit A, of the plaint lands in 1877 for Rs. 18,000 in favour of two persons whose interest is now represented by the plaintiffs. In 1884 the said son who had then become the Raja gave a usufructuary mortgage, Exhibit I, for Rs. 14,00,000 to the then *mohant* of Tirupati, whose representative-in-interest now is the defendant, over 194 villages in the *zemindari* among which the plaint villages are all included. In 1886 the 1st mortgagees under Exhibit A brought a suit on their mortgage, Original Suit No. 11 of 1886, against the Raja alone without making the 2nd mortgagee under Exhibit I a party and obtained the usual mortgage-decree for the amount due to them, *viz.*, Rs. 37,305 with interest and costs. In 1889 the mortgagee under Exhibit I took a fresh usufructuary mortgage-deed, Exhibit II, from the Raja for a sum of Rs. 19,67,330, being the amount due on his mortgage Exhibit I together with a sum of three lakhs due on another simple mortgage Exhibit VI which the Raja had executed to him at the same

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time as Exhibit I on certain other properties, as well as an amount due on certain small items of credits and debits between the parties. The properties under Exhibit II were, with the exception of two villages released from the mortgage, the same as in Exhibit I, and included the plaint lands. Plaintiffs got their decree made absolute in 1896 and in execution thereof sold the plaint properties and with leave of Court purchased them themselves in January 1912. The sale was duly confirmed and plaintiffs were put in possession in 1913. Thereupon the defendant applied to the Court to have himself put back into possession on the ground that he was entitled to possession as against the plaintiffs; the Court, agreeing with his contention, directed re-delivery of the properties to him and this was carried out. Thereupon plaintiffs brought this suit under Order XXI, rule 103, of the Code of Civil Procedure for the establishment of their right to and for possession as auction-purchasers against the defendant. Defendant's case is that plaintiffs' decree and auction-purchase are subject to his rights under his 1st mortgage-deed of 1884 on which he is entitled to rely against the plaintiffs notwithstanding the execution of Exhibit II and, therefore, the plaintiffs' suit for possession must fail. The learned Advocate-General who appeared for the defendant does not contest the position that his client's rights under Exhibit II are subject to the plaintiffs' rights under their previously obtained mortgage-deed and the sale in execution of it. He contends, however, that he is entitled to rely on Exhibit I as against the plaintiffs in spite of the execution of Exhibit II. Plaintiffs deny this and contend that by the execution of Exhibit II the rights under Exhibit I have been abandoned or extinguished and that defendant can no longer rely on them as they are non-existent.

Numerous authorities have been cited before us to show in what cases Courts have held that previous incumbrances paid off or renewed were to be treated as still kept alive or as extinguished against mesne incumbrancers. The principle deducible from these cases is that the question is really one of intention of the parties to the transaction and where there is no clear evi-

dence of that intention from express declarations or attendant circumstances, parties must be presumed to have intended what is for their benefit; the mere fact that the incumbrance has been paid off or renewed does not decide the question. Their Lordships of the Privy Council laid down these principles in *Gokaldas Gopaldas v. Puranmal Premeek Das* (1), the leading case on the point. They also held in that case that the doctrine enunciated in *Toulmin v. Steere* (2) should not be applied to India and the question should be treated as one of justice, equity and good conscience. The presumption that a man intends to act for his own benefit is so strong that very clear and cogent evidence to the contrary is necessary to replace it. Lord Justice Parker has stated the result of English authorities in his judgment in *Crosbie-Hill v. Sayer* (3) thus: "Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage-debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise. The question in such cases is not whether the purchaser has shewn an intention to keep the security of the first mortgagee alive for his own protection, but whether the Court can gather that he has shewn an intention to merge it for all purposes." His Lordship has also quoted with approval the following observations of Lord Justice Lindley, in the case of *Liquidation Estates Purchase Co. v. Willoughby* (4): "Because in that case (*i. e.*, if the mesne incumbrancer is preferred) the purchaser would not have got what he bargained for, namely, the property free

(1) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 542; 5 Ind. Dec. (N. S.) 692.

(2) (1866) 3 Mer. 210; 17 R. R. 67; 36 E. R. 81.

(3) (1908) 1 Ch. 866 at p. 877; 77 L. J. Ch. 466; 99 L. T. 267; 24 T. L. R. 442.

(4) (1896) 1 Ch. 726; 65 L. J. Ch. 486; 74 L. T. 228; 44 W. R. 612.

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from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who have never intended to benefit him." These are the observations in the case of a merger where the presumption of extinguishment is greater and as his Lordship observes, where there is no question of merger it is easier to hold that the prior incumbrance paid off is kept alive for protecting the person paying against subsequent incumbrancers. In the case of renewals where the money is not paid off at all but continues charged on the property, the presumption that the prior mortgage is not extinguished is much stronger. In the case of renewals, Sir Edward Sugden, afterwards Lord St. Leonards, made the following remarks in *Tenison v. Sweeny* (5) so long ago as 1844 and they are very pertinent: "Then another point was started, that as the successive mortgages were for the sums secured by the prior mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages." This was cited and followed in *Goluknath Misser v. Lalla Prem Lal* (6), where their Lordships held that a mortgagee does not surrender his mortgage or lower its priority by taking a subsequent mortgage including the same lands with other lands for the same debt and that the question whether the earlier mortgage is extinguished or not is a question of intention. It was similarly

held in *Alangaran Chetti v. Lakshmanan Chetti* (7) that the execution of a new mortgage-deed in renewal of an earlier one did not extinguish the security under the latter; in that case the argument that the equitable principle enunciated by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premeukh Das* (1) was not applicable to renewals, an argument which was also urged before us, was repelled. In another case which arose on the Original Side of this High Court and was appealed against, reported as *Yellapaddi Mahalakshammal v. Sriman Madhva Siddhantha Oonahini Nidhi Ltd.* (8), it was held that a mortgagee by deposit of title-deeds who had obtained a mortgage-decree and had taken a fresh mortgage for the decree amount and for further advance, was still entitled to use his first mortgage against a puisne mortgagee whose deed though subsequent to the date of the former's first mortgage was before his decree and second mortgage and who had obtained a decree and purchased the property himself, and this notwithstanding the fact that in his second mortgage there was a statement that his charge and his decree-debt were both extinguished. The learned Judge on the Original Side observed: "The law imputes to a person an intention to act according to his interest. That presumption is made even when the mortgagee, as in this case, may not have been aware of the circumstances indicating what course of conduct would be for his interest." The learned Judge also held that "an intention to give up his charge against a puisne incumbrancer cannot be imputed in the absence of any knowledge on his part of that incumbrance." The learned Chief Justice who was one of the Judges who heard the appeal in that case remarked: "The effect of Exhibit O (the second mortgage-deed) was unquestionably to put an end to the plaintiff's subsisting judgment debt against his mortgagor, but the fact that the debt was extinguished leaves open the question whether the security was put an end to" and

(5) (1844) 1 Jo. and Lat. 710; 7 Ir. Eq. R. 511.

(6) 3 C. 307; 1 Ind. Dec. (N. S.) 783.

(7) 20 M. 274; 7 M. L. J. 87; 7 Ind. Dec. (N. S.) 195.

(8) 11 Ind. Cas. 865; 35 M. 642; 10 M. L. T. 169; 21 M. L. J. 311; (1912) M. W. N. 24.

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following the rulings in *Bhawani Koer v. Mathura Prasad* (9) and *In re Jennings' Estate* (10), held that neither the security nor its priority was defeated by the new deed. The intention has to be inferred not from the facts as they appeared to the persons paying off the prior incumbrance at the time but from the real facts of the case: see *Subramania Pillai v. Palaniappa Madali* (11).

It is not necessary to refer to all the cases cited but I shall refer to one other case, as the facts of that case are somewhat analogous to the facts in the present case and that is the case of *Gopal Chunder Sreemany v. Herembo Chunder Hoblar* (12). In that case one A had mortgaged to plaintiff his $\frac{1}{3}$ rd share in a house in 1882; he again mortgaged the same $\frac{1}{3}$ rd share to one B in January 1884. Again in May 1884 he and his two brothers mortgaged the whole house to plaintiff for the money due under the 1st mortgage and a further advance then paid. It was recited in the deed that the money was borrowed in part to liquidate the debt under the 1st mortgage and that that debt was paid off. The interest charged under the new deed was different and the property mortgaged, as stated above, had been added to. The mortgage-deed was left with the mortgagee, but only as one of the title-deeds. Their Lordships held that, looking at what was done in fact, and not to the words, the transaction was in reality a fresh advance upon fresh security being given for both the old debt and the new advance and upon a fresh arrangement being made as to interest, that the old security for the old debt remained untouched; and further that, even if it was taken that the old debt was paid off, that did not destroy the security, and that the circumstances referred to above did not show an intention to extinguish the security and that, therefore, it should be presumed that the security was kept alive for the plaintiff's protection.

It is thus apparent from the authorities above cited that Courts in this country have liberally applied the equitable doctrine in question to prevent a puisne incumbrancer obtaining an unfair advantage of priority and an unjust enrichment of himself by the accident of the prior incumbrance being paid off or renewed by third parties, which was not intended to benefit him. I, therefore, think that where a subsequent incumbrancer alleges that a prior incumbrance has been extinguished by payment or renewal, it must be clearly established by cogent evidence, whether direct or inferential, that the person making the payment or taking the renewed deed, deliberately and with the knowledge that it was to his benefit to keep the prior incumbrance alive, elected to extinguish it for all purposes; otherwise the presumption that a man intends what is to his benefit should be allowed to prevail.

It is argued that as the plaintiffs were the prior mortgagees in this case and the defendant seeks to have recourse to the equitable doctrine and rely on his first mortgage only for the purpose of getting rid of the effect of plaintiffs' decree obtained between the dates of the two mortgages, and not of a mesne incumbrance, the doctrine should not be applied. No case exactly bearing on this question has been cited to us. But there does not seem to be any reason why the protection granted to persons renewing prior incumbrances against intervening incumbrancers should not be extended to cases of intervening decrees. By the plaintiffs' decree and the sale in execution thereof the defendant would lose all his rights in the plaint properties if he is not allowed to rely on his first mortgage. I think the principle does apply to intervening decrees where property has been sold as in this case. I shall now examine the evidence in the case in the light of the principles I have stated above. A comparison of the two deeds Exhibits I and II shows that there is nothing in the second deed to justify a finding, as the Subordinate Judge has come to, that the defendant has expressly extinguished his rights under the first deed for all purposes and that he cannot any longer rely on it as against plaintiffs. Apart from the terms of the two deeds

(9) 7 C. L. J. 1.

(10) 15 Ir. Rep. 277.

(11) 21 Ind. Cas. 978; 14 M. L. T. 585; 26 M. L. J. 94.

(12) 16 C. 523; 8 Ind. Dec. (N. S.) 345.

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there is no evidence of any intention on defendant's part to abandon his security. In fact the defendant is not shown to have known of the existence of the plaintiffs' decree at the time of Exhibit II. In paragraph 2 of Exhibit II it is true that some mortgages and decrees are referred to, but there is nothing to show that the reference is to plaintiffs' decree. The list referred to there is evidently the list of properties we find attached to that document as filed in Court. It is difficult to see how without knowing of the existence of the decree the defendant could be held to have intended to give up his rights under it as against plaintiffs. But even if defendant knew of the plaintiffs' decree there is nothing to show that his intention was to abandon his original rights. The very paragraph referred to indicates that the defendant bargained for a mortgage free of the mortgages and decree-debts referred to therein, as he stipulates that the mortgagor is to pay them off.

Exhibit II recites Exhibit I and purports to be executed for the amount due under Exhibit I with certain other sums added thereto; this is not a case where the previous debt is paid off. It is true two out of the 194 villages included in Exhibit I are not included in Exhibit II, but this fact cannot affect the 192 villages on which the amount due under Exhibit I continues charged. The charge on the two released villages no doubt is extinguished. Under Exhibit I the mortgagee was to have possession for 20 years and if at the end of the period the money was not paid, he was to continue in possession or after giving six months' notice enforce the personal covenant to pay. See paragraph 19 of Exhibit I. The same possession is continued under Exhibit II with the difference that the period is increased to 25 years. Though the deed, Exhibit II, says that the properties were again delivered possession of to the mortgagee by means of it, as pointed out by the Subordinate Judge, the fact is the defendant continued in possession without any break. No doubt as between the *zemin* *dar* and the defendant his subsequent possession should be regarded as under the new deed; and it would be so in the case of every renewal of a usufructuary mortgage.

In paragraph 23 of Exhibit II it is the mortgage-deed alone that is cancelled and not the mortgage itself; even the deed is left with the mortgagee though only for reference. There is no doubt a change in the stipulation as to interest, originally interest at six per cent. on Exhibit I and the interest on Exhibit VI were to be paid from the usufruct, the mortgagee keeping accounts; under the new deed the usufruct is to be taken in full satisfaction of the whole interest payable. All these circumstances existed in the case of *Gopal Chunder Sreemany v. Herembo Chunder Holder* (12) and yet it was held that the substance of the transaction should be looked at and not mere words, that the old deed was not paid off and even if it was, it did not affect the question of the security for the old debt which remained untouched. Following the view taken in that case with which I agree and looking to the substance of the transaction in Exhibit II, it is clear to my mind that it is only a renewal of Exhibit I, that there was no payment of the money due under Exhibit I but that that amount remained charged on the 192 villages still included in Exhibit II and that the latter document is really a continuation of the old security on slightly varied terms.

Finding as I do that there is no proof of any intention on the part of the defendant to give up his security under Exhibit I and as it is manifestly to his advantage now to rely on it, I must give effect to the presumption that he intended what was to his benefit, and hold that defendant is entitled to rely upon Exhibit I against the plaintiffs' decree and sale under it.

It was then argued for plaintiffs that even if defendant is entitled to rely on Exhibit I against them he has abandoned his possession under Exhibit I and his present possession is under the terms of Exhibit II and as the latter deed is of no avail against them, his present possession under it cannot be availed of either, as against them. It was also said that the defendant's right to possession under Exhibit I was only for 20 years and that period having now expired, he could not use it against plaintiffs' right to possession. This last argument is erroneous on the facts, as under Exhibit I defendant can remain in

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possession at his option until the money due to him is fully paid off, and that has not been done. It is difficult to understand the first part of the argument. If defendant is entitled to rely on Exhibit I, as I have held, his right to possession under it must prevail against the plaintiffs and their claim to possession must fail. It is not his present possession that the defendant puts forward against the plaintiffs but his right to possession under his first deed. There is no force in the suggestion that right to possession is not part of the security in a usufructuary mortgage-deed and that it is the security alone, meaning thereby the money charge, that is kept alive for the defendant's benefit. In a usufructuary mortgage possession is an essential part of the security; and what is kept alive is not merely the security but the rights of the defendant on the property under the deed.

Taking then that the defendant can rely on his rights under Exhibit I against the plaintiffs including his right to possession, what is the effect of it on the plaintiffs' present claim for possession? The defendant is in the position of a puisne mortgagee with possession and plaintiffs in the position of first mortgagees who have purchased the property in execution of the decree on their mortgage to which the puisne mortgagee was not a party. The question whether in these circumstances the suit of the prior mortgagee purchaser for possession should be allowed subject to the second mortgagee's right of redemption or should be dismissed, was considered and decided by a Full Bench of this Court in the case of *Mulla Veetil Seethi v. Achuthan Nair* (13). It was held that a suit for possession failed. Following that decision I hold that plaintiffs' suit must fail.

I, therefore, allow the appeal and reversing the decree of the lower Court dismiss the suit and direct the plaintiffs to pay the defendant's costs here and in the Court below.

Appeal allowed.

(13) 9 Ind. Cas. 513; 9 M. L. T. 431; 21 M. L. J. 213; (1911) 1 M. W. N. 165.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 46 of 1915.

April 19, 1916.

Present:—Mr. Stuart, A. J. C., and
 Mr. Kanhaiya Lal, A. J. C.

SHEODAT SINGH AND OTHERS—PLAINTIFFS
 —APPELLANTS

versus

KALI—DEFENDANT—RESPONDENT.

*Oudh Rent Act (XXII of 1886), ss. 108, 127—
 Tenant, position of, when ejected by trespasser—Tres-
 passer, suit against, for assessment and recovery of
 rent.*

An ordinary tenant who has been wrongfully ejected from his holding (which was either under his own cultivation or under that of a sub tenant) by a person other than his own landlord, can treat such person as his sub-tenant and sue him for assessment and recovery of rent under section 127 read with section 108 of the Oudh Rent Act. [p. 463, col. 2.]

Badlu v. Ramzan, 4 O. C. 24, dissented from.

Appeal from the decree of the District Judge, Rae Bareilly, dated the 3rd September 1915, reversing the order of the Assistant Collector, Rae Bareilly, dated the 5th January 1915.

Babu Lachhman Das, for the Appellants.

Mr. Hakim-ud-din Siddiqui, for the Respondent.

JUDGMENT.—This appeal has been referred to a Bench for decision, and the question for determination is whether an ordinary tenant who has been ejected from his holding by a trespasser can be allowed to treat such trespasser as his sub-tenant and sue him for the assessment and recovery of rent under section 127 read with section 108 of the Oudh Rent Act. The plaintiffs are the *guzaradars* of *Tabuka Bahrouli*, which is now owned by *Musammam Mithan Kuar*. The village *Khajuba* forms a part of that *taluka* and *Chak Manau* is a hamlet of that village. The dispute in this case relates to the rent of a plot of land, which the plaintiffs describe as bearing No. 340 *Khasra* measuring 15 *biswas*, in *Chak Manau*. Their allegation was that they were also the *guzaradars* of plot No. 340 *Khasra* along with other plots situated in *Chak Manau*, that the said plot was in the cultivation of their tenant, *Lokai*, and that on his death the defendant, *Kali*, wrongfully took possession of it without the consent of the plaintiffs in 1318 *Faski*. They

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claimed its rent from Rabi 1319 to the end of Kharif 1322 Fasli.

The defendant admitted that the plaintiffs were the *guzaradars* of Taluka Bahrouli, but denied that they had any concern with *Chak Manau* or the land situated in it. He further stated that the plot in dispute was not situated in *Chak Manau*, but formed part of plot No. 1598 *Khasra* in the village Pahu, which was owned by Drigpal Singh, and that he had been cultivating the said plot of land from a period of ten or twelve years and paying its rent annually to the *talukdar* of Pahu. He asserted that Lokai was not a tenant of the said land and that the plaintiffs had never been in possession of it. The issues framed by the Court of first instance were:

"Are the plaintiffs landlords of the land in suit?"

"If so, what rent, if any, is due to them from the defendant?"

They were not sufficiently comprehensive to cover the various defences raised in the case. The finding of the Court of first instance on those issues was that the plaintiffs and their father were entered in the *khatauni* under clause 5, and that the defendant had no right to hold the land without the consent of the plaintiffs. A decree for Rs. 12.14.3 was accordingly passed against the defendant. On appeal the learned District Judge directed the Court of first instance to determine whether the plaintiffs were the *guzaradars* of the land in dispute or ordinary tenants and whether the *talukdar* of Bahrouli was the proprietor of *Chak Manau*. The findings of that Court were that the plaintiffs were ordinary tenants of the land in dispute and that the *talukdar* of Bahrouli was not the owner of *Chak Manau*. The learned District Judge accepted those findings, though by oversight he misdescribed the latter, and proceeded to dismiss the suit on the ground that the plaintiffs, being ordinary tenants, had no right to sue for the assessment and recovery of rent against a trespasser under section 127 of the Rent Act. He relied in support of that view on a decision, *Badlu v. Ramzan* (1). It was held in that case by Mr. Spankie that the expression "landlord" in section 127 of the Oudh Rent Act did not

include an ordinary tenant and that the provisions of that section did not cover a case where a person occupied, without the consent of an ordinary tenant, a part of his holding. The definition of "landlord" as contained in section 3, clause (11), of the Oudh Rent Act is, however, wide enough to include any person to whom a tenant is liable to pay rent, and the definition of the word "tenant" in section 3, clause (10), of the same Act is also sufficiently comprehensive to include a person who is liable to pay rent. As between an ordinary tenant and a person whom he is willing to treat as a sub-tenant, the relationship is of the same nature as that between a proprietor of the land and the tenant thereof; and if an ordinary tenant is entitled to claim rent from a sub-tenant he must be treated, in the absence of anything in the subject or context to the contrary, as a landlord for the purposes of the Oudh Rent Act. We have, therefore, to examine whether there is anything in the subject or context of section 127 of the Act to exclude the case of an ordinary tenant, claiming the rent of his land from a person who had trespassed on his tenancy, from its purview. The language, used in sections 24, 67 and 68 of the Act, cannot be of any help in elucidating the matter, for the rights, conferred by sections 24 and 67, have been expressly declared by section 68 to be inapplicable to *thekadars*, mortgagees and sub-tenants. Section 127 gives an option to a person entitled to the rent of land either to treat the person in possession of it without his consent as a trespasser and sue for his ejectment in the Civil Court, or to claim rent from him at the rate payable in the year preceding the wrongful occupation or, if the rent was not payable in that year, at such rate as the Court may determine to be fair and equitable, and the mere fact that the section denies to such a person in the latter instance any of the statutory privileges conferred by the Act on ordinary tenants makes no difference. It is also immaterial whether the person ousted had prior to his ouster been in cultivatory possession of the land, or was in possession of it through a previous sub-tenant; for in the former case the law permits an equitable rate to be charged, and in the latter case the rent levied previous to the

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trespass can be recovered. The case would be the same, whether the person claiming is the proprietor of the land or a tenant ejected from his holding by a person other than his landlord. Any other interpretation would leave a tenant wrongfully ejected from his holding practically at the mercy of the trespasser, if he is not sufficiently well off to wait and seek his remedy in the Civil Court, and would deprive him of the shorter and summary remedy for the redress of his rights, which the above section was intended to provide. We are unable, therefore, to agree with the reasoning upon which the judgment in *Badlu v. Ramzan* (1) proceeded, and feel inclined to take the view that section 127 is wide enough to cover cases in which an ordinary tenant is wrongfully ejected by a person other than his own landlord.

The other issues arising in the case connected with the claim of adverse possession set up by the defendant and the situation of the land and the payment of its rent to the *talukdar* of Fahu have not been tried.

We allow the appeal accordingly, and setting aside the decree of the lower Appellate Court remand the case to that Court with a direction to re-instate it under its original number and to dispose of it, after determining the remaining pleas urged in defence, in the manner required by law. The costs here and hitherto will abide the result.

Cause remanded.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No 235 OF 1913.

April 6, 1916.

Present:—Mr. Justice Chapman and
Mr. Justice Atkinson.

RAJBANS SAHAY—OPPOSITE PARTY—

APPELLANT

versus

Rai MAHABIR PRASAD—APPLICANT—

RESPONDENT.

*Land Acquisition Act (1 of 1894), ss. 11, 12—
Acquisition of land by Government—Compensation,
right to—Adverse possession, claimant by.*

Where the question was whether compensation for land compulsorily acquired by Government should be awarded to the collateral heir of the last male owner, or to a person who had been in possession of the land for more than twelve years prior to the acquisition proceedings without payment of rent:

Held, that the latter was the person entitled to receive the compensation.

First appeal from an order of the District Judge, Gaya, dated the 18th March 1913.

Messrs. Akbari and Khurshed Hasnain, for the Appellant.

JUDGMENT.—A plot of land was acquired for the purposes of the East Indian Railway Company on the 23rd March 1912, and a certain sum of Rs. 580 odd was assessed as the compensation to be paid for the land. For this sum there were two rival claimants, Rai Mahabir Prasad and Rajbans Sahay. The plot was originally held by Rai Gudar Sahay. Rai Mahabir Prasad claimed to be the reversioner to the estate left by Rai Gudar Sahay who appears to have died in March 1897, leaving a widow and a daughter, both of whom are since dead. The other claimant, Babu Rajbans Sahay, claimed to have been the family *mukhtear* and to have been in possession of the plot rent-free. His case was that his father had been in possession before him. The finding of the learned District Judge, which is based apparently upon evidence common to both sides, is that Rajbans Sahay took possession of the property soon after the death of Rai Gudar Sahay during a dispute between the widow of Rai Gudar Sahay and Rai Gudar Sahay's daughter-in-law, Sabodra Koer. The respondent has not appeared, but upon the evidence offered on either side there can be no doubt that Rajbans Sahay had been in possession of the property for at least twelve years before the 23rd March 1912, when the property was acquired, and that during that period he has paid no rent for it. He asserts now that the landlord's title lies with Sabodra Koer. It is not clear when he first asserted this, but it is clear that he has been in possession for twelve years, and, therefore, Rai Mahabir Prasad had lost his right to recover possession from him before the land was acquired. At the time of the acquisition Rajbans Sahay appears to have acquired by adverse possession the title to hold the land without paying any rent for it. We are of opinion that the learned District Judge was wrong in awarding the full amount of compensation to Rai Mahabir Prasad, and we set aside that direction, and we direct that the amount be paid to the appellant, Rajbans Sahay.

Appeal decreed.

EMPEROR v. NGA MYAT KAING.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION PETITION NO. 363A
OF 1916.

June 12, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Twomey.

EMPEROR—PROSECUTOR—APPLICANT

versus

NGA MYAT KAING—ACCUSED—OPPOSITE
PARTY.

Penal Code (Act XLV of 1860), s. 302—Murder—Sentence—Extenuating circumstances—Murder in the heat of passion.

A sentence of death should ordinarily be passed for the crime of murder unless there are extenuating circumstances, and a mere absence of aggravating circumstances is not enough to justify a sentence of transportation for life.

The fact that a murder was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance.

Crown v. Nga Tha Sin, 1 L. B. R. 216; *Hamid v. Emperor*, 2 L. B. R. 63 and *Shwe Cho v. Emperor*, 3 L. B. R. 111; 3 Cr. L. J. 25, referred to.

Review of the order of the Sessions Judge, Hanthawaddy, dated the 4th April 1916, passed in Sessions Trial No. 12 of 1916.

JUDGMENT.

TWOMEY, J.—(May 23rd, 1916.)—The appeal of Myat Kaing has been dismissed summarily. But I have serious doubts whether the learned Sessions Judge exercised his power under section 367 (5), Code of Criminal Procedure, in accordance with law in this case. It has been held that a sentence of death should ordinarily be passed for murder unless there are extenuating circumstances, and that a mere absence of aggravating circumstances is not sufficient to justify a sentence of transportation for life. In the present case the lesser sentence was passed because the Judge found that the crime was committed "without premeditation in the heat of passion upon a sudden quarrel". These are not, in my opinion, extenuating circumstances as contemplated in the rulings of this Court, *Crown v. Nga Tha Sin* (1), *Hamid v. Emperor* (2), *Shwe Oho v. Emperor* (3). The facts were that the accused and deceased had words with one another in a gambling *waing*, when accused drew a knife

(1) 1 L. B. R. 216.

(2) 2 L. B. R. 63.

(3) 3 L. B. R. 111; 3 Cr. L. J. 25.

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and stabbed deceased in the abdomen wounding him mortally.

Nga Myat Kaing will be called upon to show cause before a Bench of this Court why the sentence passed on him should not be enhanced.

ORDER.

Fox, C. J.—The learned Sessions Judge appears to have overlooked the rule adopted by the Full Bench of this Court in *Crown v. Nga Tha Sin* (1), which laid down that to justify the passing of a sentence of transportation for life in cases of murder, the Judge should find that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

It was also stated that mere absence of premeditation was ordinarily an insufficient reason for not passing a capital sentence. If these rules had been borne in mind, a sentence of death in the present case should have been passed.

It appears to me, however, doubtful whether this Court would have felt bound to confirm a sentence of death for a crime committed 19 years ago, when the accused had apparently not been guilty of excesses of violence since. Whilst of opinion that there were no really extenuating circumstances in connection with the accused's crime and that a sentence of death should have been passed by the Sessions Judge upon the accused, I do not think enhancement of the sentence of transportation for life is called for. That sentence will stand.

TWOMEY, J.—I concur.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION NO. 532
OF 1916.

August 17, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Smither.
SARAT CHANDRA MADAK AND OTHERS—
PETITIONERS

versus

MOBARAK MALLIK AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 147.—

SARAT CHANDRA MADAK C. MOBARAK MALLIK.

Dispute concerning right to collect tolas from hat, whether falls within the section.

The words "concerning the right of use of any land or water" in section 147, Criminal Procedure Code, are wide enough to include the right to go upon a hat for the purpose of collecting gratuities; therefore, a dispute concerning the right to collect tolas (gratuities) from a hat falls within the purview of the section. [p. 467, col. 1.]

Criminal revision against the order of the 1st class Magistrate at Arambagh, dated the 10th April 1916.

Babus Rishindra Nath Sarkar and Ramesh Chandra De, for the Petitioners.

Babu Bibhuti Bhusan Saha, for the Opposite Party.

JUDGMENT.—In this case the dispute was with reference to the right to collect tolas, or small perquisites, from Dewangunge hat. The first party on behalf of the local Mahomedans was claiming the right to collect the tolas only on one day every year, for performing a certain religious ceremony. The second parties who were Hindus were objecting to this, saying that the Mahomedans had no such right to collect tolas from the hat as alleged by the first party.

Now, the first ground upon which this Rule was issued was that the case was not one falling within section 147 of the Criminal Procedure Code, and the reason why it is alleged that the case did not come within that section was that the dispute was not one concerning the right of use of any land.

Now, in our opinion, it was a dispute concerning the right of use of land. As far as I can understand, the facts of this case show that the hat was held every week in the particular village. It was held always on the same vacant piece of ground somewhat about the middle of the village, and when the hat was held, people who wanted to sell their goods came and took up their position upon different places on this vacant piece of ground in the ordinary course of events. It may be described as a kind of market, and the place where it is held may be described as a kind of market-place. The Mahomedans were alleging that they had the right on one day in the year to go upon this piece of land when the hat was held for the purpose of collecting from the people who were there, the shop-

keepers I suppose, and also people who frequented the shops, gratuities for the purpose of performing a particular religious ceremony, and the dispute was with reference to the right of the Mahomedans to do that.

The question is whether that is a dispute concerning the right of use of any land.

The first observation, I would make, is that the words which are used in section 147 of the Criminal Procedure Code are not the same as those used in section 145 of the same Code. The words used in section 145 are these: "a dispute likely to cause a breach of the peace exists concerning any land or water." It has been held by this Court that what is contemplated there is *immovable property*, something of which actual physical possession can be given and taken. But when you come to section 147, as I have already pointed out, the words used are not "concerning land or water", but "concerning the right of use of any land or water." The words used are of wider and more general application. The marginal note describing this section is "disputes concerning easements, etc." It has been held by this Court that the words of a section cannot be limited by the marginal note in accordance with the usual rule of construction of Statutes. It has, however, been held that the word "easements" was not used in this section in the limited sense in which it is used in English Law. It has been expressly so held by this Court in the case of *Dukhi Mullah v. Halway* (1) (and the part of the judgment to which I wish to refer is at page 59) that the word "easements" was not used in a limited sense as in English Law: and the judgment goes on to point out: "In the first place the section speaks of 'easements, etc.', and in the second place there is nothing to show that the British Indian Legislature uses the term 'easements' in the restricted sense in which it is used in English Law so as to exclude profits *a prendre*, while on the contrary a reference to the definition of *easements* in the Limitation Act (XV of 1877, section 3), which was passed four years before the Criminal Procedure Code, and in the Easements Act

(1) 23 C. 55; 12 Ind. Dec. (N. S.) 37.

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(V of 1882, section 4), passed in the same year as the Criminal Procedure Code a little more than a month before, shows that the term is used as including profits *a prendre*. There is then nothing to show that the words 'the right to do anything in or upon tangible immoveable property' in section 147 do not include the right to fish in a *jhil*."

Now, those words "the right to do anything in or upon any tangible immoveable property", which had been in section 147 of the previous Criminal Procedure Code, are not to be found in the corresponding section of the present Code and the material words now are, "concerning the right of use of any land or water." Having regard to the ordinary meaning of the words and to that decision, I am of opinion that the words are wide enough to include such a right of use of the land as is claimed by the Mahomedans in this case, namely, the right to go upon the land for one day in the year for the purpose of collecting gratuities to be used for a certain religious purpose.

With regard to the *second* point, this was of an entirely different nature. It was based on the ground that there was no finding as to the last exercise of the right. This arises in this way. There is a proviso to section 147 which says this: "Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or where the right is exercisable only at particular seasons or on *particular occasions*, unless the right has been exercised during the last of such seasons or occasions before such institution." The latter part of this proviso applies to this case; and it is alleged on behalf of the petitioners that there is no finding here that this particular right claimed by the Mahomedans was exercised during the last of such seasons or occasions before the institution of the inquiry; and, therefore, he argues that the Magistrate had no jurisdiction to make the order.

It is quite true that there is no express finding to that effect in his judgment. But we have got his explanation and from

it we find that 'although there had been opposition' by the petitioners, that opposition was not successful: and, the evidence of the witnesses for the first party, that is the Mahomedan party, showed that the right was exercised by the first party Mobarak Mallik during the last three years: and that witnesses for the first party proved that the right had been exercised by the first party upto the last year and that they could not only this year collect any *tola* owing to violent opposition by the second party: and then the Magistrate goes on to refer to the particular witnesses whose evidence I need not specifically mention. Now, if the evidence as to these facts was accepted by the Magistrate, as I gather from his explanation he intended to do, he in fact had jurisdiction. The only thing is that he did not expressly state that finding in his judgment. The only result of making the Rule absolute asking the Magistrate to reconsider the matter would be to ask him to insert that, the effect of which he had stated in his explanation. My learned brother and myself are satisfied on the facts that the Magistrate had jurisdiction to make the order: and we do not think that that is a good ground for making the Rule absolute.

With regard to the *third* point, that there is no finding that there was a likelihood of a breach of the peace, in my opinion, there is a finding to that effect. If it is not express it is certainly implied. Further than that, it was not one of the grounds on which the Rule was granted.

For these reasons, we think that the Rule must be discharged.

Rule discharged.

NGA SHWE KYAW v. EMPEROR.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION PETITION No. 120 OF 1916.
August 21, 1916.

Present:—Mr. Justice Twomey.

NGA SHWE KYAW—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 439—
Revision, grounds for—Inferences not warranted by
evidence.*

Inferences not warranted by the evidence, drawn to the prejudice of the accused, are good grounds for a criminal revision [p. 468, col. 1.]

Review of the order of the Special Power Magistrate, Prome, dated the 14th February 1916, passed in Criminal Regular Trial No. 317 of 1915.

ORDER.—The applicant Shwe Kyaw was convicted of having in his possession a mould for making counterfeit rupees and seven counterfeit rupees and was sentenced under section 235, Indian Penal Code, to rigorous imprisonment for three years. The Sessions Court dismissed his appeal. I admitted the application for revision, mainly because it appeared from the judgment of the Sessions Court that several inferences not warranted by the evidence had been drawn to the prejudice of the accused.

The incriminating articles were found under a small paddy bin behind the accused's house. The mould or press consists of two flat pieces of iron which fit on to one another, one piece having a circular depression the size of a rupee and when the two pieces of iron are placed together there is an aperture at one end of the mould, which is apparently adapted for pouring in molten metal. Although the circular depression has no wax or other material for receiving the impression of a coin, there can be little doubt that the two pieces of iron were designed for the purpose of making counterfeit rupees.

But this mould and the counterfeit coins were admittedly found in a place where it would have been a matter of no particular difficulty for an outsider to "plant" them. The paddy bin is close to a path leading to the high road to Hmattaing and the village fence has holes in it. It would apparently have been easy enough for an outsider to put the things under the bin at night without the knowledge of the accused, and though he has not succeeded

in proving to the satisfaction of the Magistrate and the Sessions Judge that the informer Po Thaw and the headman Po Kyaw bear him ill-will, the mere fact that the articles were found in such an outlying position gives rise to doubts as to conscious possession on the part of the accused.

It appears that Shwe Kyaw had been under suspicion for a long time and that his house had already been searched twice within the year but without result. I cannot agree in the Sessions Judge's opinion that the previous unsuccessful searches were likely to increase Shwe Kyaw's sense of security. It seems to me that a man who had such excellent grounds for knowing that he was suspected would be unlikely to keep incriminating articles at any place where it could be said they were under his control. The Sessions Judge appears to have gone so far as to count the remoteness of the paddy bin and its accessibility from outside as circumstances indicative of Shwe Kyaw's guilt, the argument being that the accused would keep the mould, etc., far from his house so as if need be to avail himself of the defence which has actually been set up. Carrying this argument to its logical conclusion it would follow that the more remote the place of concealment and the more accessible to "planters", the greater is the probability of guilty knowledge. But the Sessions Judge seems to have been influenced also by a consideration which is inconsistent with the above. It appears that Shwe Kyaw particularly asked the searchers not to pull his paddy bin about lest they might damage his property, and the Sessions Judge accepted the view of the prosecution that his remonstrance betokened guilty knowledge of what was under the bin. If Shwe Kyaw had designed to rely on the remoteness of the bin and its accessibility, he would surely not spoil the effect of this defence by showing nervousness when the search became "hot". It is natural for a man to protest if his property is roughly handled and the fact that Shwe Kyaw did so, appears to me to be in his favour rather than otherwise. If he knew what was under the bin it was obviously his best policy to hold his

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tongue and rely on the defence which, according to the Sessions Judge's argument, he had already planned.

The supplementary evidence produced by the prosecution as to false coins having been issued previously by Shwe Kyaw is in every case of a very dubious kind. The witnesses all speak to incidents which happened 8 to 10 months before the search and a good deal of the evidence is mere hearsay. Even if these witnesses are speaking the truth, there is no proof that any of the coins which they refer to were really counterfeit.

I think the prosecution entirely failed to establish the charge against the applicant. The conviction and sentence are set aside and the applicant Shwe Kyaw is acquitted.

Conviction set aside.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 17 OF 1916.

July 21, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Walmsley.
TARU BABU *alias* TARAK DAS MOITRA
—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), s. 225B—Sending persons to Magistrate for abetting escape from custody—Omission to make preliminary enquiry—Jurisdiction.

A Court has no power to accord sanction for prosecution of a person under section 225B, Indian Penal Code, for snatching away a judgment-debtor from the custody of one of its process peons, as section 225B, Indian Penal Code, is not mentioned in section 195, Criminal Procedure Code. [p. 469, col. 2.]

A Court acts without jurisdiction under section 476, Criminal Procedure Code, in sending a person to take his trial, for an alleged offence, without making a preliminary enquiry as to the circumstances constituting the alleged offence. The enquiry may be unnecessary when the Court is already in possession of the material facts from the evidence recorded at the trial, but where the incident constituting the alleged offence took place outside the Court as to which the Judge himself has no knowledge, it is incumbent on the Court to make an enquiry preliminary to passing orders under the section. [p. 470, col. 1.]

Rule against an order of the 2nd Munsif, Howrah, dated the 20th May 1916.

Babu Monmotha Nath Mookerjee, for the Petitioner.

JUDGMENT.

SANDERSON, C. J.—In this case we think the Rule should be made absolute. What happened was this. It was brought to the knowledge of the learned Munsif who had tried a particular case; No. 614 of 1915, that certain persons, one of whom was the petitioner to this Court, had endeavoured to rescue a certain person from the custody of the execution peon. The learned Munsif directed these persons to appear before him and to show cause why they should not be committed for trial in the Criminal Court. Then it came to his knowledge that a relation of his was assisting to conduct the case for some of the accused. He, therefore, very properly felt that he ought not to adjudicate upon the case. Consequently, he proceeded to send "the aforesaid persons to the Magistrate to try them on the charge of snatching away Sadhan Chandra Nandy from the lawful custody of the said peon." He also sent "the said Sadhan Chandra Nandy to the Magistrate to take his trial before him for abetting the aforesaid persons in the commission of the offence". To my mind it is clear that he purported to act under section 476, Criminal Procedure Code.

The question arises whether he had power so to do. In my opinion he had not; *first*, because the section in pursuance of which the accused persons were charged was section 225B of the Indian Penal Code. That is a section which is not mentioned in section 195 of the Criminal Procedure Code. Therefore for that reason the learned Munsif would not have power to send the accused for trial for that offence.

But there is *another* reason which to my mind is a more important reason, and it is this. Section 476, Criminal Procedure Code, says, "when any Civil, Criminal or Revenue Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary may send the case for enquiry or trial to the

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nearest Magistrate of the first class". Now it is quite evident in this case that the learned Munsif made no preliminary enquiry whatsoever. It was reported to him that these persons had snatched away or endeavoured to snatch away the judgment-debtor from the custody of the peon. He did not make any enquiry. It is quite true, as has been pointed out by Mr. Mookerjee, that the words are "any preliminary enquiry that may be necessary", and I can quite imagine that in certain cases no preliminary enquiry is necessary. It may be that in a case where the Judge is trying the case and all the facts which are material to the charge have been brought to the notice of the learned Judge, or have come out during the course of the hearing of the case, it would be mere waste of time and quite unnecessary to hold a preliminary enquiry, because the learned Judge is already in possession of all the material facts on which it is necessary for him to form the judgment. But in such a case as this, where the incident took place outside the Court, and as to which the learned Judge himself could have no knowledge and as to which evidence must be called for, in my judgment, unless he does hold such a preliminary enquiry as may be necessary to enable him to determine whether or not there is any case fit to be sent to the Magistrate, he has no jurisdiction to send the accused under section 476, Criminal Procedure Code.

For these two reasons in my judgment the learned Munsif had no jurisdiction.

I think one ought to say that our decision does not necessarily put an end to any such proceedings as ought to be taken against the accused persons. A complaint may be laid before the Magistrate in the ordinary way in respect of this matter and the learned Magistrate may proceed to enquire into it in the usual course.

In our opinion, this Rule, which is obtained by the petitioner in this case, should be made absolute. But we think that it ought to be made applicable to all the accused persons.

WALMSLEY, J.—I agree.

Rule made absolute.

PATNA HIGH COURT.
FULL BENCH.

CRIMINAL REVISION No. 343 of 1916.

November 27, 1916.

Present:—Mr. Justice Mullick, Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

BUCHAN SINGH AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106—Appellate Court, power of, to order security in affirming conviction—Jurisdiction.

An Appellate Court has power, in affirming a conviction and sentence passed on an accused, to pass an order binding down the accused under section 106 of the Criminal Procedure Code, even though the Court convicting in the first instance was not competent to do so. [p. 471, col. 1.]

Emperor v. Bhausing Dhumalsing, 1 Ind. Cas. 454; 33 B. 33; 10 Bom. L. R. 759; 8 Cr. L. J. 267; *Dharam Das v. Emperor*, 7 Ind. Cas. 412; 33 A. 48; 7 A. L. J. 910; 11 Cr. L. J. 480; *Solai Gounden, In re*, 21 Ind. Cas. 174; 37 M. 153; 14 M. L. T. 235; (1913) M. W. N. 764; 25 M. L. J. 403; 14 Cr. L. J. 574, approved.

Emperor v. Momin Malita, 35 C. 434; 12 C. W. N. 752; 7 C. L. J. 602; 8 Cr. L. J. 9; 4 M. L. T. 340, dissented from.

Criminal revision from an order of the Sub-Deputy Magistrate, Buxar, dated the 11th September 1916.

Mr. *Rajendra Prasad*, for the Petitioners.

The Deputy Government Advocate, for the Opposite Party.

JUDGMENT.

MULLICK, J.—In this case a second class Magistrate convicted the petitioners before us of rioting and sentenced them to various terms of imprisonment. The case came on appeal before the District Magistrate and the District Magistrate, while upholding the convictions, altered the sentences and at the same time called upon the petitioners to shew cause why they should not be bound down under the provisions of section 106 of the Criminal Procedure Code of 1898. Cause was shown by the petitioners, with the result that the District Magistrate ordered each of the petitioners to execute a bond for Rs. 300 with two sureties of Rs. 300 each. The matter now comes on revision before us on a point of law. It is submitted by the learned Vakil for the petitioners that the learned District Magistrate was not competent to order the peti-

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tioners to give security as the Court of first instance was itself not competent to do so, and he has invited us to refer to the corresponding provisions of the Criminal Procedure Code of 1872 for the purpose of shewing what the intentions of the original framers of the Code were. But we are not concerned with the terms of that Code which were superseded by section 106 of the Code of 1882, which again was amended by the present Code of 1898. After the Code was amended in 1882 some Courts took the view that an Appellate Court had no longer power to bind down an accused person of its own motion. Section 106 of the present Code was then expressly enacted in order to declare and affirm the Appellate Court's power to do so. But I cannot admit that the effect of the enactment is to place upon the Appellate Court the limitations which the learned Vakil for the petitioners now desires to impose upon the exercise of its powers.

Apart from the plain language of the section the weight of authority is entirely against the learned Vakil. In the case of *Emperor v. Bhausing Dhumalsing* (1), the Court held that under clause 3 of section 106 of the Code of 1898, an Appellate Court was fully competent to pass an order binding down an accused under section 106, even though the Court convicting in the first instance was not competent to do so. That decision was followed in *Dharam Das v. Emperor* (2) and again in *Solai Gounden, In re* (3), where a Full Bench of three Judges of the Madras High Court, expressly dissenting from *Muthiah Chetti v. Emperor* (4) and *Paramasiva Pillai v. Emperor* (5), adopted the reasoning of the Bombay Court in *Emperor v. Bhausing Dhumalsing* (1). This Full Bench decision of the Madras High Court was passed in 1914 and is the latest exposition of the law on this point. On the other hand the only authority upon

which the learned Vakil for the petitioners can rely is the case of *Emperor v. Momin Malita* (6), passed in 1908 by a Divisional Bench of the Calcutta High Court. In that case the learned Judges did not enter into any discussion of the provisions of the new Code, but they relied on the two Madras cases reviewed by the Full Bench in 1914 and upon the case of *Mahmudi Sheikh v. Aji Sheikh* (7) which was decided under section 106 of the Code of 1882. In my opinion the terms of that section having been amended by the present Act, the decision in the case of *Mahmudi Sheikh v. Aji Sheikh* (7) and the reasoning of the Court in that case do not apply to the case now before us, and the weight of authority is conclusively in favour of the view taken by the Madras High Court in *Solai Gounden's* case (3).

I would, therefore, dismiss the present application and confirm the sentences.

ATKINSON, J.—I concur.

JWALA PRASAD, J.—I concur.

Application dismissed.

(6) 35 C. 434; 12 C. W. N. 752; 7 C. L. J. 692; 8 Cr. L. J. 9; 4 M. L. T. 340.

(7) 21 C. 622; 10 Ind. Dec. (N. S.) 1045.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1712 OF 1916.

December 8, 1916.

Present:—Mr. Justice Shah Din.

NUR MUHAMMAD—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110, cl. (f)—Evidence of general repute, whether admissible—Proof.

In order to bring a case within clause (f) of section 110 of the Criminal Procedure Code, it is necessary to prove by definite evidence that the accused is so desperate and dangerous a person as to render his being at large without security hazardous to the community. [p. 472, col. 2.]

Evidence of general repute is not admissible in proceedings taken under that clause. [p. 472, col. 2.]
Akhoy Kumar Chatterji v. Queen-Empress, 5 C. W. N. 249; *Wahid Ali Khan v. Emperor*, 11 C. W. N. 789; 6 Cr. L. J. 1; *Kalai Haldar v. Emperor*, 29 C. 779; *Muthu Pillai In re*, 8 Ind. Cas. 493; 8 M. L. T. 347; 11 Cr. L. J. 663; (1911) 1 M. W. N. 34; 21 M. L. J. 438 and *Emperor v. Bidhyapati*, 25 A. 273, A. W. N. (1903) 36, referred to.

(1) 1 Ind. Cas. 454; 33 B. 33; 10 Bom. L. R. 754; 8 Cr. L. J. 267.

(2) 7 Ind. Cas. 412; 33 A. 48; 7 A. L. J. 910; 11 Cr. L. J. 490.

(3) 21 Ind. Cas. 174; 37 M. 153; 14 M. L. T. 235; (1913) M. W. N. 763; 25 M. L. J. 403; 14 Cr. L. J. 574.

(4) 29 M. 190; 3 Cr. L. J. 461.

(5) 30 M. 48; 1 M. L. T. 403; 5 Cr. L. J. 88

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Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Jhelum, dated the 21st August 1916, affirming that of the Magistrate, 1st class, Chakwal, dated the 12th July 1916, directing the petitioner to furnish a bond in Rs. 500, with two sureties jointly and severally responsible in the same amount, to be of good character for the period of one year, or in default to undergo one year's rigorous imprisonment.

Dr. Muhammad Iqbal, for the Petitioner.

Mr. Bhagat Ram Puri, for the Government Advocate, for the Crown.

JUDGMENT.—In this case the petitioner Nur Muhammad has been ordered under section 110 (f), Criminal Procedure Code, by Mr. P. J. Anderson, Magistrate of the first class, Chakwal, to execute a bond for Rs. 500 with two sureties to be of good behaviour for a period of one year. The petitioner has applied to this Court for revision of the order of the Magistrate, on the ground that the evidence adduced by the Police against him is not sufficient to bring his case within the purview of clause (f) of section 110 aforesaid, and after hearing Counsel for the petitioner and for the Crown, I think that this contention is sound and must be allowed. Seven witnesses have given evidence against the petitioner in the Court below, and the gist of their evidence is that the petitioner had committed two murders in 1910 and 1915, was suspected in 1911 of having committed burglary in the house of one Hassa in connection with which his house was searched but nothing incriminating was found, that he associates with bad characters in the neighbourhood, and that he is a desperate and dangerous person and people are afraid of him.

As to the murders said to have been committed by the petitioner in 1910 and 1915, the petitioner was tried on both occasions in respect of the alleged crime but was ultimately acquitted in the earlier case by the Court of Session and in the later case by this Court (see judgment of this Court. Criminal Appeal No. 999 of 1915, decided on the 6th December 1915). Having been acquitted in the two capital cases, it is clear that in the eye of the law he must be held to have been inno-

cent; and the Magistrate was, therefore, in error in referring to and relying upon the criminal trials of 1910 and 1915 as showing that the petitioner was a dangerous person. Next, we have the fact that the petitioner's house was searched in 1911 on suspicion of his connection with a burglary in the house of one Hassa. That fact has no bearing whatever on this case, inasmuch as the petitioner has been held to be a dangerous character under clause (f) and not an habitual offender under any one of the other clauses of section 110, Criminal Procedure Code.

As regards the applicability of clause (f) of the aforesaid section to the present case, it is clear that evidence of general repute is not admissible in proceedings taken under that clause [*Akhor Kumar Chatterjee v. Queen Empress* (1), *Wahid Ali Khan v. Emperor* (2), *Kalai Hallar v. Emperor* (3), *Muthu Pillai, In re* (4), *Emperor v. Bidhyapati* (5)]. I have carefully gone through the evidence of the witnesses produced by the Police in this case and I find that it is mostly evidence of general repute, such as would be admissible only in proceedings taken under clauses (a) to (e) of section 110, and is wholly insufficient to establish that the petitioner's case falls within clause (f) of that section. In order to bring the petitioner's case within clause (f) of the section it is necessary to prove by definite evidence that he is so desperate and dangerous as to render his being at large without security hazardous to the community. The witnesses for the prosecution do not allege or prove any specific acts as having been done by the petitioner from which the Court could draw a reasonable inference that the petitioner was so desperate and dangerous as to render his being at large without security hazardous to the community. They all content themselves with making the bold statement that the petitioner is a desperate and

(1) 5 C. W. N. 249.

(2) 11 C. W. N. 789; 6 Cr. L. J. 1.

(3) 23 C. 779.

(4) 8 Ind. Cas. 433; 34 M. 255; 8 M. L. T. 347; 11 Cr. L. J. 653; (1911) 1 M. W. N. 34; 21 M. L. J. 453.

(5) 25 A. 273; A. W. N. (1903) 36.

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dangerous individual, and in support of it most of them refer to the two murders which were alleged to have been committed by the petitioner in 1910 and 1915 and to which reference has been made above.

In my opinion it has not been proved in this case that the petitioner's case falls within clause (f) of section 110 of the Code; and I, therefore, set aside the order of the Magistrate and direct that the security-bond, if any, executed by the petitioner be cancelled.

Order set aside.

— — —
 LOWER BURMA CHIEF COURT.
 CIVIL REVISION PETITION No. 172 OF 1916.
 November 23, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
 and Mr. Justice Ormond.

KO MAUNG GYI—APPLICANT

versus

MA MA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 439, 476—Order by Civil Court under s. 476—Revision.

Section 439 of the Criminal Procedure Code does not confer jurisdiction on the High Court exercising criminal jurisdiction to revise an order made by a District Court under section 476.

Ramzan Ali v. Oporno Charan Chowdry, 4 L. B. R. 138; 7 Cr. L. J. 416; *San Gaing v. King-Emperor*, 4 L. B. R. 339; 9 Cr. L. J. 24; *Kali Prosad Chatterjee v. Bhuban Mohini Dasi*, 8 C. W. N. 73; 1 Cr. L. J. 21, referred to.

Mr. McDonnell, for the Applicant.

JUDGMENT.—This is an application to revise and set aside an order, made by a District Judge under section 476 of the Criminal Procedure Code after the decision of a suit before him, sending to a Magistrate for inquiry a case against the applicant of having committed the offences of giving false evidence and using evidence known by him to be false.

The petition is headed as a civil revision, but the learned Advocate who appeared in support of it has not asked for the exercise of the Court's civil revisional powers under section 115 of the Civil Procedure Code.

He has asked that the application may be dealt with in exercise of the Court's revisional powers under section 439 of the Criminal Procedure Code,

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In *Ramzan Ali v. Oporno Charan Chowdry* (1) and in *San Gaing v. King-Emperor* (2) Irwin, J., held that section 439 of the Criminal Procedure Code did not confer jurisdiction on this Court exercising criminal jurisdiction to revise an order made by a District Court under section 476 of the Code. He followed a decision of the Madras High Court and the case of *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3) in the Calcutta High Court. The learned Advocate has contended that these decisions as well as others in the Allahabad High Court were erroneous, and should not be followed.

The correctness of the decision in *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3) has been expressly affirmed by a Full Bench of the Calcutta High Court [*Har Prasad Das v. Emperor* (4)] after very full and elaborate argument and consideration of all the decisions and provisions of law bearing on the questions involved.

We are not prepared to differ from this decision and hold that it is not open to us to revise the District Judge's order under powers conferred on the Court by section 439 of the Criminal Procedure Code.

The application is rejected.

Application rejected.

- (1) 4 L. B. R. 138; 7 Cr. L. J. 416.
 (2) 4 L. B. R. 339; 9 Cr. L. J. 24.
 (3) 8 C. W. N. 73; 1 Cr. L. J. 21.
 (4) 19 Ind. Cas. 197; 40 C. 477; 17 C. L. J. 245; 17 C. W. N. 647; 14 Cr. L. J. 197.

— — —
 PUNJAB CHIEF COURT.
 CRIMINAL REVISION No. 609 OF 1916.
 May 20, 1916.

Present:—Mr. Justice Broadway.
 MAULA BAKHSH—PETITIONER

versus

LAL CHAND—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 439, 537—Chief Court, power of, to examine record and pass orders—Sanction, application for—Notice to accused, whether necessary—Sanction granted by successor of Munsif before whom alleged offence committed, whether valid—Misdescription of officer granting sanction, effect of.

Under section 439, Criminal Procedure Code, the Chief Court has full powers to examine the record of a case and pass such orders as may be necessary. [p. 475, col. 2.]

Before granting sanction under section 195 it is advisable to give notice to the accused, although the

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issue of such a notice is not provided for in the Code. [p. 475, col. 2.]

There is no Court of a Munsif of the 1st class as a permanent Court with a perpetual succession of Judges, and on the transfer of a Munsif from a District, the Court of the Munsif who takes over the pending work is not identical with the Court of the Munsif who has been transferred. Therefore, a Munsif before whom an offence has not been committed cannot grant sanction to prosecute under section 195, merely because he has succeeded a Munsif in that particular place or district. [p. 477, col. 1.]

Phina Singh v. Empress, 25 P. R. 1889 Cr.; *Sobha Singh v. Lal Chand*, 30 P. R. 1901 Cr.; *Mela Ram v. Emperor*, 7 P. R. 1902 Cr.; 44 P. L. R. 1902; *Emperor v. Dauli*, 2 Ind. Cas. 812; 6 P. R. 1909 Cr.; 104 P. L. R. 1909; 12 P. W. R. 1909 Cr.; 10 Gr. L. J. 158; *Muhammad Ishaq v. Muqim-ud-Din*, 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913; *Karim Baksh v. Mul Chand*, 29 P. R. 1879 Cr., referred to.

Runga Ayyar v. Emperor, 29 M. 331; 4 Cr. L. J. 175; *In re Lakshmidas Lalji*, 32 B. 184; 10 Bom. L. R. 28; 3 M. L. J. 116; 7 Cr. L. J. 35; *Shaikh Bahadur v. Shaikh Eradatullah Mallick*, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407; *Rati Jha v. Emperor*, 14 Ind. Cas. 201; 39 C. 463 at p. 466; 16 C. W. N. 623; 15 C. L. J. 509; 13 Cr. L. J. 201; *In the matter of Lalit Mohan Pal*, 5 C. L. J. 176; 5 Cr. L. J. 186, distinguished.

A misdescription in the order of sanction of the officer granting sanction to prosecute a person does not vitiate the sanction accorded, and section 537, Criminal Procedure Code, covers the irregularity. [p. 476, col. 1.]

Where the officer who granted sanction had a dual capacity, being both a 1st class Munsif and a 1st class Magistrate, and he erroneously described himself as 'Magistrate' when he should have written 'Munsif':

Held, that it was only an irregularity which was cured by section 537, Criminal Procedure Code. [p. 476, col. 1.]

Case reported by the District and Sessions Judge, Hissar, with his No. 230 J. of 27th March 1916.

FACTS.—There was a civil dispute between Lal Chand, plaintiff, and Maula Bakhsh, defendant, about a wall in the Court of Mr. Marsden, Munsif, 1st class, Palwal. In this case Maula Bakhsh made a statement on 18th August 1914 as defendant regarding this wall. The statement does not appear to be clearly recorded, so far as the disputed wall was concerned. The defendant also stated that when plaintiff bought from Bute Khan there were two *chhappars*. In the same case on 8th December 1914 before Mr. Spence, Munsif, 1st class, Palwal, Maula Bakhsh as a witness of the plaintiff stated that when Bute Khan owned the plaintiff's house it was inhabited by Kalu, son of Mangtu, in one *chhappar* and Alim Ullah in the other, Bute Khan lived

in a *chhappar* outside. There are three *chhappars* in all. This case was decided by Mr. Spence on 17th December 1914. There was an appeal made by Maula Bakhsh, defendant. The appeal is said to be still pending before the Additional District Judge sitting at Karnal. On 13th May 1915, Lal Chand appears to have applied to the Sub-Divisional Officer, Palwal, (then Mr. Raghbir Singh) for sanction to his prosecuting Maula Bakhsh on the alleged discrepancies in his statements as a defendant and subsequently as a witness of the plaintiff. It is admitted that as a witness of the plaintiff his statement was true.

Lal Chand, plaintiff, was by order, dated 11th June 1915, granted sanction by Kanwar Raghbir Singh, Sub-Divisional Officer, Palwal, under section 195, Criminal Procedure Code, to prosecute Maula Bakhsh under section 193, Indian Penal Code.

GROUND.—Mr. Raghbir Singh thought that as successor of Messrs. Marsden and Spence he could give the sanction, and gave to Lal Chand sanction to prosecute Maula Bakhsh signing the order of sanction, dated 11th June 1915, in his capacity of Magistrate, 1st class. He passed this order without hearing Maula Bakhsh. Lal Chand lodged a complaint on the basis of this sanction on 17th November 1915 in the Court of Lala Prabhu Dayal, Magistrate, 1st class, Gurgaon. Maula Bakhsh applied to that Court on 17th January 1916, bringing to the notice of the said Court the illegality of the order of sanction passed against him without giving him any notice and without hearing him, and he was directed to seek his remedy by appeal, if advised. After this Maula Bakhsh petitioned to this Court on 4th March 1916. Appellant's petition as an appeal is time-barred but the illegalities committed are so material and the order of sanction so carelessly given by the lower Court, which had no jurisdiction whatever to give such sanction, that I consider it a fit case for submission to the Chief Court with a recommendation that the order be set aside.

First, Mr. Raghbir Singh as successor of Messrs. Marsden and Spence had no jurisdiction to grant the sanction. He should have sent up the petition for sanction to the Appellate Court,

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Second, the first statement of Maula Bakhsh was as a defendant and regarding the subject-matter of the suit and was itself not a clearly recorded one. There was no second contradictory statement on the subject of the ownership of the wall. It was in this first statement only that questions were put about the wall, and the defendant corrected himself in this very statement. The second statement of Maula Bakhsh was as a witness of the plaintiff and it is said in this subsequent statement he gave correct answers about the *chhappars*.

I cannot understand how did the lower Court give sanction to Lal Chand to prosecute the petitioner, under the circumstances above mentioned, without hearing what he had to say against it.

Mr. *Rup Ram*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

ORDER.—Mr. *Tek Chand* on behalf of Lal Chand raised a preliminary point that no revision lay in this matter for the following reasons:—

(i) sanction to prosecute was granted on 11th June 1915;

(ii) complaint was filed by Lal Chand on 17th November 1915;

(iii) the first hearing of the case was on 26th November 1915; and that on that date the petitioner became aware of the existence of sanction.

In spite of this knowledge, however, the case proceeded and witnesses for the prosecution were examined on the 11th January 1916, on which date all that petitioner did was to object to the legality of the sanction, and that it was not till the 4th March 1916 that he took any steps to have the sanction set aside. He contended that inasmuch as an appeal lies from an order granting sanction under section 195, Criminal Procedure Code, it was the duty of the petitioner to file such an appeal. He further contended that Article 154 of the Indian Limitation Act, 1908, was applicable and that by making use of section 5 of that Act the petitioner could have filed an appeal on becoming aware of the existence of the sanction on the 26th November 1915, and that as the petitioner did not take any steps to get the sanction set aside

till the 1st March 1916, this Court should not consider the revision at all.

I am, however, unable to accede to the contention. I consider that section 439, Criminal Procedure Code, gives this Court full power to examine the record and to pass such orders as may be necessary.

No doubt when there has been inordinate delay in moving the Court, it would not be considered necessary or advisable to take any action under section 439, Criminal Procedure Code, but in this case the circumstances are such that I consider it necessary to examine the record of the proceedings in order to ascertain how far the sanction accorded on the 11th June 1915 is legal.

As pointed out in the order of reference, these proceedings have arisen out of civil litigation between the parties.

This civil litigation was commenced before Mr. Marsden, as Munsif, 1st class, at Palwal and before him Maula Bakhsh, on the 18th August 1914, made a statement as defendant.

Mr. Marsden was transferred and Mr. Spence succeeded him as Munsif, 1st class, at Palwal. Before him Maula Bakhsh, on the 8th December 1914, made a statement as a witness produced by the plaintiff. The suit was decided by Mr. Spence on the 17th December 1914, and an appeal is, I understand, pending against his decision.

In his turn Mr. Spence was transferred and was succeeded by Mr. Raghbir Singh as Munsif, 1st class, at Palwal. It was before this officer that Lal Chand filed an application under section 195, Criminal Procedure Code, praying for sanction to prosecute Maula Bakhsh under section 193, Indian Penal Code, in respect of the two statements above referred to.

Mr. Raghbir Singh without issuing notice to Maula Bakhsh granted the sanction prayed for on 11th June 1915.

Mr. *Rup Ram* for Maula Bakhsh has attacked this sanction on various grounds. He complains that notice was not given to his client before sanction was granted. The Code does not provide for the issue of such a notice and, therefore, a sanction granted without notice is not illegal. It has, however, been repeatedly held that it is usual and advisable to give notice—and

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in cases like the present I am of opinion that notice should invariably issue, although on this ground alone I would not be inclined to interfere under section 439, Criminal Procedure Code. It is next argued (1) that Mr. Raghbir Singh granted sanction as a Magistrate, 1st class, whereas the offence (if any) was committed in a Civil Court; and (2) that there being no Court of a Munsif, 1st class, with a perpetual succession of Judges, Mr. Raghbir Singh had no jurisdiction to grant the sanction, the offence (if any) not having been committed before him.

As to (1) I am of opinion that a mere misdescription, such as this, would be no ground for holding a sanction to be bad in law.

Mr. Raghbir Singh was at Palwal in a dual capacity, he was Munsif, 1st class, as well as a Magistrate, 1st class, and his erroneously describing himself as a "Magistrate" when he should have written "Munsif" would not vitiate the sanction accorded. In any event I consider that section 537, Criminal Procedure Code, would clearly cover such a misdescription.

The second contention, however, is on a totally different footing, and is one of the main points taken by the learned Sessions Judge in his order of reference.

It was held in *Phina Singh v. Empress* (1) by Plowden, J., that "there is no Court of a Magistrate of the 1st class as a permanent Court with a perpetual succession of Judges"—and that, therefore, a Magistrate before whom the offence had not been committed could not grant sanction to prosecute under section 195, Criminal Procedure Code, merely because he succeeded a Magistrate in that particular place or District.

The case was followed by Reid, J., in *Sobha Singh v. Lal Chand* (2) and on this point *Sobha Singh v. Lal Chand* (2) was not differed from in *Mela Ram v. Emperor* (3).

In *Emperor v. Dauli* (4), *Phina Singh v. Empress* (1) was referred to with

approval by a Division Bench of this Court, and finally Beadon, J., followed *Phina Singh v. Empress* (1) in *Muhammad Ishaq v. Muqim-ud-Din* (5) and held that there was no Court of a Subordinate Judge as a permanent Court having a perpetual succession of Judges.

Mr. Tek Chand urges that this decision is bad in law and apparently section 18 of the Punjab Courts Act, 1914, was lost sight of. He also has referred me to *Runga Ayyar v. Emperor* (6), *In re Lakshmidas Lalji* (7), *Shaikh Bahadur v. Shaikh Eradatullah Mallick* (8), *Rati Jha v. Emperor* (9) and 5 A. L. J. 17* and on the ground that other High Courts in India have taken a different view on this point of law, has invited me to refer this case to a Division Bench.

I see no reason for thinking that the learned Judge who was responsible for the decision in *Muhammad Ishaq v. Muqim-ud-Din* (5) overlooked the provisions of the Punjab Courts Act then in force and as I hold the same view of the law, I see no reason for making the reference asked for.

Referring to the cases cited by Mr. Tek Chand I find that *Runga Ayyar v. Emperor* (6) was dissented from in *Emperor v. Dauli* (4) by a Division Bench of this Court; and *In re Lakshmidas Lalji* (7) has no bearing on the point under consideration.

No doubt *Shaikh Bahadur v. Shaikh Eradatullah Mallick* (8) is to some extent in point as also is *Rati Jha v. Emperor* (9), but the former case dealt more particularly with the provisions of section 476, Criminal Procedure Code, and the latter treats the matter as concluded and gives no reason for the decision arrived at. In these circumstances I can see no reason for taking a different view on this question to that taken by this Court consistently since 1889.

(5) 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913.

(6) 29 M. 331; 4 Cr. L. J. 175.

(7) 32 B. 184; 10 Bom. L. R. 28; 3 M. L. J. 116; 7 Cr. L. J. 35.

(8) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

(9) 14 Ind. Cas. 201; 39 C. 463 at p. 466; 16 C. W. N. 623; 15 C. L. J. 509; 13 Cr. L. J. 201.

*The correct reference is *In the matter of Lalit Mohan Pal*, 5 C. L. J. 176; 5 Cr. L. J. 186—Ed.

(1) 25 P. R. 1889 Cr.

(2) 30 P. R. 1901 Cr.

(3) 7 P. R. 1902 Cr.; 44 P. L. R. 1902.

(4) 2 Ind. Cas. 812; 6 P. R. 1909 Cr.; 104 P. L. R. 1909; 12 P. W. R. 1909 Cr.; 10 Cr. L. J. 158.

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I have also had my attention drawn to *Karim Baksh v. Mul Chand* (10), but I cannot see that that case is to the point—probably in those times there was a Court of the Judicial Assistant and the Madras decision relied on in that case seems to have been discussed and distinguished by Plowden, J., in *Phina Singh v. Empress* (1).

I have been unable to find the ruling cited as 5 A. L. J. 17.* No doubt section 18 of the Punjab Courts Act, 1914, establishes certain classes of Courts, among which are (a) the Court of the Subordinate Judge and (b) the Court of the Munsif. In precisely the same way section 6 of the Criminal Procedure Code, 1908, provides for the establishing of certain classes of Courts, among which is to be found the Court of "Magistrate of the 1st class." As was held in *Phina Singh v. Empress* (1) with regard to the Courts of Magistrates and in *Muhammad Ishaq v. Mugim-ud-Din* (5) with regard to the Courts of Subordinate Judges, I hold that there is no Court of a Munsif of the 1st class as a permanent Court with a perpetual succession of Judges, and that on the transfer of a Munsif from a District, the Court of the Munsif who takes over the pending work is not identical with the Court of the Munsif who has been transferred. It follows, therefore, that in the present case Mr. Raghbir Singh was acting beyond his jurisdiction when he granted the sanction under consideration.

Whether or not this illegality (or irregularity as Mr. Tek Chand would call it) could be cured by section 537, Criminal Procedure Code, is doubtful and as at present advised I do not think it could [*Subrahmaniya Ayyar v. King-Emperor* (11)], but I do not see how I can ignore this illegality when it has been brought to my notice before the trial has concluded.

I accordingly set aside the sanction granted by Mr. Raghbir Singh on the 11th June 1915 and quash the proceedings that have been commenced under it.

Revision accepted.

(10) 29 P. R. 1879 Cr.

(11) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 L. A. 257; 5 C. W. N. 866; 2 Weir, 271 (P. C.).

*The correct reference is *In the matter of Lalit Mohan Pal*, 5 C. L. J. 176; 5 Cr. L. J. 186—Ed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 7 of 1916.

May 25, 1916.

Present:—Mr. Justice Roe and Mr Justice Jwala Prasad.

DEBI MAHTO—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—Order directing prosecution on result of findings in civil proceeding—Appeal, pendency of, against findings—Stay of criminal proceedings, expediency of.

Proceedings in a Criminal Court initiated as the result of an order by a Court under section 476, Criminal Procedure Code, should be stayed pending the disposal of an appeal against the order or decree in respect of which the order was passed under the section. [p. 478, col. 1.]

The Court to which the application for stay of proceedings is presented, should not prejudge the appeal by making any declaration as to the correctness or otherwise of the order appealed against to determine whether the prosecution should be postponed or not, but should leave it to the Court which has cognizance of the appeal, staying proceedings meantime. [p. 478, col. 1.]

Appeal against an order of the District Judge, Saran, dated the 16th March 1916.

Mr. *Rajendra Prasad*, for the Petitioner.

JUDGMENT.—In this case one Debi Mahto applied for a succession certificate in the matter of the estate of one Raghbir Mahto. This certificate was granted *ex parte*, but upon the application of one Sadhu Mahto was subsequently revoked. In the course of proceedings upon Sadhu Mahto's application for revocation, the learned Judge found, not only that Debi's allegation that he was the nearest heir of Raghbir was not proved, but also that it was conclusively shown that Debi Mahto was not related to Raghbir in any way. He, therefore, ordered enquiry under section 476 to be made and, on the result of that enquiry, directed the prosecution of Debi Mahto under sections 193 and 209.

Debi Mahto has filed an appeal to this Court, one of the grounds of the appeal being that the finding of the learned District Judge on the essential issue of fact was an erroneous finding. He now comes to this Court with a prayer that the proceedings in the Magistrate's Court at Saran in the matter of the prosecution of Debi Mahto be stayed, pending the result of the appeal to this Court. No one appears

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against the Rule issued upon the District Magistrate. The District Magistrate has himself written showing cause why the application should not be granted. In the course of that letter he says that in view of the fact "that justice delayed means too often justice denied", and in view of the fact that there is a danger of Debi Mahto's tampering with the witnesses for the prosecution, this Court should not interfere with the present proceedings, unless it is patent upon the face of the record that the decision of the learned Judge is wrong. While fully sympathising with the learned Magistrate in his desire to dispose quickly of the cases in the Courts subordinate to him, we must point out that the point of view of the learned Magistrate is clearly a wrong point of view. It may be that this Court should not postpone a prosecution of this nature, if it is satisfied that the finding of the District Judge is clearly right. But to make such a declaration would be to prejudge an issue which is likely to come before another Bench. That Bench may decide that Debi Mahto's story is true and that he is the nearest heir. Debi Mahto may succeed in his civil appeal and take out a succession certificate, and also suffer rigorous imprisonment for having made an application to do so. We are not prepared to prejudge the issue by saying that Debi Mahto's appeal has no chance of success. We order that the proceedings against him under sections 193 and 209 be stayed, pending a final finding of fact by this Court.

That this was the view taken by the District Judge is clear from the order made by him on the 14th April 1916, in which he says that Debi Mahto, if he wishes the proceedings to be stayed, should appeal and obtain an order from the Appellate Court staying proceedings.

We note that proceedings in regard to this matter have also been taken against Ambica Lall and Mahadeo Rai, on a charge of abetting the institution of a false proceeding under section 209 read with section 109. We direct that this proceeding be also stayed pending the hearing of the appeal of Debi Mahto.

We direct the Registrar to take such steps as may be necessary for expediting the civil appeal of Debi Mahto.

Proceedings stayed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 192 of 1916.

January 8, 1917.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice LeRossignol.

EMPEROR—APPELLANT—

versus

THAKAR DATT AND ANOTHER—

RESPONDENTS.

Penal Code (Act XLV of 1860), s. 292—'Obscene' publication—Medical journal, description of sexual disorders in—Offence.

Disease is a thing to be combated, and descriptions of it, with cures suggested, printed in a paper intended to reach sufferers and doctors and not likely to come into the hands of others are not criminal. On the other hand, descriptions of defective sexual enjoyment, with advice for heightening and prolonging such enjoyment in the case of normal persons, should be kept out of public prints, as they amount to incentives to sensuality. [p. 480, cols. 1 & 2.]

Emperor v. Hari Singh, 28 A. 100; A. W. N. (1905) 203; 2 Cr. L. J. 520; *Sarat Chandra Ghose v. King-Emperor*, 32 C. 247; 2 Cr. L. J. 201; *Empress of India v. Indarman*, 3 A. 837; A. W. N. (1881) 94; 2 Ind. Dec. (N. S.) 549; *Reg. v. Hicklin*, (1868) 3 Q. B. Cas. 360; 37 L. J. M. C. 89; 18 L. T. 395; 16 W. R. 601; 11 Cox C. C. 19, *Queen-Empress v. Parashram Yeshwant*, 20 B. 193; 10 Ind. Dec. (N. S.) 687, referred to.

Appeal from the order of the District Magistrate, Lahore, dated the 10th January 1916, acquitting the respondents.

Mr. Herbert (Assistant Legal Remembrancer), for the Appellant.

The Hon'ble Mr. Muhammad Shafi and Mr. Jai Gopal Sethi, for the Respondents.

JUDGMENT.

JOHNSTONE, J.—The accused persons are Thakar Datt and Devi Chand, respectively Proprietor, and Printer and Editor of the "Desh Upkarak." They were arraigned under section 292, Indian Penal Code, on account of alleged obscenity in the issues of 18th August, 1st September and 8th September of 1915, but have been acquitted by the learned District Magistrate. Against this acquittal Government has appealed, and we have read the evidence, examined the obnoxious passages and heard arguments of Counsel. The District Magistrate, marshalling the points in favour of the accused, lays stress upon (a) the fact that the paper is not sold about the streets (or apparently through newsagents), but only to some 485 subscribers, whose names are to be found in a register, (b) that the questions and answers objected to all relate to concrete questions

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of human health and seem to the Magistrate *bona fide*; (c) that, though matters of this sort are in the west looked upon as too private to be blazoned in a paper that may be seen by thousands, "in the east modesty is of a different texture," a proposition which he illustrates by two examples based on his own observation; ($\frac{c}{1}$) that much good is done; (d) that, though the publication is cheap, one anna a copy, it is on much the same footing as the well-known English books of family medicine, which do not inflame the imagination of the average purchasing father of a family, though they might have this effect in the case of a prurient schoolboy; (e) that on the face of it there is no reason "to suppose that they (the objectionable passages) are written with intention to corrupt or deprave."

Mr. Herbert attacks this reasoning, but, before stating his line of attack, it is as well to hear what Mr. Shafi has said by way of supplement to the District Magistrate's views. Mr. Shafi's arguments may be summarised thus:—(f) The paper is called *Tibbi Akhbar* on first page, is wholly devoted to medical subjects, contains no news or articles on non-medical subjects and has no advertisements; shewing that it appeals solely to medical practitioners and actual sufferers.

(g) A publication does not come within the purview of such a law as that in section 292, Indian Penal Code, unless it causes general demoralisation or real danger to public morals—Russell on Crimes, Volume II, page 1878, paragraph 5.

(h) In many periodicals and books of the medical kind are to be found innumerable passages much more objectionable from the point of view of the general reader than the passages complained of here, and, so far as is known, no prosecutions have been launched against those papers—e.g., "British Medical Journal," page 1587, dated December 16th, 1905; "Medical World" (American), page 445, dated October 1909; "Charaka Samhita" (Indian), subscribed to by the Government of India, page 1077 of A. D. 1910; "The M. S. Journal," an Indian monthly, of 15th March 1909, page 95; "Practical Medicine," page 194, of September 1915;

"The Lancet", page 137, of January 30th, 1864; "The Medical World" again, page 127, March 1910; "Sexual Life of Our Time" by Bloch, page 47; "The Sexual Life" by Malchow (American), 3rd Edition, page 133; Dr. Scott on "The Sexual Instinct," 2nd Edition, page 421.

(i) In the passages objected to can be found no descriptions of "lurid scenes or passions," the phraseology is careful and restrained and so technical as to be unintelligible to the casual reader, and only actual cases with symptoms, history and treatment are touched upon.

(j) All sorts of diseases are discussed in the paper and not only sexual matters.

(k) The paper has been in existence for thirteen years and has always been run on the same lines. On this ground and also because other publications of a more objectionable character have escaped prosecution, the accused might reasonably have been under the impression that they were not transgressing the law, which deals with a matter incapable of mathematical discrimination and the application of which is always difficult and must always depend on the personal equation of the Judge.

(l) This Court should not set aside an acquittal save in very exceptional cases and to remedy a clear miscarriage of justice: *Emperor v. Kiru* (1), a Lahore case, which we think might well be printed in the Punjab Record.

Some of these arguments Mr. Herbert has no difficulty in meeting. For example he rightly argues that section 292, Indian Penal Code, makes no exception in favour of books and papers only sold to registered subscribers, nor does it extend immunity on the ground of the publisher having no *intention** to corrupt or deprave, or because the publication is a "medical" one. He is

(1) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 205 P. L. R. 1911; 12 Cr. L. J. 364.

*Cf. *Emperor v. Hari Singh*, 28 A. 100; A. W. N. (1905) 203; 2 Cr. L. J. 520; *Sarat Chandra Ghose v. King-Emperor*, 32 C. 247; 2 Cr. L. J. 201; *Empress of India v. Indarman*, 3 A. 837; A. W. N. (1881) 94; 2 Ind. Dec. (N. S.) 549.

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also right in saying that, if the passages under consideration are "obscene" within the meaning of the law, the mere fact that other persons have published "obscene" matter with impunity is no defence, though it might indirectly affect the question of *quantum* of punishment; and he is on safe ground also in contending that obscene passages are not excused because the rest of the publication is unobjectionable*. But as regards the other arguments set forth by the District Magistrate and Mr. Shafi, we hardly think a sufficiently strong case has been made out for interference.

No doubt section 292 says nothing about *intention*, or about medical works, or about agency for distribution, or about immunity because only concrete cases are dealt with; but these points nevertheless have a bearing on the problem. We think this publication is not shown actually to reach the general public. On the face of it the paper is one that would not be subscribed to except by medical men or by sufferers from disease; and we cannot assume that the morals of such persons would suffer from what they read in this paper, which, in the absence of general news or writing on ordinary journalistic topics, would not appeal to the man in the street. We have had the obnoxious passages carefully translated, and have anxiously scrutinised the wording, and we find that for the most part highly technical and unusual arabic words are employed, some of which would convey little or nothing to the average reader. There is no attempt at what might be called lewd writing, though, of course, some of the things discussed are in their nature disgusting; and, in short, we cannot find anything distinctly calculated to incite a reader to indulge in acts of indecency or immorality. The only point we would like to emphasize for the future guidance of the Editor is one in connection with which we find he has at least reached the limits of decency and has written of things which many might think—and not altogether without reason—should not appear in a public print. We would like to see a distinction drawn between (i) descriptions of disease, with remedies and treatment therefor, and (ii) description of defective sexual enjoyment, with advice for heightening and prolonging

**Cf. Empress of India v. Indarman*, 3 A. 837; A. W. (1881) 94; 2 Ind. Dec. (N. S.) 549.

such enjoyment in the case of normal persons. Disease is a thing to be combated; and descriptions of it with cures suggested, printed in a paper intended to reach sufferers and doctors and not likely to come into the hands of others, are not criminal; but advice of the kind mentioned in (ii) above is on a different footing and should be kept out of public prints, as it amounts to an incentive to sensuality. In the present case we do not go further than this that two or three of the passages under consideration come dangerously near the boundary line between the above categories, even if they do not overstep that line.

It will be useful to note some of the remaining principal authorities on this difficult subject. In *Reg. v. Hicklin* (2) at page 371 Lord Chief Justice Cockburn said: "The test of obscenity is this, whether the tendency of the matter charged... is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Now, with regard to this work it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

That case was noticed in *Queen-Empress v. Parashram Yashvant* (3), a ruling arising out of a reference by a Sessions Judge asking that a conviction regarding certain pictures should be set aside. The learned Bench refused to interfere, remarking that the law leaves to the Magistrate "the question of obscenity, which is very much one of fact."

The whole question is discussed in Volume I of Gour's Penal Law of India under section 292, Indian Penal Code, where, *inter alia*, intention is held to be immaterial and the question is said to be one of fact and not of law. At page 1052 the law as laid down in the well-known *Bradlaugh* and *Besant* case (4), making criminal the publication of a book advocating checks on conception and explaining the means, is, on the strength of a Bombay unreported case, found not to be the law in India. We are far from endorsing this view, as we have already indicated above.

(2) (1868) 3 Q. B. Cas. 360; 37 L. J. M. C. 89; 18 L. T. 335; 16 W. R. 801; 11 Cox. C. C. 19.

(3) 20 B. 193; 10 Ind. Dec. (N. S.) 637.

(4) (1877) 2 Q. B. D. 539; on appeal (1878) 3 Q. B. D. 697; 33 L. T. 118; 26 W. R. 410; 14 Cox. C. C. 68.

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Our conclusion, then, is that we should not interfere and this appeal is dismissed.

LEROSSIGNOL, J.—I agree with all that the learned Chief Judge has written above. The difficulty of applying the law in cases of this nature is very considerable, for in one sense most medical treatises contain obscene chapters.

In particular I concur heartily with the learned Chief's remarks on the advertisements of aphrodisiacs for use by normal persons, and I trust that the respondent will take warning therefrom, for the advertisements are essentially obscene and respondent escapes punishment solely by reason of the technical and recondite terms he employs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 144 OF 1916.

March 10, 1916.

Present:—Mr. Justice Chitty and
Mr. Justice Walmsley.

NASIRUDDIN SIRCAR—PETITIONER

versus

GOFURUDDIN MOHAMED AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Concurrent proceedings—Order under s. 145 after passing order under s. 107—Jurisdiction.

Proceedings under sections 107 and 145, Criminal Procedure Code, may go on concurrently between the same parties. [p. 481, col. 2.]

A Magistrate by reason of having passed an order under section 107, Criminal Procedure Code, does not lose his jurisdiction to make an order under section 145 in proceedings pending before him, though the order may be defective on other grounds. [p. 481, col. 2.]

Emperor v. Abbas, 12 Ind. Cas. 833; 39 C. 150; 14 C. L. J. 429; 12 Cr. L. J. 569; 16 C. W. N. 83, referred to.

Rule against an order of the Sub-Divisional Magistrate, Thakurgaon, dated the 11th December 1915.

Babu Monmotha Nath Mookerjee, for the Petitioner.

Babus Bankim Ohandra Sen and Profulla Charan Chatterjee, for the Opposite Party.

JUDGMENT.—In this case a petition was presented for proceedings under section 145, Criminal Procedure Code, by the first party on 8th September 1915. On 15th September 1915, the same Magistrate passed orders against both the parties in this case under section 107, Criminal Procedure Code, binding them down to keep the peace for one

year. It should be stated that the parties are relations and co-sharers and are now apparently at logger heads. In spite of the order under section 107, Criminal Procedure Code, the section 145 proceedings continued. Both the parties filed their written statements. One we have before us of 29th September 1915. That was the petition of the 2nd party, one of whom is the petitioner before us. In that the second party did not plead any want of jurisdiction in the Magistrate by reason of the order under section 107. On the contrary they pleaded that they had done nothing which was likely to lead to a breach of the peace. The proceedings continued before the Magistrate, the first hearing taking place on 28th October and the final order being passed on 11th December. The Magistrate ultimately found that neither party was in actual possession of the land in dispute and so he passed an order under section 146, Criminal Procedure Code. It is argued for the petitioner before us—who is one of the second party—that the Magistrate having passed an order under section 107, Criminal Procedure Code, had no jurisdiction to continue the proceedings under section 145. It appears clear from the decision of a Full Bench of this Court in the case of *Emperor v. Abbas* (1) that there would be no want of jurisdiction in such a case. The Court there said: "Whether after proceeding under section 107, Criminal Procedure Code, it will be proper for a Magistrate to act under section 145, Criminal Procedure Code, must depend on the circumstances of each case as it arises. It may be that after an order under section 107, Criminal Procedure Code, no likelihood of a breach of the peace would continue." That contemplates that proceedings under both sections may go on concurrently. It may be that the order of the Magistrate was defective in this particular that he did not, so far as his judgment shows, consider what the effect would be upon the parties of the order under section 107. This, however, would not affect his jurisdiction, though it might affect the

(1) 12 Ind. Cas. 833; 39 C. 150; 14 C. L. J. 429; 12 Cr. L. J. 569; 16 C. W. N. 83.

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propriety of the order which he passed. In this case, however, it is clear that both parties, with full knowledge of that order, went on with the section 145 proceedings, each hoping, no doubt, to get an order of possession in its favour. In this neither party was successful. We do not think that, under these circumstances, it is a case in which this Court ought to interfere. The sooner the parties have recourse to the Civil Court to settle their differences with regard to this property the better. The Rule is discharged.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1841
OF 1916.

October 14, 1916.

Present:—Mr. Justice Shah Din.

KHUDA BAKHSH—ACCUSED—PETITIONER
versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898, ss. 195, 109, 439—Sanction to prosecute—Magistrate exercising jurisdiction in one district, whether can delegate powers to Magistrate in another district—False statements made in ultra vires proceedings—Penal Code (Act XLV of 1860), s. 193.

A Magistrate exercising jurisdiction in one district has no jurisdiction to make an enquiry into the sufficiency of security required under section 109, Criminal Procedure Code, by a Magistrate of another district. Therefore, persons making false statements in the course of such enquiry cannot be prosecuted for perjury under section 195, Criminal Procedure Code. [p. 483, col. 1.]

Obiter.—The inquiry by the former Magistrate would be illegal even if the latter were to authorise it. [p. 482, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Multan, dated the 17th June 1913, affirming that of the Subordinate Judge and Magistrate, 1st class, Muzaffargarh, dated the 7th March 1916, granting sanction for prosecution of the petitioner.

FACTS.—Sardar Taj Mohammad Khan, Sub-Divisional Magistrate of Bhakkar in Mianwali District, passed an order against certain vagrants to give security of Rs. 500 each under section 109, Criminal Procedure Code. Ghulam Haidar and Ghulam Kadir stood sureties for them.

As the sureties were residents of Muzaffargarh District, they were asked to appear

before the District Judge, Muzaffargarh. On 12th January 1916, they and the witness K. stated before Sheikh Rukn-ud-din, Sub-Judge, Muzaffargarh, that the sureties had property sufficient to meet the Government demand in case of forfeiture of the bonds.

On the request of the District Superintendent of Police, the said Sub-Judge of Muzaffargarh made further inquiry and after sending for the report from the Tahsildar of Muzaffargarh he found that the statements of the sureties and the witness were false; consequently on 7th March 1916, he gave permission under section 195, Criminal Procedure Code, to prosecute the sureties and the witness under section 193, Indian Penal Code, for intentionally making false statements.

They then applied to the learned Sessions Judge to cancel the order, but on 17th June 1916 he rejected the application. Hence an application for revision to the Chief Court.

Lala Hargopal, for the Petitioner.

JUDGMENT.—There is nothing whatever on the record to show what authority Sheikh Rukn-ud-Din, Subordinate Judge, 1st class, Muzaffargarh, had for taking down the statement on oath of the petitioner and the two sureties, Ghulam Kadir and Ghulam Haidar, in connection with the security bonds executed by the two last-named persons on behalf of the vagrants against whom an order under section 109, Criminal Procedure Code, was passed by Sardar Taj Muhammad Khan, Sub-Divisional Magistrate, Bhakkar. There is no order of Sardar Taj Muhammad Khan delegating to Sheikh Rukn-ud-din the duty of inquiring into the sufficiency of the security tendered by Ghulam Kadir and Ghulam Haidar; and even if such an order had been passed by Sardar Taj Muhammad Khan, it would have been bad in law and Sheikh Rukn-ud-din's proceedings connected with the inquiry into the sufficiency of the security would have been *ultra vires*: see *Emperor Kaim Khan* (1) and *Mahala v. Emperor* (2).

Sheikh Rukn-ud-din had, therefore, no authority under the Code of Criminal Procedure to take down the statements of

(1) 18 P. R. 1906 Cr.; 19 P. W. R. 1906 Cr.; 5 Cr. L. J. 148; 14 P. L. R. 1907.
(2) 28 Ind. Cas. 721; 6 P. R. 1914 Cr.; 77 P. W. R. 1913 Cr.; 142 P. L. R. 1914; 16 Cr. L. J. 387.

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the petitioner and the two sureties after administering an oath to them; and it follows that the sanction granted by him for the prosecution of these persons for an offence under section 193, Indian Penal Code, is illegal. I accordingly accept this revision and set aside the order of *Sheikh* Rukn-ud-din, dated the 7th March 1916, and that of the Sessions Judge, Multan, dated the 17th June 1916.

In exercise of my revisional jurisdiction I also quash orders of the same date so far as they affect the sureties, Ghulam Kadir and Ghulam Haidar; and the proceedings in the Magistrate's Court under section 193, Indian Penal Code, against these three persons, the petitioner and the sureties, are hereby set aside.

Petition accepted.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 487 OF 1916.
August 16, 1916.

Present:—Mr. Justice Walsh.

MEGHRAJ AND OTHERS—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 420—Cheating, elements of—Inducement to execute document, whether offence—Charge, framing of—Practice.

In a case of cheating it must be shown exactly how the complainant has, in the first instance, been misled and what loss he has suffered, or what attempt to obtain a benefit to his prejudice has been made by the accused. [p. 484, col. 1.]

A decree-holder in a certain suit in consideration of the judgment-debtor executing two bonds promised to get a postponement of the sale and the judgment-debtor accordingly executed the bonds which, to the knowledge of both were for fictitious amounts. The decree-holder failed to obtain the postponement and retained the bonds in his possession. He was charged by the judgment-debtor with the offence of cheating under section 420, Indian Penal Code:

Held, that the offence of cheating was not made out as the failure to get a postponement of the sale was only a breach of contract for which the decree-holder was liable in damages for any loss proved to have been caused to the judgment-debtor and the retention of the bonds was not an offence by itself. [p. 484, col. 2.]

It is not an offence to induce a person to execute a document, unless it is shown that the inducement was made by some false or fraudulent representation. [p. 483, col. 2.]

A charge of cheating was drawn up as "that you on.....cheated and induced him to execute two documents in favour of.....":

Held, that the frame-work of the charge showed no offence at all. [p. 483 col. 2.]

In a criminal trial there is less difficulty and less liability to error if the Court throughout the trial keeps before it the frame-work of the charge in order to see whether the evidence fits into it. [p. 483, col. 2.]

Criminal revision from an order of the Sessions Judge, Budaun.

Messrs. *C. Ross Alston* and *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This conviction cannot be sustained. It is perhaps better, rather than to attempt to speculate as to the true interpretation of these proceedings, to see whether the charge, as stated, is made out by the evidence. Now the charge, as originally framed, was in these terms:—that you, that is, the present appellants, on the 18th of February 1906, cheated Lal Singh and induced him to execute two documents in favour of Niranjana Lal and Ishwari Prasad. So stated there is no offence in law at all. There are considerable gaps in the statement. It is not a crime to induce a person to execute a document. It has to be shown that the inducement was made by some false or fraudulent representation, if the charge is that you induced him to do it for the purpose of cheating. Nor is it alleged in the charge in what way, when the documents were executed, he would be a loser and the accused would be the gainers. In complicated matters of this kind nothing is more important than that the Criminal Court trying the case should, either by itself or through the prosecution, frame the process with the nature of the fraudulent inducement which constituted the fraudulent intent and the alleged resultant gain to the accused which constitutes the cheating. There is less difficulty and less liability to error if the Court throughout the trial keeps before it the frame-work of the charge, in order to see whether the evidence fits into it. Now in this case the frame-work of the charge shows no criminal offence at all, but the judgment of the Appellate Court does state, in more or less precise language, what it believed the complaint to be. The statement of the charge and the judgment is this, that Niranjana Lal promised that if the complainant would execute two documents for a total of Rs. 1,200 he would get the sale postponed. Assuming that to be the correct interpretation of the object for which these bonds were executed, the failure to obtain the postpone-

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ment was no more than a breach of duty or a breach of contract on the part of the decree-holder, which rendered him liable to deliver up the bonds and possibly, if any loss had been suffered by the failure to postpone, to pay damages to the judgment-debtor. What appears to have happened afterwards is this: that being in possession of these bonds (whether or not he ever intended to use them for the purpose of obtaining a postponement is for this purpose immaterial), after promising to return them he retained them in his possession, apparently contemplating making some future use of them. Whether if he had attempted to do so, that in itself would have been an offence against the criminal law, or would have been sufficient evidence of his proposed fraudulent intent, it is not necessary to discuss; because before he made any attempt to make use of them, the complainant was too quick for him and brought a suit for the cancellation of the bonds. Whatever defence the decree-holder set up in that suit has no bearing on this charge. To my mind the obtaining of the bonds either under a pretence of attempting to obtain a postponement of the sale or with a *bona fide* intention of using them for that purpose, has the same result so far as this charge is concerned. I have read through the evidence of the complainant and it is only fair to say that he did not attempt either to say or to suggest that he had been cheated by anybody. He was, no doubt, aggrieved at the non-postponement of the sale and at being compelled to bring a suit for the return of the bonds, but according to his own statement, the bonds were perfectly worthless and the moment it appears that they were given for fictitious amounts, and were given to his knowledge for fictitious amounts for the purpose of obtaining the postponement, the fictitious nature of the consideration ceases to have any bearing upon the criminal intent or alleged criminal intent of the decree-holder in obtaining it. The Appellate Court realised that criminal intent ought to be established. It discussed four witnesses who were called to establish it and dismissed them with contempt. It then proceeded, as far as I follow its judgment, to draw the conclusion that the decree-holder's intention was fraudulent, because the debts for which the bonds were executed were fictitious. To my mind that is clearly immaterial. They were fictitious

to the knowledge of the executant, and the bonds in the hands of the decree-holder, the moment the chances of postponing the sale had been lost, were worthless as against the complainant, and it is extremely difficult to say how he was ever cheated or an attempt to cheat was perpetrated by the mere execution of the bonds for fictitious amounts. It may be that the decree-holders pretended to oblige him by obtaining a postponement of the sale and did not in fact do so, being desirous of getting the property for themselves. That, however, is not the charge made against them, and there is no evidence that even if that were so, that the judgment-debtor suffered any loss. It looks to me like one of those cases in which neither the prosecution nor the Court has really ever cleared its mind as to the actual charge which was being made against the accused. Relevant topics have been mixed up with irrelevant topics and the resultant total of prejudice and suspicion has been considered sufficient to justify a conviction for cheating. That will not do. In a case of cheating, it must be shown exactly how the complainant has, in the first instance, been misled and what loss he has suffered, or what attempt to obtain a benefit to his prejudice was made by the accused. I think the conviction must be reversed and the accused acquitted. I, therefore, acquit all the accused and order them to be forthwith released. The bail-bonds of all the appellants are discharged.

Conviction set aside.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASES NOS. 81, 82,
AND 83 OF 1916.

October 30, 1916.

Present:—Mr. Justice Mullick and

Mr. Justice Atkins.

*In the matter of JANAK KISHORE AND
OTHERS—PETITIONERS.*

Legal Practitioners Act (XVIII of 1879), s. 14, proceedings under, nature of—Transfer of proceedings—Jurisdiction of High Court—Civil Procedure Code (Act V of 1908), s. 24—Government of India Act, 1915 (5 & 6 Geo. V. C. 61), s. 107—'Superintendence,' meaning of.

The enquiry contemplated under section 14 of the Legal Practitioners Act is of an administrative nature and is not a civil proceeding, the intention of the Act being to provide a procedure or remedy of a disciplinary character for practitioners practising in subordinate Courts without giving the Courts the

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power to inflict a penalty for abuse of discipline but only to recommend to the High Court the course to be taken. It is neither civil nor criminal, but purely designed for the purpose of discipline. [p. 455, col. 2; p. 486, col. 2.]

Proceedings under section 14 of the Act cannot be transferred under section 24, Civil Procedure Code, read with section 141 of the Code or by virtue of the powers of superintendence vested in the High Courts under section 107 of the Government of India Act. [p. 485, col. 2; p. 486, cols. 1 & 2.]

Neither section 24 nor section 141, Civil Procedure Code, applies to the Legal Practitioners Act, because the proceedings under the latter Act are not civil proceedings in a Court of civil jurisdiction to which alone the Civil Procedure Code is applicable. [p. 485, col. 2; p. 486, col. 1.]

Section 141, Civil Procedure Code, is controlled in its operation and effect by the concluding words of the section, which limit its application to proceedings in any Court exercising civil jurisdiction. The procedure under the Legal Practitioners Act is self-contained. [p. 486, cols. 1 & 2.]

Per *Mullick, J.*—The terms of section 14 of the Legal Practitioners Act make it incumbent that the enquiry under the section should be made by the presiding officer of the Court. It cannot be delegated or transferred to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed. [p. 486, col. 1.]

Without expressing any opinion as to the applicability of section 107 of the Government of India Act, it is sufficient to say that the High Court should not interfere with the progress of an enquiry in which nothing final can be done by the presiding officer. [p. 486, col. 1.]

Per *Atkinson, J.*—The 'general superintendence' vested in the High Court under section 107 of the Government of India Act applies only to cases where a subordinate officer, be he a Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. When a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an enquiry, the High Court will not interfere under the Statute unless he has grossly abused his powers. [p. 486, col. 2.]

Petition against the order of the District Judge, Darbhanga, dated the 25th July 1916.

Mr. S. Sinha (with him Mr. Rajendra Prasad), for the Petitioners.

JUDGMENT.

MULLICK, J.—The petitioners in these three Rules are Legal Practitioners against whom proceedings under section 14 of the Legal Practitioners Act were taken by the Munsif of Samastipur. After the proceedings were taken, but before any evidence was recorded, the petitioners moved the District Judge for the transfer of the inquiry from the Court of the Munsif to some other Court. The District Judge, while holding that he was competent to order a transfer under section 24 of the Civil Procedure Code, found that the balance of convenience was

in favour of the inquiry being held by the Munsif, and he accordingly declined to transfer the proceedings from the file of the Munsif to that of any other officer. The petitioners then came to us and obtained these Rules directing the Munsif to shew cause through the District Judge why the proceedings should not be transferred. Cause has now been shewn, and learned Counsel on behalf of the petitioners has argued their cases very fully and ably before us.

The first point urged is, that the learned Munsif is wrong in maintaining that this Court has no jurisdiction to direct a transfer under section 24 of the Civil Procedure Code. Now, although the fact that the case of *Purna Chunder Pal, In the matter of* (1) was, in consequence of a difference between two Judges of a Division Bench, referred to a third Judge under section 575 of the Civil Procedure Code of 1882, may lead to the inference that in the opinion of the Calcutta High Court a proceeding under section 14 of the Legal Practitioners Act was subject to the provisions of the Civil Procedure Code, yet on a careful perusal of the three judgments passed in that case it is quite clear that the precise point whether the Civil Procedure Code was or was not applicable to a proceeding under section 14 of the Legal Practitioners Act was never considered. In that case two Judges of a Division Bench having disagreed, the Chief Justice referred the matter to a third Judge for final decision; and although in the order of reference mention is made of section 575 of the Civil Procedure Code of 1882, the point whether that section was really applicable to the proceeding was not raised or argued before any of the learned Judges. Giving my best consideration to the arguments advanced by the learned Counsel before us to day, I have no doubt that the Civil Procedure Code is not applicable to inquiries under section 14 of the Legal Practitioners Act. The learned Counsel relies upon section 141 of the Civil Procedure Code of 1908. In my opinion that section does not apply, for the simple reason that the disciplinary proceedings taken by the Munsif were not proceedings in a Court of civil jurisdiction. I am of opinion that section 141, Civil Procedure Code, does not contemplate an inquiry

(1) 27 C. 1023; 4 C. W. N. 389; 14 Ind. Dec. (N. S.) 671.

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of an administrative nature, such as is prescribed by section 14 of the Legal Practitioners Act.

The learned Counsel then falls back upon section 107 of the Government of India Act of 1915, and he asks us in exercise of our powers of superintendence to interfere and to direct a transfer. Without expressing any opinion as to the applicability of section 107 I think it sufficient to say that in the case before us we ought not to interfere with the progress of an inquiry in which nothing final can be done by the learned Munsif.

But apart from that it is clear that we are precluded from interfering even if we wished to do so by the very terms of section 14 of the Legal Practitioners Act, which make it incumbent that the inquiry should be made by the presiding officer of the Court. The section leaves no room for the contention that the inquiry may be delegated or transferred to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed.

In this view of the case I would discharge the rules without costs.

ATKINSON, J.—Mr. Sinha, who argued this case with his usual candour and ability, admitted that the applications in these three cases were instituted under section 24 of the Code of Civil Procedure, and he said under that section these applications came under the words "other proceeding"; that they constituted in effect a proceeding which would give this Court jurisdiction to exercise its power of transferring the proceedings from one Court to another. He supported that argument by a reference to section 141 of the Code of Civil Procedure. But on reading section 141 of the Code of Civil Procedure, it appears to me obvious and plain that that section can have no reference whatsoever to a proceeding instituted under the Legal Practitioners Act of 1879. Section 141 is controlled in its operation and effect by the concluding words of the section, which limit its application to proceedings in any Court exercising civil jurisdiction. Those words are the key-note for the construction of the section itself. In my opinion, it is clear that a proceeding under the Legal Practitioners Act is not a civil proceeding. The intention of the Act of Parliament (*sic*) was to provide a procedure or remedy of a disciplinary character for practi-

tioners practising in subordinate Courts. It provides a procedure to be followed, and nominates the person who should hold the inquiry and make the charge. It gives no power to inflict any sentence or penalty. It merely gives the power of recommendation, with a safeguard of a very wide right of appeal to the High Court upon the entire evidence that has been taken and upon the recommendations that have been made. The procedure under this Statute is, in my opinion, self-contained. It is neither criminal nor civil, but purely designed for the purpose of discipline in controlling the procedure and the conduct of practitioners practising in subordinate Courts.

Mr. Sinha, finding that the latter argument cannot be sustained, then falls back on section 107 of the Government of India Act, and relies upon the general power of superintendence which that section confers upon the High Court to support his present application. I am not at all too sure that he has not, in the course of his argument, given far too wide an interpretation to the words "general superintendence"; because, as I gather, in this Court it has now been held that superintendence applies only to cases where a subordinate officer, be he Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. If, having jurisdiction, he decides a case or a fact wrongly, that does not give the High Court jurisdiction under its power of superintendence to interfere with his finding of fact. I ask them, had this officer jurisdiction? I find that he had jurisdiction to enter upon this inquiry. If I find he had jurisdiction to enter upon this inquiry, under the Statute he had power to make the charge he did against these professional gentlemen. How can I then say that section 107 gives us any power to exercise the right of superintendence, irrespective altogether of the argument of my learned brother, who points out that the person who is nominated by Statute is the presiding officer in whose Court the misconduct takes place? Nevertheless I find that a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an inquiry under the Statute; I cannot say that we have under section 107 that right to interfere, unless we find that he has grossly abused his powers, or that he has acted in excess of his jurisdiction,

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or done something without jurisdiction. But that is not this case.

Irrespective of the construction that may be put upon section 107 of the Government of India Act, I am of opinion that it is not open to the parties at this stage of the proceedings to entirely amend or frame a new application which was not the application on which they came before the Court and on which they obtained their Rule. Suffice it to say that under section 24 I am of opinion that this application is not sustainable and it should be dismissed without the usual penalty.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION NO. 8 OF 1916.

June 2, 1916

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

RAJKUMAR SINGH—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 476, 177, 195—“Brought to its notice in the course of a judicial proceeding,” meaning of—S. 476, scope of—Offence committed in another province—Jurisdiction—Penal Code (Act XLV of 1860), ss. 209, 210.

Per Chamier, C. J.—Section 476 of the Code of Criminal Procedure does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated. [p. 438, col. 2.]

Per Sharfuddin, J.—Section 476, Criminal Procedure Code, is a self-contained section and the reference made to section 195 of the Code is only for the purpose of avoiding the enumeration of the sections mentioned in section 195. The most important element in section 476 is that the offences referred to in section 195 should either be committed before the prosecuting Court or brought under its notice in the course of a judicial proceeding, when that Court may proceed as provided by section 476. [p. 439, col. 1.]

If an offence has been committed, no matter where, and if in the course of a judicial proceeding it is brought to the notice of a Court that such an offence has been committed, that Court has jurisdiction to proceed under section 476. [p. 439, col. 1.]

Petitioner instituted a suit at Bilaspur against a resident of Arrah and obtaining a decree, sought to execute it at Arrah by means of a transfer. The

judgment-debtor then instituted a suit at Arrah to have the decree of the Bilaspur Court set aside, on the ground that it had been obtained by fraud. The suit was decreed, and petitioner's appeal to the District Judge, Arrah, was dismissed. The District Judge, finding that the petitioner had brought a false suit and had obtained a decree by fraud and by tampering with the service of summonses, etc., directed his prosecution under sections 209, 210, Indian Penal Code:

Held, that the District Judge had jurisdiction to take action against petitioner under section 476, Criminal Procedure Code, as the offences alleged to have been committed by him were brought to the notice of the District Judge in the course of a judicial proceeding. [p. 433, col. 2; p. 439, col. 2.]

Criminal revision against an order of the District Judge, Shahabad, dated the 4th February 1916.

Mr. Bahadurji (with him Mr. Nirsu Narayan Sinha), for the Applicant.

Mr. Manuk (Government Advocate), for the Crown.

JUDGMENT.

CHAMIER, C. J.—This is an application for revision of an order of the Sessions Judge of Arrah, directing the prosecution of the three applicants for offences under sections 209 and 210 of the Indian Penal Code.

The first applicant brought a suit in a Small Cause Court at Bilaspur in the Central Provinces against Ramkesawar Koir, a resident of the Arrah district in this province, and obtained a decree *ex parte*. The decree was at his instance transferred for execution to the Court of the Subordinate Judge of Arrah and application was made for the arrest of the judgment-debtor. The latter then brought a suit in the Court of the 1st Munsif of Arrah to have the Bilaspur decree set aside on the ground of fraud and obtained a decree which was confirmed on appeal by the District Judge of Arrah. The learned Judge directed the prosecution of the three applicants for offences under sections 209 and 210 of the Indian Penal Code, as he found on the evidence that they had combined to bring a false suit against Ramakesawar Koir and had obtained a decree against him by concealing from him the institution of the proceedings and tampering with the service of summonses.

An appeal has been presented to this Court against the decision of the District Judge in the civil case and has been admitted.

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The first ground on which the order under section 476 of the Code of Criminal Procedure has been challenged is that the first Munsif of Arrah had no jurisdiction to entertain the suit to set aside a decree passed by a Court in another province. In view of the decision in *Jawahir v. Neki Ram* (1) in which I took part and the authorities there cited, I doubt whether there is much force in this contention. But we are not now concerned with the question of the jurisdiction of the Munsif, for there can be no doubt that the District Judge of Arrah had jurisdiction to entertain an appeal against the Munsif's decision. The hearing of the appeal by the District Judge was a judicial proceeding and the offences alleged to have been committed by the three applicants were brought to his notice in the course of that proceeding.

The second point taken is that section 476 of the Code of Criminal Procedure should be read with section 195 of the same Code, and that the words in the former section "any offence referred to in section 195" mean only the offences mentioned in that section which are committed under the qualifying circumstances mentioned in that section, *i. e.*, to come to the particular case before us, the contention is that section 476 does not authorise a Court to take action in respect of offences under sections 209 and 210 of the Indian Penal Code, unless those offences were committed in or in relation to a proceeding in a Court. This is a matter upon which there has been some difference of opinion. On one side are the decisions in *In re Derji* (2), *In re Keshav Narayan Manolkar* (3) and *Akhil Chandra Sen v. Queen-Empress* (4), while on the other are the decisions in *Abdul Khadar v. Meera Saheb* (5) and *Jadumandan Singh v. Emperor* (6), in which the Court endeavoured to distinguish the case of *Akhil Chandra Sen v. Queen-Empress* (4) from the

case then before it. It is unnecessary for us in this case to choose between these two conflicting views, for the offences supposed to have been committed by the applicants were committed, if at all, in a proceeding in a Court—the case against them being that they fraudulently brought a false suit or claim in a Court and fraudulently obtained a decree for a sum which was not due. So far as this point is concerned, it must be held that the District Judge had jurisdiction to take action against the applicants under section 476 of the Code of Criminal Procedure.

The third point taken is that the District Judge had no jurisdiction to take action in respect of offences committed outside the local jurisdiction of his Court, and reliance is placed upon section 177 of the Code of Criminal Procedure. No authority has been produced in support of this contention and there are at least two reported cases in which Courts took action in respect of offences committed in another district or province. [See *Girwar Prashad v. Emperor* (7) and *Kamta Prasad v. Emperor* (8)]. Section 476 of the Code of Criminal Procedure does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated. In my opinion, the District Judge of Arrah had jurisdiction to take action in this case under section 476.

In the last resort it was urged that criminal proceedings should not be taken against the applicants until the second appeal to this Court has been disposed of.

• It may be undesirable to allow criminal proceedings to be taken during the pendency of civil proceedings in which the same question of fact is in issue, but that is not the case here. In the appeal to this Court the question for decision is whether the Munsif of Arrah had jurisdiction to entertain a suit to set aside the Bilaspur decree. Even if the appeal is allowed on that ground, the applicants should be prosecuted if they fraudulently brought a false claim and fraudulently

(1) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.

(2) 18 B. 591; 9 Ind. Dec. (n. s.) 896.

(3) 17 Ind. Cas. 720; 14 Bom. L. R. 968; 13 Cr. L. J. 848.

(4) 22 C. 1004; 11 Ind. Dec. (n. s.) 667.

(5) 15 M. 224; 2 M. L. J. 148; 2 Weir 174; 5 Ind. Dec. (n. s.) 507.

(6) 4 Ind. Cas. 710; 37 C. 250; 10 C. L. J. 564; 14 C. W. N. 330; 11 Cr. L. J. 37.

(7) 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219.

(8) 9 Ind. Cas. 497; 33 A. 396; 8 A. L. J. 210; 12 Cr. L. J. 93.

In re MUKUNDRAI ATMARAM DESAI.

obtained a decree for a sum which was not due to them.

I would reject this application.

This order will govern Civil Revision No. 9 of 1916 also.

SHARFUDDIN, J.—I have had the advantage of reading the judgment of the learned Chief Justice and, fully agreeing with the views expressed therein, I desire to observe that it appears to me, from the wording of section 476 of the Code of Criminal Procedure, that it is a self-contained section and that the reference made to section 195 of the Code is only for the purpose of avoiding the enumeration of the sections mentioned in section 195. The most important element in section 476 is that the offences referred to in section 195 should either be committed before the prosecuting Court or brought under its notice in the course of a judicial proceeding, when that Court may proceed as provided by section 476. It is clear, therefore, that if an offence has been committed, no matter where, and if in the course of a judicial proceeding it is brought to the notice of a Court that such an offence has been committed, that Court has jurisdiction to proceed under section 476. Learned Counsel on behalf of the appellant urged that the words "brought to its notice in the course of a judicial proceeding" mean that the offence should have been committed in reference to the judicial proceeding then pending in that Court. In the present case, the false case was instituted in one of the towns of the Central Provinces and an *ex parte* decree was obtained by the plaintiff of that suit from the Central Provinces Court. That decree was attempted to be executed in the District of Shahabad, on a transfer. It was then that the defendant of that suit for the first time came to know that such a decree had been passed against him by the Central Provinces Court. It appears that the decree-holder, who is now the petitioner, obtained that decree by suppression of the summons in the Shahabad District. It was then that the defendant of that suit instituted a suit in the Munsif's Court at Arrah for a declaration that the *ex parte* decree was obtained by fraudulent means. The Munsif

of Arrah gave a decree to the plaintiff of this suit, on which there was an appeal to the District Judge. There can be no doubt that this appeal lay to the District Court. The hearing of this appeal by the District Court was a judicial proceeding, and in the course of this judicial proceeding it was brought to the notice of that Court that the present petitioner had obtained an *ex parte* decree against the opposite party by suppression of the summons in the District of Shahabad; and hence I am of opinion that the Arrah District Court had jurisdiction to put the law in motion under section 476 of the Code of Criminal Procedure, and the application on the above ground is rejected.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 26 OF 1916.

June 23, 1916.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

In re MUKUNDRAI ATMARAM DESAI—
APPLICANT.

Jurisdiction—Magistrate, sweeping prohibitory order of—Closing burial place—Omission to record provision of law—Ultra vires.

A District Magistrate acts without jurisdiction in issuing a sweeping public prohibitory order without referring to any provision of law as authorising such an order. [p. 489, col. 2.]

Criminal reference made by the Sessions Judge, Broach.

FACTS.—The District Magistrate of Broach issued orders prohibiting on sanitary grounds the burial of corpses in a place previously used by the public for the purpose. On the petition of the applicant the following order of reference was made by the Sessions Judge of Broach:—

"As remarked by Heaton, J., in *Bhagubhai Dwarkadas v. Emperor* (1), 'the District Magistrate has no power whatever to issue a prohibitory order to the public unless that power is specifically conferred by some provision of the law:' see also the observations in the case of *Queen-Empress v. Saminadha Pillai* (2). In the present case, the District

(1) 27 Ind. Cas. 146; 16 Bom. L. R. 684; 16 Cr. L. J. 98; 2 Bom. Cr. C. 249.

(2) 19 M. 464; 6 M. L. J. 181; 1 Weir 144; 6 Ind. Dec. (N. S.) 1029.

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Magistrate has not stated anywhere under what provision of law the notice was issued. The learned Public Prosecutor relied upon section 39, clause (1), of the District Police Act (IV of 1890). That section, however, merely authorises the District Magistrate to 'make rules or orders regulating the hours during which and the manner in which any place for the disposal of the dead may be used so as to secure the equal and appropriate application of its advantages and accommodation and to maintain orderly conduct amongst those who resort thereto.' The section nowhere authorises the District Magistrate to prevent the public, either wholly or partially, from using a place previously set apart for the disposal of the dead. Where a place is used both for cremation and burial, it cannot be said that prohibiting its use for burial is 'regulating the manner in which it shall be used so as to secure the equal and appropriate application of its advantages,' etc.

There is also no provision in the Criminal Procedure Code empowering the District Magistrate to issue the prohibitory order in question. The only sections which could conceivably be thought to apply are sections 133 and 143. The former section empowers the District Magistrate to make a conditional order requiring the person causing a nuisance in any public place to remove it within a certain time, or appear on a certain date and move to have the order set aside or modified. Assuming burial in Dashaswamedha site to be a nuisance within the meaning of the section, still the section does not contemplate the issue of a prohibitory order to the public generally, but only to a particular individual [cf. section 144, clause (3)], and the order is, moreover, to be conditional in the first instance and the person to whom it is addressed has to be given an opportunity to be heard before it is made absolute. In the present case, it is obvious that the District Magistrate was not acting under this section, and even if he was, the order would be illegal as the prescribed procedure was not followed.

Next, as to section 144. That section empowers the District Magistrate to 'order any person not to repeat or continue a

public nuisance, as defined in the Indian Penal Code or any special or local law.' As observed in *Queen Empress v. Saminadha Pillai* (2), 'under the section no Magistrate can prohibit what was lawful before the date of his order, and thereby make such an otherwise legal act, committed after the date of the order, punishable as a nuisance under the Indian Penal Code. For he is by that section empowered to enjoin a person from repeating or continuing only a public nuisance as defined in the Indian Penal Code or any special or local law.' The same case lays down that the disposal of a corpse in a place set apart for the purpose is not a public nuisance within the meaning of the Indian Penal Code, so long as the act is performed in a decent and inoffensive way. I am, therefore, of opinion that section 143 cannot also be called in aid here.

The result is that, in my opinion, the District Magistrate's order was made without jurisdiction and is consequently invalid. It seems to me that the Government has advisedly reserved to itself the power to close a place used for the disposal of the dead, as being a matter deeply affecting the religious feelings of a community and requiring deliberation by the highest authority."

Mr. G. N. Thakore, for the Applicant.

JUDGMENT.—The District Magistrate in issuing this sweeping public prohibition has omitted to refer to any provision of law as authorising such an order. We are, therefore, left to guess under what authority he conceived himself to be acting, and upon this reference there is no appearance before us in support of the order. For the reasons given in the careful letter of reference by the Sessions Judge, Mr. Taleyar Khan, we are of opinion that the order in question is wholly without jurisdiction. We, therefore, set it aside.

Order set aside.

BEGA v. EMPEROR.

*PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 249 of 1916.
May 29, 1916.

Present.—Mr. Justice LeRossignol.

BEGA AND OTHERS—CONVICTS—

APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 100, 148, 325—
Right of private defence—Injury caused in self-defence.*

Four persons of the accused's party were digging a drain. They were attacked by the complainants. Partisans of the parties ran up and a free fight ensued. One of the accused's party was killed and the arm of one of the complainants' party was fractured. The accused were convicted of offences under sections 148 and 325, Indian Penal Code:

Held, that the accused must be acquitted, as there was no safe ground for holding that they acted otherwise than in self-defence either of themselves or of the deceased.

Appeal from the order of the Magistrate, 1st class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Shahpur, dated the 17th February 1916, convicting the appellants.

Mr. Nand Lal, for the Appellants.

Rai Sahib Lala Mul Chand, for the Respondent.

JUDGMENT.—The facts of this case are set forth in Criminal Appeal No. 190 of 1916, and the questions in this appeal are the guilt or innocence of Shah Nawaz's party and the nature of their offence, if any.

There is no serious contention that all the appellants did not take part in the fight and I am satisfied that all were concerned.

The main plea is that they were attacked and acted solely in self-defence.

That they were the assailed I have no doubt, the injuries inflicted by them on the other side were comparatively slight, whilst their side was very seriously handled.

The worst that can be said is that Shah Nawaz, Khuda Yar and Nur Khan must have known that their action in digging the *nali* was likely to provoke a quarrel: but I cannot find that at the first this side comprised more than four men. When they were attacked, partisans ran up and a free fight ensued, but I can find no safe ground for holding that the appellants acted otherwise than in self-defence either of themselves or of Nur Khan who had been felled to the ground,

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Nur Khan was killed and the only grievous hurt inflicted on the other side was a fractured arm. In the circumstances I am not prepared to hold that the appellants committed any offence and I acquit them.

Accused acquitted.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 113 of 1916.

June 5, 1916.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Heaton.

EMPEROR—PROSECUTOR—APPELLANT

versus

RACHAPA GURAPPA HATTARVAT—

ACCUSED—RESPONDENT

Explosives Act (IV of 1884), rules under—Clove-crackers, possession of, without license, whether legal—“Toy fire-works.”

Clove-crackers or *lavangi*-crackers are “toy fire-works” within the meaning of rule 3 issued under the Explosives Act and are, therefore, exempt from rule 35 imposing the necessity of a license for possessing them. [p 49, col. 1.]

Criminal appeal by Government of Bombay from an order of acquittal passed by the first class Magistrate, Bail-Hongal.

Mr. S. S. Patkar (Government Pleader), for the Crown.

Mr. Velinkar (with him Mr. P. B. Shingne), for the Accused.

JUDGMENT. This is an appeal by the Government of Bombay against an order of the first class Magistrate of Bail-Hongal, who discharged the accused after investigation of a charge of possessing 2,300 lbs of crackers under the Indian Explosives Act, whereas his license only entitled him to possess 200 lbs. The accused imported Chinese crackers of various kinds, and the 2,300 lbs with which we are now concerned are entirely crackers spoken of in the evidence as *lavangi*-crackers or *patakhas*, that is to say, clove-shaped crackers. They are strings of very small sticks hardly longer than a clove, each of which, when ignited, emits a small report. The Governor-General-in-Council has issued rules under the Explosives Act, under section 35 of which an explosive shall not be possessed except under and in accordance with the conditions of the

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license granted under the rules. It is provided, however, by rule 3 that nothing in the rules shall apply to the possession of toy fire-works such as paper caps for toy pistols. The first question we have to determine is whether the clove-crackers in question are explosives. The definition of 'explosives' requires that they should be either for a practical explosive effect or be used to give a pyrotechnic effect. There can be no question, we think, that the crackers in question have no practical explosive effect. They may, however, be fire-works intended to produce a pyrotechnic effect, if that term is used in its broadest possible sense, although the light produced from the explosion of one of these crackers is momentary. But assuming for the purpose of argument without deciding that they might be treated as fire-works falling within rule 5, clause 7, of the statutory definition, we think that they should be treated as "toy fire-works" within the rule just mentioned. As such they will be exempt from rule 35 imposing the necessity of a license. We, therefore, think that the learned Magistrate came to the right conclusion. We may observe that there is no technical evidence whatever as to these fire-works, and the only knowledge of their effect which we have been able to obtain has been from the ignition of one of them in Court during the progress of the arguments. We dismiss the appeal.

Appeal dismissed.

PATNA HIGH COURT.
FULL BENCH.

CIVIL REFERENCE NO. 4 OF 1916.

November 27, 1916.

Present:—Mr. Justice Mullick, Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

In the matter of EMPEROR—APPLICANT
versus

LEAKUT HUSAIN, MUKHTEAR—
RESPONDENT.

*Legal Practitioners Act (XVIII of 1879), ss. 13, 14—
Receiving mukhtarnama without enquiry and from
unauthorised person—Gross negligence—Misconduct,*

A legal practitioner is bound to take instructions directly from clients, or from their agents duly empowered to act in their behalf. [p. 493, cols. 1 & 2.]

A mukhtear who receives his mukhtarnama from an unauthorised person without making adequate enquiry as to the person who is giving him the same and who acts upon the same, is guilty of gross negligence which amounts to misconduct. [p. 493, col. 2.]

Reference by the Officiating District Judge, Shahabad, dated the 26th June 1916.

The Government Advocate, for the Crown.

Mr. Athar Hossain, for the Respondent.

JUDGMENT.

ATKINSON, J.—This reference comes before us under sections 13 and 14 of the Legal Practitioners Act. The facts of the case are very short. A mukhtear by name Leakut Hussain apparently practises his profession as a mukhtear at Shahabad. He is a certified mukhtear under the Statute and Rules made pursuant thereto. The offence with which he is charged is one involving professional misconduct, in that he purported to file a petition on behalf of certain decree-holders in an execution matter then pending before the Munsif of that district, alleging on behalf of the decree-holders that the amount of the decree had been paid in full and had been satisfied by the judgment-debtors. That petition was based upon a mukhtarnama purporting to have been executed by one of the judgment-creditors. The mukhtarnama was accepted and acknowledged by this mukhtear Leakut Hussain as having been received by him from the hand of the decree-holder whose name he expressly mentions and is endorsed on the mukhtarnama. It is alleged that he received no instructions from this man Din Dayal or from any one of the decree-holders and in acting as he did he acted in collusion with the judgment-debtors or agents on their behalf. It appears that on the 3rd January 1916 the judgment-debtors had filed a petition in which they objected to execution issuing for the sale of their property, on the ground that they had satisfied by payment the decree of the decree-holders. On the 29th January 1916 the decree-holders filed a petition alleging that their decree had never been satisfied by payment. The 29th was fixed as the date for the hearing of the petition of the 3rd January and upon that date the decree-

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holders had filed their counter-petition and the matter stood adjourned for the hearing of both petitions until the 5th February. On the 2nd February this man Husain, the party here impleaded, took the step which has involved him in this trouble. It appears when he was examined on the 5th February 1916 that he said that he had got his instructions, not from Din Dayal Rai at all, but from Ambika who was alleged to be in some sort of privity with Din Dayal. This *mukhtear* also says that Ambika came to him with Din Dayal Rai and that Din Dayal Rai consented to his acting on his behalf, and that the *mukhtear* in good faith relied upon the representations made to him by Ambika and that, therefore, he was an innocent man; that he had not been guilty of a breach of duty and that he had been imposed upon in pursuance of a conspiracy between Din Dayal and Ambika.

One most significant fact in this case seems to be unaccounted for in the course of the argument on behalf of the *mukhtear*, and that is the fact that the judgment-debtors never appeared in this case on the 5th February in support of their petition filed on the 3rd January. Their absence is most significant and cannot be accounted for, except on the assumption that they were the moving parties to get this man Husain to file the petition on the 2nd February, which would have dispensed with the hearing of this enquiry on the 5th February itself. It was a bold and daring act of this man to take, because it was an attempt to deceive and mislead the Court. The Court is here to protect all litigants and it is incumbent on the Court and its bounden duty in these matters to see that frauds of this kind are not practised with impunity. The Court's duty must be exercised with care and diligence; otherwise the administration of justice will be paralysed and polluted. You have this *mukhtear* taking no steps to conform with his obligations and duties under the rules of which he is bound to know the contents; and we must assume that he does know what are the rules and that as a certified officer of this Court he has perused those rules. What are the duties of this *mukhtear*? One of them is that he must take his instructions directly from his clients,

or if from an agent that he is duly empowered to act. But this man Husain took no steps to satisfy himself that the representations made by Ambika were *bona fide*. I can find no evidence that he made any enquiry and his own statement endorsed on the *mukhtarnama* itself shews that the man never took any steps to inquire. The endorsement is to the effect that he received the *mukhtarnama* from the hands of Din Dayal and from no one else. He is pinned to that admission on the 2nd February, the same day that the petition is filed. He says that he got the petition and the *mukhtarnama* at one and the same time and in doing as he did, he acted innocently though wrongly. We are inclined to think that he was not a party to any express fraud in conjunction with the judgment-debtors; but we do think that he acted in violation of his duty under circumstances which shew the greatest possible negligence on his part. We cannot altogether condone these malpractices and misconduct. There must be a limit. It is a pity that an old man should be the first victim to be sacrificed; but that is his own look-out. It may serve as a warning to others who may be attempted to act as he did. We do not think that this *mukhtear* Leakut Husain was guilty of express fraud. If we did our duty would be a very painful one indeed. But we do think that he acted negligently, with gross negligence and that for that negligence and in the interests of justice and its purity he must be punished. It is said that the Munsif recommends a suspension of the grant of a certificate for a period of six months. The learned District Judge, Mr. Macpherson, at the time took a most lenient view in favour of this old man grounded upon his age and the possibility that he might not return to work again. But six months had not elapsed from the time that Mr. Macpherson's order was made when this old man had the hardihood again to apply for his certificate. Without that certificate I understand he cannot practise. The question is whether we should give him that certificate now. I, for one, am of opinion that we should not give it to him for a considerable period of time. Bearing in mind all that has been

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said on his behalf we are satisfied that the right to obtain this certificate should be suspended for a period of one year from this date.

MULLICK, J.—I concur.

JWALA PRASAD, J.—I concur.

Mukhtear suspended.

PATNA HIGH COURT.

CIVIL REVISION No. 18 OF 1916.

November 3, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

LACHMI SINGH—PETITIONER

versus

BRIJ MOHAN LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Prosecution under s. 476, order for—Jurisdiction—Offence 'brought to notice in the course of a judicial proceeding.'

L. instituted a suit in the Small Cause Court in the District of Darbhanga for recovery of a sum of money against B. and obtained an *ex parte* decree. He got the decree transferred for execution to the Chapra District. B. brought a suit in the Munsif's Court at Chapra to set aside the decree, on the ground of fraud. The Munsif decreed the suit. B. then applied to the Munsif for sanction to prosecute L. The Munsif refused sanction. On appeal the District Judge at Chapra directed the prosecution of L. under section 476 of the Criminal Procedure Code:

Held, that as offences in respect of which sanction was sought under section 195 were brought to the notice of the District Judge at Chapra in the course of a judicial proceeding, he had jurisdiction to direct the prosecution. [p. 495, col. 1.]

Ambica Tewari v. Emperor, 34 Ind. Cas. 320; 1 P. L. J. 206; 17 Cr. L. J. 208, distinguished.

Rajkumar Singh v. Emperor, 37 Ind. Cas. 487; 1 P. L. J. 298, referred to.

Appeal against an order of the District Judge, Chapra, dated the 11th August 1916, reversing that of the Munsif, 2nd Court, Chapra, dated the 29th May 1916.

Sir Ali Imam, Messrs. S. Sinha and Chandra Sekhar Banerji, for the Petitioner.

Mr. M. Fakhruddin (Government Pleader), for the Crown.

JUDGMENT.—This is an application for revision of an order of the District Judge of Chapra, directing the prosecution of the applicants for various offences alleged to have been committed by them in respect of a suit brought by the applicant Lachmi Singh in the Darbhanga District in the

Court of a Munsif exercising Small Cause Court powers on the basis of a hand note.

It appears that Lachmi Singh having obtained a decree *ex parte* caused the decree to be transferred to the Chapra District for execution, and in execution the defendant Brij Mohan Raut was actually arrested in the Chapra District on August 21st, 1913. Brij Mohan Raut then brought a suit in the Court of the 2nd Munsif of Chapra to have the decree obtained by Lachmi Singh set aside on the ground that it had been obtained by fraud. Brij Mohan Raut obtained a decree in June 1914 setting aside the decree. Lachmi Singh appealed but his appeal was dismissed on March 8th, 1915, and a second appeal by him to the High Court was also dismissed on July 13th, 1915. Brij Mohan did not become aware of the order of the High Court dismissing Lachmi Singh's appeal until January 1916. On February 2nd, 1916, he presented an application to the 2nd Munsif of Chapra for sanction to prosecute Lachmi Singh and others who had assisted him in various ways in the false suit. The Munsif dismissed the application. Thereupon Brij Mohan Raut appealed to the District Judge of Chapra, who has ordered the prosecution of Lachmi Singh and others for various offences set out at the end of his order.

The case came before Mr. Justice Roe during the vacation and that learned Judge, thinking that there was some conflict between two rulings of this Court referred the case to this Bench. One of the cases referred to by him was that of *Ambica Tewari v. Emperor* (1). In that case what was decided was that as no appeal lay to the District Judge against an order of a Small Cause Court rejecting an application for sanction, the District Judge could not at the hearing of the appeal pass an order under section 476 of the Code of Criminal Procedure. That case seems to have no bearing on the present case. The other case referred to is *Rajkumar Singh v. Emperor* (2) decided by this Bench on June 2nd, 1916. In that case we held that the District Judge of Arrah had jurisdiction to direct the prosecution of

(1) 34 Ind. Cas. 320; 1 P. L. J. 206; 17 Cr. L. J. 208.

(2) 37 Ind. Cas. 487; 1 P. L. J. 298.

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certain persons in connection with a false suit brought by them in the Central Provinces. It is suggested that the cases against the present applicants cannot be made over to a Magistrate in Chapra for trial inasmuch as the offences were committed in the Darbhanga District. It appears to us that the requirements of section 476 of the Code of Criminal Procedure have been satisfied. The District Judge's order under section 476 was passed in the course of a judicial proceeding. Certain offences referred to under section 195 of the Code of Criminal Procedure were brought to his notice in the course of a judicial proceeding and he was, therefore, authorised by section 476 to send the case for enquiry or trial to the nearest Magistrate of the first class. In our opinion, the proper Magistrate at Chapra will have jurisdiction to try the cases which have been sent to him under the order of the District Judge of Chapra.

The only defect in the order of the District Judge is that he has failed to specify the Magistrate to whom the cases are to be sent. On receipt of our order the District Judge will specify the Magistrate to whom the cases are sent in order that the provisions of section 476 may be complied with.

Subject to this, the application is dismissed.

Application dismissed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 5 OF 1916.
March 31, 1916.

Present:—Mr. Justice Batchelor and
Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

A DEAF AND DUMB ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 341—Deaf and dumb accused, trial of—Procedure—Conviction.

The law in England as well as in India with regard to the trial of a deaf and dumb person is that though great caution and diligence are necessary in the trial of such a person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment.

Rex v. Steel, (1887) 1 Leach C. C. 651; *Queen v. Bowka Hari*, 22 W. R. 35 Cr.; *Queen v. Bowka*, 22 W. R. 72 Cr.; *Queen-Empress v. Reubin Samuel*, (1894) Rat. Unrep. Cr. C. 696; Cr. Rg. No. 26 of 1894, referred to.

NARAYANA NADAN v. PALANIAPPA NADAN.

Criminal reference made by the first class Magistrate, at Bhusawal.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.—In this case the accused, a deaf and dumb man, has been convicted of theft under section 380 of the Indian Penal Code, and the proceedings have been submitted to this Court, under section 341 of the Criminal Procedure Code.

Section 341 provides that in such a case as this the High Court should pass such orders as it thinks fit. The law in England appears to be that though great caution and diligence are necessary in the trial of a deaf and dumb person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment: see Russell on Crimes, Volume I, page 62; Archbold's Criminal Practice, page 11 and *Rex v. Steel* (1), *Queen v. Bowka Hari* (2) and *Queen v. Bowka* (3) *Queen-Empress v. Reubin Samuel* (4) are authorities to show that the same is the law and practice in India. In this case we are satisfied from the learned Magistrate's judgment that he was right in finding that the accused understood the nature of the act, which he was committing when he committed this theft.

We, therefore, confirm the conviction and sentence the accused to one month's rigorous imprisonment.

Conviction and sentence confirmed.

- (1) (1787) 1 Leach C. C. 451.
- (2) 22 W. R. 35 Cr.
- (3) 22 W. R. 72 Cr.
- (4) (1894) Rat. Unrep. Cr. C. 696; Cr. Rg. No. 26 of 1894.

MADRAS HIGH COURT.
CRIMINAL MISCELLANEOUS PETITION No. 366
OF 1916.

November 29, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Napier.

NARAYANA NADAN—RESPONDENT—
PETITIONER

versus

PALANIAPPA NADAN—PETITIONER—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195,

NARAYAN NADAN v. PALANIAPPA NADAN

cl. (b) (c)—Sanction, grant of—Case committed to Sessions Court—Statement before Committing Magistrate, sanction by Sessions Judge in respect of, legality of—'In relation to any proceeding in any Court,' meaning of—Penal Code (Act XLV of 1860), s. 193—Perjury—Contradictory statements, when indictable.

A Sessions Judge has power to grant sanction for perjury in respect of statements made by a witness before a Committing Magistrate, though appeals do not lie to him from the latter's Court within the meaning of clauses (6) and (7) of section 195, Criminal Procedure Code.

Such statements which are brought to the notice of the Sessions Court trying the case are made in relation to the proceedings of the latter Court within the meaning of section 195 (1) (b), Criminal Procedure Code.

Reddi Rami Reddi v. Public Prosecutor of Kurnool, 25 Ind. Cas. 524; (1914) M. W. N. 793; 27 M. L. J. 586; 15 Cr. L. J. 612, distinguished.

High Court Proceedings, dated 17th January 1877, No. 120, 2 Weir 160, followed.

Sanction should not be accorded for prosecution on the ground of contradictory statements, unless there is a direct contradiction, especially when they are immediately corrected and explained.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order of the Sessions Court of Ramnad at Madura, in Criminal Miscellaneous Petition No. 14 of 1916 (Sessions Case No. 5 of 1916), granting sanction to prosecute the petitioner herein.

Dr. S. Swaminadhan and Messrs. R. Shadagopachariar and V. K. Venkatarama Aiyar, for the Petitioner.

The Public Prosecutor, for the Crown.

Mr. P. R. Narayanasami Iyer, for the Respondent.

ORDER.—In respect of the sanction to prosecute for an offence under section 211 of the Indian Penal Code, there is no evidence on the record that the petitioner knew that there was no just or lawful ground for the charge of arson.

As regards the alternative sanction for perjury, the point is taken that the Sessions Court, not being the Court to which appeals ordinarily lie from the second class Magistrate, could not grant a sanction with respect to statements made before that Magistrate holding the preliminary enquiry.

The case of *Reddi Rami Reddi v. Public Prosecutor of Kurnool* (1) is no authority for this proposition. In that case the

statement was made to a Sub-Magistrate in proceedings under section 164 of the Code of Criminal Procedure. The question does not turn on the construction of clauses 6 and 7 of section 195 of the Code of Criminal Procedure but on clause 1 (b) of that section, and we are satisfied that a statement made before a Committing Magistrate and brought to the notice of the Sessions Court trying the case is made in relation to the proceedings before the latter Court. This is the view taken by this High Court in *High Court Proceedings*, dated 17th January 1877, No. 120 (2) and has, we believe, been acted on ever since.

With regard to the first set of contradictory statements the Sessions Judge has not correctly set out the language used in the Magistrate's Court, but assuming that it is open to the meaning given to it, the statement was corrected at once in the Court in which it was made.

The Public Prosecutor does not suggest that there is a direct contradiction as regards the third set of statements.

With regard to the second set there is undoubtedly a direct contradiction and we have had grave doubts whether we should not uphold the sanction in this case. The petitioner evidently intended to convey to the Sub-Magistrate that he did not know the accused before the receipt of the letters. In the Sessions Court he frankly admitted at once that he had known him and he gave full details of the nature of his acquaintance and the reasons for his antipathy to the accused. We think that his conduct in the Sessions Court in admitting this so freely should be taken into consideration and we have decided to revoke the sanction, and we do revoke it accordingly.

Petition allowed; Sanction revoked.

V.R.P.

(2) 2 Weir 160.

(1) 25 Ind. Cas. 524; (1914) M. W. N. 793; 27 M. L. J. 586; 15 Cr. L. J. 612.

GULLAPALLI VENKATRAMAYYA v. KOONAPARAJU VENKATRAJU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 300 of 1914.

October 11, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Phillips.

GULLAPALLI VENKATRAMAYYA—

PLAINTIFF—APPELLANT

versus

KOONAPARAJU VENKATRAJU AND

OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66, O. XXI, 11. 98 to 103—Execution sale, purchase at, benami—Resistance to certified purchaser by person deriving title from judgment-debtor—Suit for possession by benamidar purchaser, whether lies.

A certified *benami* purchaser at an execution sale who has been obstructed in securing possession by a person deriving title from the judgment-debtor cannot maintain an action in ejectment against the latter. There is no distinction between ordinary suits for ejectment and suits by *benami* purchasers at Court sales. [p. 497, col. 2.]

There is nothing in section 66 of the Civil Procedure Code which confers such a right. That section is designed to protect the person who has obtained a sale-certificate and has acquired possession under it. It has no application to a purchaser who seeks to oust another from possession. [p. 497, col. 2.]

Tenkata Suryanaraina Jayapatiraju v. Goluguri Bapiraju, 7 Ind. Cas. 60; 34 M. 143; 8 M. L. T. 154; (1910) M. W. N. 286, *Rarji Appaji Kulkarni v. Mahadev Bapuji Kulkarni*, 22 B. 672 at p. 678; 11 Ind. Dec. (N. S.) 1030, explained and distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Kistna, at Ellore, in Appeal Suit No. 271 of 1912, preferred against that of the District Munsif, Narasapur, in Original Suit No. 287 of 1911.

Mr. P. Nagabhushanam, for the Appellant.

Mr. T. Prakasam, for the Respondents.

JUDGMENT.—The Receiver of the Nidadavole Estate obtained a decree for money against defendants Nos. 1 to 3. The properties in suit were attached in execution and were purchased by the plaintiff. He obtained a certificate of sale, but when he applied to be put in possession, he was resisted by the 4th defendant who claimed to have purchased the property at a private sale from defendants Nos. 1 to 3. The present suit is to recover possession.

The contention of the 4th defendant, among other pleas, is that the plaintiff is a *benamidar* for the Receiver, and that consequently he is not entitled to sue in eject-

ment. The Subordinate Judge found that the plaintiff was a *benamidar*. In a careful judgment, after reviewing the authorities, he came to the conclusion that the plaintiff was not entitled to sue.

We think he is right. Mr. Nagabhushanam, who appeared for the appellant, conceded that in an ordinary suit in ejectment, a *benamidar* cannot recover possession. He argued, however, that in a suit necessitated by resistance or obstruction in execution, the holder of the certificate of sale, whether he be a *benamidar* or not, is entitled to maintain a suit for possession. It was not seriously argued that anything in section 66 of the Code of Civil Procedure can confer such a right. That section is designed to protect the person who has obtained a sale certificate and has acquired possession under it. It has no application to a purchaser who seeks to oust another from possession.

Reliance was placed by the learned Vakil upon certain observations in *Tenkata Suryanaraina Jayapatiraju v. Goluguri Bapiraju* (1). A careful perusal of the judgment leaves no room for doubt that that decision is no authority for the contention now advanced. The learned Judges in that case drew a distinction between contractual rights and rights arising from title. In the former class of cases, the person, who is *eo nomine* the contracting party, is entitled to enforce the terms of the contract. It will not be open to the other party to the contract to turn round and say that although he did enter into the contract with the party suing, as that party is only a name-lender for another, he can refuse to perform his part of the contract. The analogy of the sections relating to the rights of agents of undisclosed principals was relied upon for this purpose. We can conceive cases where even possession may be claimed under the contract against the party who has agreed to deliver possession. But the person sued in this case is not the person who entered into the contract; he is a third party who claims possession in his own right. The plaintiff, in such cases, must show that he has a better title than the person whom he seeks to eject. Consequently, it is open to the defendant to plead

(1) 7 Ind. Cas. 60; 34 M. 143; 8 M. L. T. 154; (1910) M. W. N. 286.

BHOJRAJ v. NATHURAM.

that such a plaintiff has no right to recover possession. It is on this ground, we take it, that in suits in ejectment, the *benamidar* is not allowed to recover possession.

Mr. Nagabushanam contended that under Order XXI, rules 97 to 103, the person entitled to move the Court in cases of obstruction to possession is the certificated purchaser and none else, and that, therefore, he is the only person who can sue under rule 103. We are not prepared to hold, as at present advised, that the real purchaser is not entitled to take action under these rules. Even granting the premises, it does not follow that the real owner has no remedy. The fact that he could not sue to remove the obstruction under rule 103, does not show that the ordinary right of a suit for possession on title is not open to him.

A stray observation in *Rajji Appaji Kulkarni v. Mahadev Bapuji Kulkarni* (2) that the *benamidar* can sue for possession was relied on. This was a suit for damages against the judgment-debtor for cutting and carrying away the crops after the auction-sale. The learned Judges very guardedly say that as between the *benamidar* and the judgment-debtor, the former may have a right to recover possession. We do not think that that observation can help the appellant.

We are of opinion that the view of the Subordinate Judge is right and dismiss the second appeal with costs.

Appeal dismissed.

V.R.P.

(2) 22 B. 672 at p. 678; 11 Ind. Dec. (N. S.) 1030.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 126
OF 19 5.

July 3, 1916.

Present:—Mr. Mitra, Offg. A. J. C.

BHOJRAJ—DEFENDANT—APPELLANT

versus

NATHURAM—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Co-parcener, one, sale by, how far binding on other co-parceners—Legal necessity—Purchaser, rights of.

A sale of joint property by a co-parcener, though made without legal necessity, is valid to the extent of the vendor's share. [p. 499, col. 2.]

If a vendee wishes to stand by a sale which is valid only partially, he must be content with the vendor's share, but if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. [p. 499, col. 2.]

Chandradeo Singh v. Mata Prasad, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263; *Hira Ram v. Udhe Ram*, 19 Ind. Cas. 861; 9 N. L. R. 74; *Banwari Lal v. Sheo Sankar Misser*, 1 Ind. Cas. 670; 3 C. W. N. 815; *Hirabhadra Gowdu v. Guruvankata Charlu*, 22 M. 312; 8 Ind. Dec. (N. S.) 222; *Sabapathi v. Somasundaram*, 16 M. 76; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760, distinguished.

Marappa Goundan v. Rangasami Goundan, 23 M. 89; 8 Ind. Dec. (N. S.) 456, followed.

Appeal against the decree of the Divisional Judge, Hoshangabad Division, dated the 23rd November 1914, confirming that of the Subordinate Judge, Hoshangabad, dated the 1st August 19 4.

The Hon'ble Mr. M. B. Dadabhoy and Mr. Chuckerbutty, for the Appellant.

Dr. H. S. Gour and Mr. S. Ramdas, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for a declaration that the plaintiff's half-share in certain joint ancestral property sold by his father, is unaffected by the sale. Plaintiff's case was that the sale was a nominal transaction. The first Court found in favour of the plaintiff and decreed the claim. The lower Appellate Court has held that there was consideration for the sale, and that Rs. 500 out of Rs. 2,000 represented an antecedent debt of the father. But as no legal necessity was alleged or proved, the Divisional Judge has confirmed the decree of the first Court. The only point argued in this second appeal is that there should not have been an unconditional decree, but that the plaintiff should have been ordered to refund Rs. 500 found to have been an antecedent debt of the father.

This Court has held, following the Full Bench of the Allahabad High Court in *Chandradeo Singh v. Mata Prasad* (1), that a Hindu father governed by Mitakshara Law cannot alienate ancestral family property, so as to bind his sons, except to pay off an antecedent debt or for legal necessity [*Hira Ram v. Udhe Ram* (2)]. If the case had

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(2) 19 Ind. Cas. 861; 9 N. L. R. 74.

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been one of mortgage, it would have presented no difficulty. But here we are concerned with a sale, which, being for valuable consideration, is binding on the alienor's share, as on this point this Court follows the Bombay and Madras view, as opposed to the view taken by the High Courts at Calcutta and Allahabad. The plaintiff does not contest that his father's share is bound by the sale, but only asks for relief in respect of his own half-share. The question for decision is whether there is an equity in favour of the purchaser in respect of the amount of the antecedent debt, for which the father could, no doubt, have sold joint family property of that value, and for which a proper charge could have been created on the family estate. The appellant's learned Counsel merely relies upon authorities which show that it is the pious duty of a Hindu son to pay his father's debts not tainted with immorality. This is not disputed by the learned Counsel for the respondents whose contention is that, as no charge has been created, no effect can be given in this suit to any such obligation. This is perfectly correct, but it does not touch the question whether there is an equity in favour of the purchaser in the present case. The Bengal case cited for the respondents, *Banwari Lal v. Sheo Sankar Misser* (3), is not of much help for the right of a co-parcener to sell his share is not recognized there. As laid down by Mookerjee, J., at page 822*, "When...an alienation made by a co-parcener is set aside at the instance of another member of the family, the Court orders that the property should be possessed in defined shares and the shares of the transferor should be subject to the lien of the transferee for the return of the purchase-money." The next case cited for the respondents is *Virabhadra Gowdu v. Guruvankata Charlu* (4), which must be read with the case of *Sabapathi v. Somasundaram* (5), on which it is based. In neither of the cases was there legal necessity, nor an antecedent debt justifying the sale. The only case which I have been able to find out, which is really in point, is the case

of *Marappa Goundan v. Rangasami Goundan* (6). I entirely concur with the following observations of Subramania Ayyar, J.: "One must hesitate to countenance the introduction of a new rule such as that suggested, having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a co-parcener, though made without legal necessity, is in this Presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more? Next, suppose that the share is worth less than the price paid. The vendee cannot, in such a case, reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price which he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement. The simpler and the better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid all necessity for enquiry into matters alluded to before and, on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some co-parceners into transactions calculated to affect the rights of other co-parceners who are not parties thereto."

The cases in which an equity has been recognized are cases in which the sale as a whole has been set aside, but I have not been able to find one in which the sale is upheld in part. In the absence of any authority to the contrary I follow the view taken by the Madras High Court and dismiss the appeal with costs.

Appeal dismissed.

(6) 23 M. 89; 8 Ind. Dec. (N. S.) 456.

(3) 1 Ind. Cas. 679; 13 C. W. N. 815.

(4) 22 M. 312; 8 Ind. Dec. (N. S.) 222.

(5) 16 M. 76; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760.

SUBHADRA KUAR v. SHAMBHU PRASAD.

ODDH JUDICIAL COMMISSIONER'S
COURT.

RENT APPEAL No. 107 OF 1914.

April 13, 1915.

Present:—Mr. Lindsay, J. C.

Rani SUBHADRA KUAR—DEFENDANT—
APPELLANT

versus

SHAMBHU PRASAD AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Profits, suit for share of—Village permanently settled—Revenue, enhancement of, for purpose of determining amount of cesses—Division of profits, method of.

A taluka was permanently settled by way of reward for the talukdar's loyal services. Subsequently, a person was declared by the Privy Council to be entitled to a share of the profits of a village situated in the taluka. At the time of the recent Settlement the revenue of the village was enhanced, not for the purpose of subjecting the talukdar to any additional liability as to payment of revenue but for the purpose of determining the amount of cesses:

Held, that in estimating the profits of the village the talukdar was not entitled to treat the new assessment of revenue as a real and substantial thing and to deduct the newly assessed amount of revenue from the gross income of the village before coming to any division of profits with the said person. [p. 501, col. 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 27th May 1914, modifying that of the Assistant Commissioner, Lucknow, dated the 20th November 1913.

Babu Bisheshwar Nath Srivastava, for the Appellant.

Syed Nabi Ullah and Mr. A. P. Ser, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for the recovery of a one-third share of the profits of *Manza Sissendi Khas* for the years 1317—1320 *Baski*, and the only dispute now remaining is with regard to the method by which the profits of the village are to be ascertained.

The village is included in the Sissendi Taluka now owned by Raja Chandra Sekhar. The estate is under the control of the Court of Wards and this village has been made over by the Court of Wards to the Raja's wife, Rani Subhadra Kuar, by way of provision for her maintenance. She was the defendant in the Court of first instance, and is the appellant in this Court. It appears that at the time of annexation the talukdar of this estate was

Raja Kashi Prasad, one of the loyal talukdars whose property was exempted from the confiscation declared by Lord Canning's Proclamation after the Mutiny.

By way of reward for his loyal services the Government of India directed that Raja Kashi Prasad should be entitled to hold his estate under a Permanent Settlement, and should also be entitled to a reduction of the Settlement *jama* to the extent of 10 per cent. (cf. Notification No. 1300 of 9th April 1868, in the Oudh Government Gazette of the 18th April 1868, page 154). The revenue was assessed at Rs. 2,300 at the first Regular Settlement and the result, therefore, was that the Raja and his successors became entitled to hold this village on payment of Rs. 2,300 per annum Government revenue less ten per cent., and as the Settlement was permanent it also followed that the Raja and his successors were never thereafter to be called upon to pay Government revenue at any higher rate.

The sum of Rs. 230 per annum, i.e., 10 per cent. of the revenue, which the Raja was to be allowed to retain under the terms of the notification just referred to, goes apparently by the name of "*haqq istimrari*."

In the year 1864 a litigation was started which was finally disposed of by a judgment of their Lordships of the Privy Council dated the 29th July 1873. A full report of this judgment is to be found in Messrs. Rafique and Jackson's Collection of Oudh Privy Council Decisions, second edition, page 135 [*Widow of Shankar Sahai v. Rajah Kashi Pershad* (1)]. The claimant in this litigation was the widow of one Shankar Sahai and the defendant was Raja Kashi Prasad. The Raja's wife was the daughter of one Mohan Lal who was the real uncle (father's brother) of Shankar Sahai.

It is unnecessary for the purposes of this case to discuss the nature of the claim put forward by Shankar Sahai's widow. It is sufficient to say that by the decree of the Privy Council which modified in some respects the order of Colonel Barrow, Financial Commissioner, dated the 7th of November 1868, it was laid down that Shankar Sahai's widow was entitled to a

(1) 4 I. A. 195; Rafique & Jackson's P. C. No. 23; 2 Suth. P. C. J. 4; 3 Ser. P. C. J. 289.

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Hindu widow's estate of inheritance in four villages comprised in the Sissendi Taluka, and to a one-third share of the profits of seven other villages of the estate, one of which is Sissendi Khas, the village of which the profits constitute the subject-matter of the present dispute.

It is not denied that the plaintiffs-respondents are entitled to the benefits of this decree of the Privy Council. It is conceded that they can claim a one-third share of the profits of Sissendi Khas.

The question is as to the manner in which the total amount of the divisible profits is to be ascertained and it has arisen in this way. Although Sissendi Khas is a permanently settled village the revenue of which has been fixed at Rs. 2,300, there was at the last revision of Settlement a re-assessment of revenue not for the purpose of subjecting the *talukdar* to any additional liability in the matter of payment of Government revenue, but for the purpose of determining how much should be paid on account of certain cesses. For this latter purpose the revenue was declared to be Rs. 3,100, but of course it is not pretended that the Raja or the Rani who for the time being represents him is liable to pay this sum. On the contrary all that is payable on account of Government revenue is the amount of the old assessment, Rs. 2,300, less the ten per cent. which the Raja is allowed to retain by way of reward for the services rendered by his predecessor Raja Kashi Prasad.

But it is claimed that in estimating the profits which by the decree of the Privy Council are divisible between the parties in the proportion of $\frac{1}{3}$ rd to $\frac{2}{3}$ rd, the *talukdar*, or rather his representative Rani Subhadra Kuar, is entitled to treat this new assessment as a substantial and real thing and to deduct the amount from the gross income before coming to any division of profits with the plaintiffs, and so in the accounts put forward by the Rani we find *inter alia* an annual deduction of Rs. 1,043 which is described as "*haqq istimrari*." How this actual figure is arrived at is not quite clear, but the notion apparently is that the Rani is entitled to retain Rs. 230, being 10 per cent. on the assessment at the First Settlement, plus Rs. 800, being the difference between the former assessment (Rs. 2,200) and the new or

nominal assessment (Rs. 3,100). The ground upon which this method of calculation is sought to be justified is that the benefit of the Permanent Settlement was conferred upon Raja Kashi Prasad as a personal mark of favour, and that the plaintiffs are in no way entitled to participate in that benefit. And so it is argued that to allow the plaintiffs to claim their one-third share of the profits after deduction from the gross income of only the amount which the Raja is liable to pay for Government revenue under the permanent assessment, is to admit them to a share of a boon to which they have no right. In other words, because it is a village which but for the fact that it is permanently settled would now be liable for a revenue of Rs. 3,100 per annum, the plaintiffs must submit to a deduction of this sum from the amount of the gross income, although admittedly the *talukdar* is not called upon to pay a half penny more than the sum fixed at the first Regular Settlement.

Both the Courts below have refused to accept this method of calculating the profits and in my opinion they have done right.

We have the decree of the Privy Council by which the *talukdar* is under an obligation to surrender to the widow of Shankar Sahai or to the persons who now represent her interest a one-third share of the net profits of Sissendi Khas, and those net profits consist of what is left of the gross income after deduction of all proper items of expenditure including the amount actually paid for Government revenue plus any sum which the *talukdar* is entitled to retain for his own benefit. It would be altogether absurd, in my opinion, to allow the *talukdar* to deduct from the gross income annually a sum which he admittedly is not called upon to pay. I am unable to comprehend the statement that the rights of the *talukdar* are in any way invaded by a refusal to allow him to deduct from the amount of the gross income a purely imaginary item of expenditure. What are the rights conferred upon him by the Notification of 1865? They are (1) a right to hold the village at a permanent rate of revenue and (2) a right to retain for his own benefit a one-tenth share of the revenue so fixed.

It is not disputed that the liability for revenue remains the same as it was, and it is also not disputed that he is entitled to retain

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Rs. 230 per annum, being one tenth of the permanent revenue rate.

To permit the *talukdar* to claim now that he is entitled to deduct from the gross income a further sum of Rs. 800, which he admittedly is not called upon to pay, would be to confer upon him a benefit over and above those which the Government has bestowed upon him and to which, in my opinion, he has no right whatever. He has his Permanent Settlement, and he gets his 10 per cent. of the permanent *jama* and he is entitled to no more.

I am satisfied that the Courts below have dealt with the case correctly and I dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 2075
OF 1916.

October 24, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Seshagiri Aiyar.

CHINNAM RAJAMANNARU—
PETITIONER

versus

LINGAMALLU RADHAKRISHNIAH AND
ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Claim for legacy under Rs. 10,000—Interest decreed, addition of, for purposes of appeal—Decision affecting future claims of other legatees, whether within clause (2) of the section.

Where the subject-matter of a claim is less than Rs. 10,000, there is no right of appeal to the Privy Council merely by reason of the decree amount exceeding the said sum at the date of application for leave to appeal by the addition of subsequent interest allowed by the decree. [p. 502, col. 2]

Where, in a claim based on a legacy under a Will, the value whereof is below Rs. 10,000, a decision is given as to the source from which the legacy is payable, the aggrieved party has no right of appeal to the Privy Council under section 110 (2), Civil Procedure Code, on the ground that the decision would affect, though not conclude, future claims by other legatees which may exceed that amount. [p. 503, col. 1.]

The second clause of the section refers to a decree

involving a larger claim, i.e., there must be something in the decree which affects the larger subject-matter. In effect, the smaller decree must have the effect of estopping either by the rule of *res judicata* or otherwise a party from claiming rights under a larger claim. [p. 503, col. 1.]

Sri Kishan Lal v. Kashmiri, 21 Ind. Cas. 617; 35 A. 445; 11 A. L. J. 654; *Afzul Hossain v. Musamat Umda Bibi*, 1 C. W. N. 93; *Moofte Mohammad Uddoollah v. Baboo Mootechund*, 5 W. R. 34 (P. C.); 1 M. I. A. 363; 1 Suth. P. C. J. 56; 1 Sar. P. C. J. 129; 18 E. R. 148; *Byjnath v. Graham*, 11 C. 740; 5 Ind. Dec. (N. S.) 1253; *Chinnam Rajamannar v. Tadikonda Ramachendra Rao*, 29 M. 155, referred to.

Petition, presented under sections 109 and 110 and Order XLV, rules 2 and 3, of the Code of Civil Procedure, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of the High Court in Appeal Suit No. 338 of 1913, preferred against that of the Court of the Subordinate Judge, Cocanada, in Original Suit No. 11 of 1910.

Mr. A. Krishnasami Aiyar, for the Petitioner.

Mr. T. Ramachandra Rao, for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council. It was admitted that the value of the subject-matter was below Rs. 10,000 in the suit and in the appeal to this Court. Mr. Krishnasami Aiyar made a faint suggestion that, as at the time of the presentation of the petition, the decree amount with subsequent interest thereon aggregated to Rs. 10,000, his client was entitled to appeal. This contention is clearly untenable.

The real question is whether the decree of this Court indirectly involves a claim or question respecting property over Rs. 10,000 in value.

The suit was instituted for a legacy under the Will of a testator. One of the questions related to the source from which the legacy was payable. It may be conceded that the reasons for our conclusion about the source would be applicable to other legacies payable under the Will, and that the amounts covered by all the legacies would exceed Rs. 10,000 in value. It is, therefore, probable that our decision in the

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present case may be quoted as an authority in the cases that may be, but which have not yet been, instituted by other legatees. It is not suggested that our decision would conclude the other claims. Is the probability of our decision being relied upon in similar cases arising under the same Will sufficient to bring it within the second clause of section 110? We think not. That clause refers to the decree involving a claim. There must be something in the decree which affects the larger subject-matter. For example, there may be a suit to recover interest upon a heavy claim based on a document. In refusing interest, the Court may hold that the document is not genuine or is not binding. In such cases, although the claim for interest might relate to a sum below Rs. 10,000 the decree indirectly would involve the rejection of a claim for the principal amount as well. In effect, the smaller decree must have the effect of estopping, either by the rule of *res judicata* or otherwise, the party from claiming rights under the larger claim. The decision in *Sri Kishan Lal v. Kashmiro* (1) is reconcilable with this proposition. As for *Afzul Hossain v. Musammat Umda Bibi* (2), it is enough to point out that the learned Judges granted leave under section 109 (c) and not under section 110 of the Code. It was held in *Muofti Mohummud Uddoollah v. Baboo Mootechund* (3) that where separate suits, each being for a sum less than Rs. 10,000 but involving the same contention were decreed, no leave should be granted against either or both of them, as neither of them directly or indirectly involved a claim for over Rs. 10,000. Applying that analogy, supposing different suits were brought by different legatees under the Will in question and separate judgments were passed in each of them, although there may be a point common to all the suits, the decree in none of them would be regarded as satisfying the conditions of section 110. It may be that where one common judgment is pronounced and no separate adjudication is necessary in the connected cases, the decision in the main

case may be construed as involving a claim indirectly for the aggregate amount covered by all the cases. There is authority for this proposition. *Byjnath v. Graham* (4). The present case does not come within the principle of that case.

It may also be pointed out that the pronouncement which is complained of in our judgment only followed an earlier one by Subramania Aiyar, J., in *Chinnam Rajamannar v. Tadikonla Ramachendra Rao* (5) and that that decision was never sought to be appealed against.

For these reasons we are unable to grant the certificate. The petition is rejected. No order as to costs.

Petition rejected.

V. R. P.

- (4) 11 C. 740; 5 Ind. Dec. (N. S.) 1253.
(5) 29 M. 155.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 12-B
OF 1916.

July 31, 1916.

Present:—Mr. Stanyon, A. J. C.

KEDARNATH AND ANOTHER—APPELLANTS
versus

ZUMBERLAL—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Sufficient cause for delay in presenting appeal—Negligence—Appeal.

An appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time. [p. 503, col. 1.]

Vithia v. Sakhya, 1 Ind. Cas. 904; 5 N. L. R. 25; and *Hukum Chand v. J. Bailey*, (1880) Digest of Civil Rulings of the Court of the J. C., C. P., Part IV, Ruling No. 9, referred to.

Appeal from the decree of the District Judge, West Berar, dated the 28th March 1916, confirming that of the Junior Sub-ordinate Judge, Akola, dated the 14th September 1915.

The Hon'ble Mr. M. V. Joshi, for the Appellants.

(1) 21 Ind. Cas. 617; 35 A. 445; 11 A. L. J. 654.

(2) 1 C. W. N. 93.

(3) 5 W. R. 34 (P. C.); 1 M. L. A. 363; 1 Suth. P. C. J. 56; 1 Sar. P. C. J. 129; 18 E. R. 148.

KEDARNATH V. ZUMBERLAL.

JUDGMENT.—This is an appeal from the appellate decree of the District Judge of West Berar. It has been filed one day beyond time, and I am asked to extend time under section 5, Indian Limitation Act, 1908, as applied to Berar. I am of opinion that no sufficient cause has been made out for not preferring the appeal within the period of limitation prescribed therefor.

The decree appealed from was made on the 28th March 1916. Copies of the judgment and decree were not applied for till the 2nd May 1916, and they were delivered on the 9th June 1916. The last day of the prescribed period expired on the 26th July 1916. The appeal was presented on the 27th July 1916. The explanation of the delay is given in an affidavit made by the second appellant Motilal. He affirms that owing to the river Purna being in flood he was delayed in his journey from his village to Akola, which place he reached on the 26th July—too late, according to the learned Advocate for the appellants, to catch the mail train to Nagpur that day. Consequently he arrived at Nagpur on the 27th July—a day late. I accept this statement as perfectly true for the purposes of this order, and I say that, by itself, far from showing any sufficient cause for the failure to file the appeal within time, it exhibits nothing but negligence of a kind which the Courts ought not to condone and encourage.

I have examined the district map, and questioned the appellant Motilal, and I find that his village (spelt Pathuldee in the map) is 12 or 13 miles from Wagholee, where the Purna river is crossed, and that Akola is another 12 miles from Wagholee. Thus this appellant had 25 miles to travel across country, in the middle of the monsoon, before he reached the railway. He also knew that the only train by which he could reach Nagpur on the 26th July, in time to get the appeal filed, was timed to leave Akola at 1.40 A. M. on that date. He admits before me that he left his home on the 25th July. He must be assumed to know that a flooded and temporarily impassable river is a common incident during the monsoon. It will thus be seen

that he deferred his journey, and the filing of the appeal, to the last available moment, and that, owing to an obstruction which he ought to have foreseen, he missed the last train which he hoped to catch. But this is not all. The endorsement on the court-fee stamp of the memorandum of appeal shows that it was purchased by the Hon'ble Mr. M. V. Joshi in Nagpur on the 27th July 1916. Thus, apparently, not merely the presentation of the appeal, but the retaining of a legal adviser to draw it up, and the purchase of a stamp on which to engross it, were all left to be done on the last day of the prescribed period.

In following the above course, the appellants in this case acted in accordance with an almost universal habit, among litigants in the Central Provinces and Berar, of filing plaints, memoranda of appeals, and all applications subject to a time limit, on the last day, and almost the last hour, of the period prescribed by law. In the case of appeals this custom entails much additional labour on the ministerial staff of the Courts, in making careful and exact computations of time, with reference to the time requisite for obtaining copies, which would be avoided if appeals were filed obviously within time. Controversial questions as to the correctness of the computation are frequently raised when cases are filed on the boundary line between "within time" and "beyond time." Frequently, as in this case, some contingency defeats the effort of the litigant by a few days or hours, and then the Appellate Court has the trouble of considering whether relief can be given under section 5, Limitation Act: and, in many cases, a very lenient view seems to have been taken of such failures, and an easy interpretation of the words "sufficient cause" may have encouraged the habit of leaving things to the last moment.

This habit has its origin in laxity and negligence, and, in my opinion, having regard to the increasing pressure of business in the law Courts and the many facilities now available for the punctual filing of suits, appeals and applications therein, it is high time that litigants and their legal advisers were made to realize the dangers of the procrastination which defers the

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presentation of a suit, appeal or application to the last day of the limitation prescribed therefor. In the case of an appeal efforts should be made to file it as soon as possible, and not as late as possible, after the date of the decree to be appealed from. A legal adviser should be given time to study the record and consider his case thoroughly before he draws up a memorandum. The present practice, of receiving cases on the last available day, and putting in an ill-considered memorandum based on a perusal of the judgment, is anything but satisfactory. It wastes the time of the Courts and the money of the appellants. If the Bar were to make an universal practice of refusing to receive appellate briefs, unless time were given by clients to send for and see records, and otherwise consider those briefs, litigants would speedily realize the unwisdom of procrastination. But this is not to be expected under existing circumstances; and I think it is necessary that the Courts should apply the law so as not to encourage eleventh hour procedure of the kind followed in this case. I concur with the judgment of Drake-Brockman, J. C., in *Vithia v. Sakhya* (1). The law is clear, and section 5, Indian Limitation Act, 1908, was not provided to encourage negligence, procrastination and laxity. I enunciate nothing new. As far back as in 1880, in *Hukum Chand v. J. Bailey* (2), this Court laid down that inability to get stamps, on the last day allowed by law for instituting a suit, is not one of the conditions under which the time allowed by the Limitation Law can be extended. I follow the same principle when I rule that an appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time.

For the above reasons I reject the above appeal as time-barred.

Appeal rejected.

(1) 1 Ind. Cas. 904; 5 N. L. R. 25.

(2) (1880) Digest of Civil Rulings of the Court of the J. C., G. P., Part IV, Ruling No. 9.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 70 AND 71
OF 1915.

August 25, 1916.

Present:—Mr. Abdur Rahim.

Officiating Chief Justice, and Mr. Justice
Seshagiri Aiyar.

IN O. S. A. No. 70

ROKHIA BI—CLAIMANT—APPELLANT

IN O. S. A. No. 71

SARAM BI—CLAIMANT—APPELLANT

versus

THE OFFICIAL ASSIGNEE, MADRAS—
RESPONDENT IN BOTH.

Principal and agent—Power-of-attorney in general terms—Agency, whether terminates on collection of debts—Insolvency of agent—Release, execution of, in discharge of amounts owing to principal on eve of insolvency—Release found void—Presidency Towns Insolvency Act (III of 1909), s. 56—Claim by principal for amounts withheld by agent—Limitation Act (IX of 1903), Sch. I, Arts. 97, 89.

Where a power-of-attorney executed in favour of a person empowers him to manage all the affairs of the principal generally, the agency does not terminate on the collection of debts and outstandings due to the principal. [p. 506, col. 2.]

S. and R., two Muhammadan ladies, executed a general power-of-attorney in favour of E. on 14th November 1905, constituting him as their agent and authorising him to manage all their affairs and properties to the best advantage. E. collected money under the power on 12th October 1907. On 24th October 1910 he executed a release in favour of his principals of his rights in certain properties in satisfaction of the moneys collected and appropriated by him, avowing his inability to pay. On 27th October 1910 he was adjudicated insolvent. The release having been declared void under section 56 of Act III of 1909, S. and R. put in their claims before the Official Assignee, which the Insolvency Judge disallowed as barred, more than three years having elapsed from the date of collection by E., when, His Lordship held, the agency terminated:

Held, (1) that as the power-of-attorney was general in its terms, the agency did not terminate on the collection of debts by E., but on the execution of the release deed; [p. 506, col. 2.]

(2) that the claim was governed by Article 97 of the Limitation Act and was within three years from the date when the release was declared to have no effect in law, when the consideration for it should be taken to have failed. [p. 506, col. 2.]

A statement by an agent that he finds it inconvenient or is unable to pay the debt due to his principal is not a 'refusal to pay' within the meaning of Article 89 of the Limitation Act. [p. 506, col. 2.]

Appeal from the judgment of Mr. Justice Bakewell in the exercise of the Insolvency Jurisdiction of the High Court, in Petition No. 205 of 1910, in the matter of P. M.,

ROKHIA BI v. OFFICIAL ASSIGNEE, MADRAS.

Enayatulla Saib & Co., Insolvents.

Messrs. *Rencontre & Tirumalai Pillai*, for the Appellant.

Messrs. *Short Beves & Co.*, for the Respondent.

JUDGMENT.—Two ladies Saram Bi and Rokhia Bi wanted to prove their claim in the insolvency proceedings of one Enayatulla, the son of Saram Bi and brother of Rokhia Bi. It appears that the father of Rokhia Bi and Enayatulla had money owing by a certain firm and two ladies, the claimants, executed a power-of-attorney on the 14th November 1905 in favour of Enayatulla to manage "all their affairs and all their properties to their best advantage and for the purpose of recovering moneys due to them." Enayatulla received moneys from time to time on behalf of these ladies from the firm which was indebted to his father, and the last instalment received on account of interest was on the 12th October 1907. Then on 5th November 1908 while the ladies were going to Mecca on pilgrimage, they executed a second power-of-attorney in favour of Enayatulla. There also they authorized Enayatulla to manage "all their affairs and all their properties to the best advantage, to sell or mortgage moveable and immoveable properties and to sign any deed or necessary papers on their behalf." Enayatulla was adjudicated insolvent on 27th October 1910 but on 24th October 1910, *i.e.*, three days before the adjudication, he executed in favour of his mother and sister a release of his rights in certain immoveable properties in satisfaction of the money which he had collected on their behalf and which he had not paid to them.

Under section 56 of the Presidency Towns Insolvency Act that release was void as against the Official Assignee. The two ladies put in their claims before the Official Assignee and the learned Judge has disallowed the claims as barred. He is of opinion that the agency of Enayatulla terminated when he collected the money due to the ladies. Both the powers-of-attorney, however, are in general terms, giving general power to Enayatulla to manage all the affairs of these ladies and it is difficult to see why the first power-of-attorney, Exhibit A, should be construed

to be limited to the collection of debts. That being so, it is quite clear that the agency of Enayatulla did not terminate when the debts due to the claimants were collected.

It is argued by Mr. Barton on behalf of the Official Assignee that unless the first power-of-attorney was limited to the collection of debts, there is no good reason why the second power-of-attorney should have been executed. But whatever might have been the motive in executing the second power-of-attorney, the first power-of-attorney constituted Enayatulla attorney to manage all the affairs generally of the ladies. It is also argued by Mr. Barton that Enayatulla refused to pay the money which he had collected to his mother and sister. But his evidence only shows that he did not pay. It is because he had not paid the money that he executed the release in 1910. If a debtor says that he does not find it convenient or is unable to pay his debts, that does not amount to 'refusal to pay'. The agency of Enayatulla, so far as the property in the suit is concerned, terminated when he executed the release. But the release was found to have no effect in law by an order dated 29th September 1912 and on that date the consideration for the release must be taken to have failed. In a case like this the Article applicable is Article 97 of the Limitation Act, which says, "For money paid upon an existing consideration which afterwards fails", the period of limitation being three years from the date of the failure. That this is the proper Article applicable to cases of this nature is borne out by the decision of the Judicial Committee in *Bassu Kuar v. Dhum Singh* (1). Applying that Article, the claim of the claimants is within time. The judgment of the learned Judge will be set aside and the matter must be decided upon the merits. Costs will follow the result.

Appeal allowed; Case sent back.

V.R.P.

(1) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 478.

GAYA LOAN OFFICE, LTD. v. AWADH BEHARI LAL.

* PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1356 OF 1915.

June 14, 1916.

Present:—Mr. Justice Atkinson and

Mr. Justice Jwala Prasad.

GAYA LOAN OFFICE, LTD.—PLAINTIFF

—APPELLANT

versus

AWADH BEHARI LAL—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 149—Plaint insufficiently stamped—Court-fee, deficiency in, made up after expiry of period of limitation—Suit, date of institution of—Limitation.

The plaint in a suit was filed within limitation but was insufficiently stamped. The deficiency in the Court-fee was made up after the expiry of the period of limitation, but was accepted by the Court:

Held, that the suit must, under section 149 of the Civil Procedure Code, be taken to have been instituted on the date on which the plaint was originally filed. [p. 508, col. 2; p. 509, col. 2.]

Hari Ram v. Akbar Husain, 29 A. 749; 2 M. L. T. 375; 4 A. L. J. 636, A. W. N. (1907) 253, referred to.

Second appeal from a decision of the Subordinate Judge, Gaya, dated the 10th April 1914, reversing that of the Officiating Munsif, Gaya, dated the 1st December 1914.

Mr. Ganesh Dutt Singh, for the Appellant.

Mr. Kulwant Sahay, for the Respondent.

JUDGMENT.

ATKINSON, J.—This action was brought on foot of a note of hand, dated the 27th of June 1911. The principal sum secured by the note of hand was the sum of Rs. 468. The defendant made no payment, either by way of principal or interest, at any time on foot of this note up to the 27th of June 1914. The plaintiff, on the 27th of June 1914, instituted the present suit to recover Rs. 636 by way of principal and interest. The Court-fee payable on the amount claimed would be Rs. 48. As a matter of fact the Court-fee was only paid to the extent of Rs. 10. The matter was immediately detected by the officer of the Court on the same day that the plaint was filed, and the learned Munsif, on the information as to the deficiency of the Court-fee being conveyed to him by the officer of the Court, directed the Pleader who filed the plaint to be informed of the fact. On the 6th of July the Pleader on behalf of the plaintiff lodged the amount of the deficiency,

Rs. 38, whereupon the learned Munsif, being informed of this, directed that the matter should be put up in the presence of the Pleader for the necessary orders; and accordingly on the 18th of July the matter was put up and the Munsif made the following order: "Heard the Pleader for the plaintiff; register the plaint. The legal question of limitation will be gone into at the time of trial." On the same day he made the following order: "Register the plaint and issue summons to the defendant, fixing the 12th of August 1914 for final disposal."

Now, it is contended that the 27th day of June 1914 was the last available day within which the plaintiff could bring this action so as to be entitled to maintain the suit, otherwise it would be barred by limitation of time. It is contended that because the plaint that was filed on the 27th of June was insufficiently stamped with the proper Court fee, that, therefore, the suit cannot be said to have been instituted on the 27th of June, but at some later date, and that thus the plaintiff's cause of action is barred by limitation of time. The learned Munsif, before whom this case came in the first instance, decreed the suit in favour of the plaintiff for the full amount of his claim. The learned Subordinate Judge on appeal has reversed the finding of the Munsif, and has held that in point of law the plaintiff's claim is barred by limitation of time, inasmuch as it cannot be considered that the suit was instituted on the 27th of June 1914. The view of the learned Judge is based mainly on the interpretation which he gave to the first order made upon the 13th of July. Prior to 1908 there was a conflict of authority as to what the result was when a plaint was filed and insufficiently stamped, or where a plaint was filed after time allowed. Various Courts took different views, and the intention of the Legislature was, by section 149 of the Code of Civil Procedure, to set at rest the doubts created by the conflicting decisions prevailing in Allahabad and in Calcutta; and as I take it, section 149 was intended to favour the construction put by the Courts in Allahabad upon the interpretation of the

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old section, which was section 582 of the former Code. Now, section 149 has clearly expressed in terms: "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees, has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance." That section gives wide discretionary powers to the Court, and expressly provides that at any stage the Court may allow the whole or part of the fees payable to be paid, and upon payment the document shall have the same force and effect as if the fee had been paid in the first instance. In the case of *Hari Ram v. Akbar Hussain* (1), at page 760 of the report, I think the learned Mr. Justice Knox enunciated the true principle by which the Courts should be guided. No doubt, the case was a decision before the last Code of Civil Procedure Act, and at page 760 he says:—"When the plaint, whatever its defects, is presented to the proper officer, the suit is then and there instituted, and once it has been instituted within the time prescribed, the suit escapes from the bar of limitation, unless such bar be one in existence prior to institution." This point, though not quite the same, came before the learned Chief Justice of this Court and Mr. Justice Sharfuddin in Appeal No. 2210 of 1914. In that case the learned Munsif allowed ten days to the plaintiff to file the amount of the deficiency of the Court fee. The plaintiff failed to pay the Court-fee within the time allowed, but paid it nearly ten days later. The learned District Judge, on appeal, held that as the payment of the Court-fee was not made within the time allowed by the Munsif, it could not be made after, and that the suit was consequently barred. The learned Chief Justice and Mr. Justice Sharfuddin reversed that decision, and held that once the

Court-fee was paid after the time allowed by the order of the Munsif and was accepted, the entire proceeding was in order, and the plaint must be treated as if the full fee had been paid in the first instance; and accordingly they held that no question of limitation arose in the case whatsoever, and the case proceeded.

Now, much argument has been addressed to us as to the terms of the order of the 18th of July. In fact, the learned Vakil for the defendant has based his entire argument in support of the lower Appellate Court's decision on the wording and phraseology of that order. He says that it is but a conditional granting of leave to file the plaint. I think that argument is unsound. The Court of the Munsif had been fully informed between the 27th of June and the 6th of July, when the deficiency was paid, of each step that had been taken, and when the necessity arose of making any compulsory order upon the plaintiff or his Vakil to make good the deficiency of the Court-fee, the learned Munsif became aware and was informed by the officer of the Court that on the 6th of July the money had been paid, and the Munsif directed the matter to be put up for the necessary order, and on the 18th he says in express terms:—"Register the plaint." I dare say some suggestion was made by the learned Vakil for the opposite side that some question of limitation would arise, and the learned Munsif, to safeguard the rights of the defendant, introduced this tag into his order, in case the effect of his decision might be to bar the defendant in pleading limitation of time as a defence to this action. The order to register the plaint was, in my view, a mandatory direction by the Court, and an unequivocal act recognising the validity of the payment, and thereupon the plaint became, under section 149, of full force and effect as from date the 27th of June. I am fortified in that interpretation of the first order of the 18th July by the express phraseology of the second order of the same day "Register the plaint and issue summons to the defendant." This second order has no limitation or reservation,

(1) 29 A. 749; 2 M. L. T. 375; 4 A. L. J. 636; A. W. N. (1907) 253.

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I think it is clear that the learned Munsif exercised his discretion within the meaning of section 149 and that he exercised his discretion in recognising the validity of the payment that was made. That being so, the plaint in this case must be deemed in point of law to have been filed on the 27th of June 1914 and, therefore, the cause of action was within time.

For these reasons, I am of opinion that the learned Subordinate Judge was wrong in the conclusion at which he arrived in point of law, and accordingly we allow this appeal, and we restore the order of the Munsif, with costs in the lower Appellate Court and costs of this appeal.

JWALA PRASAD, J.—The question as to whether or not this appeal is barred by limitation must, in my opinion, be answered in the negative. The suit was instituted on the 27th of June 1914, within the time prescribed for instituting a suit under the law of limitation. The plaint, however, was insufficiently stamped. Under Order VII, rule 11, of the Code of Civil Procedure, clause (3), the plaint might have been rejected by reason of the failure of the plaintiff to pay the requisite stamp-fee within the time allowed by the Court, if any such time had in fact been fixed. The omission to pay the full Court-fee was detected on the very day that the plaint was filed. The Court did not fix any time within which the deficiency was to be paid. The Court directed information of the deficiency in the stamping of the plaint to be given to the Pleader of the plaintiff, and upon being informed of the deficiency, the learned Vakil for the plaintiff paid the proper and necessary fee on the 6th July 1914. On the 18th of July 1914, the Court ordered the plaint to be registered and summonses to be issued and served upon the defendants. The order made by the Munsif in the case on the 18th July to register the plaint and to issue summonses to the defendants was required by Order V, rule 1, of the Code of Civil Procedure, when the plaintiff had complied with all the necessities of Order IV read with Order VII referable to the institution of suits. By the order of the 18th of July 1914, the

Court clearly, in my opinion, had accepted the plaint as being properly stamped and directed the same to be registered. The Court not having fixed any time for the payment of the deficient Court-fee, and not rejecting the plaint on the date when the deficient Court-fee was paid, or subsequently, naturally led the plaintiff and his advisers to believe that the plaint was properly filed and that the suit was properly instituted. There was no laches on the part of the plaintiff. If there was any error, it was an error of the Court in not passing on the first day the necessary order required by Order VII, rule 11. Under these circumstances the plaintiff ought not to suffer. There is no doubt that section 149 of the present Code has settled antecedently conflicting views as to the law on the interpretation of section 582A of the old Code, but now under the existing Code if a deficient Court-fee be paid within the time permitted by the Court, it will have retrospective effect and validate the plaint as from the date when the suit was instituted. It has been held recently by this Court that payment of a deficient Court-fee, even after the time fixed by the Court, has the same effect. Therefore, in the present case if a limit was fixed by the Court for the payment of the deficiency in the Court-fee and the fee was paid within the time allowed, and even beyond the time if the payment was accepted by the Court, the plaintiff's suit would not have been barred. The suit surely cannot be dismissed when there was no time fixed by the Court and the plaintiff paid the deficit Court-fee within a reasonable time after notice of the deficiency and the Court accepted the payment.

I agree with the views expressed by my learned brother, and in the order that the appeal should be decreed, the judgment of the learned Subordinate Judge reversed and the order of the Munsif restored with costs in the lower Appellate Court and this Court.

Appeal decreed.

GOPIKISAN, v. PADAMRAJ.

NAGPUR JUDICIAL COMMISSIONER'S
COURT.

CIVIL REVISION PETITION No. 202 OF 1915.

August 3, 1916.

Present:—Mr. Mitra, Offg. A. J. C.

GOPIKISAN AND OTHERS—APPLICANTS

versus

PADAMRAJ AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1909), s. 10—Stay of suit—Jurisdiction—Principal and agent—Accounts, agent, whether can demand.

One of the essential conditions which have to be fulfilled before an order staying a suit under section 10 of the Civil Procedure Code can be passed, is that both the Courts before whom the suits are pending must be of "concurrent jurisdiction", in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted. [p. 510, col. 2.]

Balkishan v. Kishan Lal, 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523, followed.

Meckjee Khetsee v. Kasoijee Devachund, 4 C. L. R. 282, distinguished.

Obiter dictum.—An agent cannot bring a suit for accounts against his principal, but only for the balance due upon an account. The agent alone is liable to render accounts, the principal is not. [p. 510, col. 2.]

Civil revision against the order of the District Judge, Nimar, dated the 7th August 1915.

Sir Bipin Krishna Bose and Mr. V. Bose, for the Applicants.

Dr. H. S. Gaur, for the Non-Applicants.

JUDGMENT.—This is an application under section 115 of the Civil Procedure Code for revision of an order passed by the District Judge, Nimar, staying the trial of a suit under section 10 of the Code. The applicants have brought the suit in Nimar on the allegation that they were commission agents of the non-applicants, that accounts have been settled between the parties, and that the non-applicants acknowledged a debt of Rs. 22,244-9-0. The non-applicants, at whose instance the suit has been stayed, had previously instituted a suit in the Court of the Munsif at Amraoti asking for an account against the applicants as their agents and valuing the relief for purposes of jurisdiction and Court-fees at Rs. 130. It is admitted that the parties in both suits are the same and that the matters in issue in the later case are substantially the same as in the suit previously instituted. But the jurisdiction of the Munsif is limited to the trial of a suit or original proceeding of a value not exceeding Rs. 1,000. The non-applicants rely on

Oipherts v. Arjundass (1) and argue that the Munsif can, in a suit for accounts, pass a decree for a sum in excess of his pecuniary jurisdiction. But that case does not decide that a Munsif can entertain a suit for account which is valued by the plaintiff at a figure above the limits of his pecuniary jurisdiction. Moreover, the suit filed by the applicants in the Nimar Court is not one for accounts. In fact, if I understand their position correctly, they are the agents, and an agent cannot bring a suit for accounts against his principal but only for the balance due upon an account. The agent alone is liable to render accounts and the principal is not. The present suit is on an acknowledgment of debt coupled with a promise to pay. The Munsif could not entertain this suit nor could a set-off be claimed in his Court for the amount claimed in this suit (*vide* Order VIII, rule 6). The Munsif, therefore, had no jurisdiction to grant the relief claimed in this suit. One of the essential conditions which have to be fulfilled before an order under section 10 can be passed is, therefore, wanting. The order of the District Judge is passed, therefore, without jurisdiction.

The object of the corresponding section in the Code of 1882 has been discussed in *Balkishan v. Kishan Lal* (2). At page 155, Mahmood, J., says: "The object of the rule contained in section 12 of the Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts in respect of 'the same relief.'" In the present Code the words "for the same relief" have been omitted and so far the scope of the section is wider than before. But the Courts must be of "concurrent jurisdiction", in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted.

(1) 20 Ind. Cas. 928; 9 N. L. R. 112.

(2) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523.

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This is clear from the words "having jurisdiction to grant the relief claimed." The rule is, no doubt, based on grounds of convenience, as pointed by Pontifex, J., in *Meckjee Khetsee v. Kasowjee Devachund* (3). But the section, which leaves no discretion, cannot be invoked on mere grounds of convenience, if the necessary conditions are not fulfilled. I take it that the section contemplates that the findings in the first suit would be binding in the later suit, and that there would be no need for a fresh trial of the issues already determined.

The case of *Meckjee Khetsee v. Kasowjee Devachund* (3), which is relied on by the lower Court as well as by the non-applicants here, is easily distinguishable. In that case the Calicut Court had jurisdiction to entertain a cross-claim of the value of the relief claimed in the High Court, for the order of Pontifex, J., is passed "without prejudice to the plaintiff's right to file a cross-suit in the Calicut Court."

As the District Judge had no jurisdiction to pass the order complained of, it is hereby set aside. The non-applicants will pay the costs of the applicants in this Court. I fix Rs. 100 as Pleadar's fee.

Order set aside.

(3) 4 C. L. R. 282.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 108 OF 1915.

July 25, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

NAUNIHAL SINGH—DEFENDANT—

APPELLANT.

versus

RAM RATAN—PLAINTIFF—

RESPONDENT.

Pre-emption—Custom—Co-sharer, refusal of, to purchase, effect of—Waiver.

Where the custom is that a co-sharer wishing to sell his property should first offer it to the other co-sharers, such co-sharer, if he informs the other co-sharers of his intention to sell and they decline to purchase on the ground that they have not the means or any other similar ground the vendor, is at liberty, without violating the custom, to sell to an outsider. If, however, a co-sharer intimates that he is ready to buy the property at a price, in such a case it is the duty of the vendor to mention a price, and not to sell to any one else at a lesser price. [p. 512, col. 2.]

Where a Court of Wards, intending to sell the property of a ward, widely published its intention, and the plaintiff did not come forward to exercise his right of pre-emption till more than a year after the completion of the sale:

Held, that the plaintiff must be taken to have waived his right of pre-emption. [p. 512, col. 2.]

First appeal from a decree of the Third Additional Subordinate Judge, Aligarh.

Messrs. Gokul Prasad and Girdharilal Agarwala, for the Appellant.

Messrs. Gulzari Lal and Lakshmi Narain, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. It is desirable to refer shortly to the circumstances, which are somewhat peculiar. The property belonged to a gentleman named Matwatang Dhaoj Prasad Singh. He was possessed of a considerable estate which was heavily indebted, and the estate was taken over by the Court of Wards. The sale was a sale by the Court of Wards. There is abundant evidence to show that for no less than two years prior to the sale, efforts were being made to sell a substantial portion of the estate including the property now in question, in order to liquidate the debts of the ward. There is evidence, which we have no hesitation in believing, that the intention to sell was published in the fullest manner possible. We know ourselves that it is the practice of the Court of Wards to publish the intention of making such sales. It is their duty to do so. Their object is to gain as high a price as they possibly can for the property of the ward. The obvious way of attaining this object is to have as many bidders as possible. Without for the moment referring in detail to the evidence, we have not the least hesitation in holding that all the co-sharers, including the plaintiff in the present suit, knew perfectly well that the property was in the market, and that he knew that all he had to do, if he wanted to purchase the property, was to make an application for that purpose to the Court of Wards. We will now consider for a moment the conduct of the plaintiff after the sale. The sale-deed was executed on the 7th of April 1913. It was registered on the 21st of April of the same year. The present suit was not instituted until the 16th of April 1914, that is to say, more than a year after the sale and almost a year after the registration. In fact if the suit had been five days later

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it would have been barred by limitation. One would have expected, if the plaintiff had really wished to purchase this property and had been in a position to do so, he would, immediately after the sale, have complained to the Collector or the manager of the estate that he had a right to purchase the property, and that the sale had been carried out without his knowledge. He did nothing of the kind. A number of witnesses have been produced, who prove that Ram Ratan amongst other persons was asked to purchase this very property and that he declined to do so. The learned Subordinate Judge has not believed these witnesses. We cannot agree with him. These witnesses for the most part were quite disinterested. They did not gain the property or any benefit by the purchaser being allowed to retain his purchase. A witness of the name of Avadh Bihari Lal was produced on behalf of the plaintiff. His evidence is somewhat shifty. He tried in a half-hearted way to state that no instructions were given to a man called Babu Ram Saran, a *sarbarahkar* of the Court of Wards, to go round the village and enquire for would-be purchasers, but in cross-examination he had to admit that the Court of Wards had intended to sell the property from the year 1910, and that letters were sent to all the Tahsildars to procure purchasers. He also had to admit that the Tahsildars issued notices to all the big *zemindars* and the notices were on the record of the Court of Wards. He had further to admit that the Tahsildars had reported the names of persons who were ready to purchase some of the property, but that the name of the plaintiff Ram Ratan was not amongst them. He also had to admit that persons made applications direct to the Court of Wards stating their desire to purchase portions of the property, and that no application was received from Ram Ratan. This is the plaintiff's own witness. The witnesses for the defence deposed to the fact of the publication of the intention to sell, and that the intended sale was proclaimed by beat of drum in different villages. Bearing in mind the practice of the Court of Wards and the fact that the defendant's witnesses are, as we have already said, disinterested, we certainly consider that there is no valid reason

why their evidence should not be believed both as to the publication of the intention to sell and also as to the fact that Ram Ratan was approached and declined to purchase.

It is argued that even if Ram Ratan knew that the property was for sale and even if he had declined to purchase the property, nevertheless it should have been offered to him as soon as the bargain was concluded with the vendee, and that inasmuch as it is not alleged that this was done, he is still entitled to maintain the present suit. We think that this is a most inequitable and unsound contention. The custom alleged in the present case is that where a co-sharer wished to sell his property he should first offer it to the other co-sharers. In our opinion if a co-sharer, in a village in which such a custom exists, wishes to sell his property and goes to the other co-sharers and informs them of his desire to sell and they decline to purchase on the ground that they have not the means or any other similar ground, the vendor is at liberty, without violating the custom, to sell to an outsider. No doubt the position might be different if, when informed of the intention to sell, the co-sharer intimates that he is ready to buy at a price. In such case it might be the duty of the vendor to mention a price to his co-sharer and not to sell the property to any one else at a lesser price. In the present case we hold that Ram Ratan having declined to purchase the property, the Court of Wards was absolved from any obligation to afterwards offer the property to him and it could be sold without any violation of the custom. We may mention in this connection that the property was practically sold for the price mentioned to Ram Ratan by the *sarbarahkar*. The price he mentioned was Rs. 6,000; the actual price paid was Rs. 5,980-12-0.

We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

HAMIDUL-HAQ V. ATAET HOSSAIN.

PATNA HIGH COURT.

CRIMINAL REVISION No. 384 OF 1916.

January 4, 1917.

Present:—Mr. Justice Atkinson.

HAMIDUL HAQ AND OTHERS—SECOND
PARTY—PETITIONERS

versus

Sheikh ATAET HOSSAIN AND OTHERS—
FIRST PARTY—OPPOSITE PARTY.*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Arbitration, reference to—Magistrate, delegation of duties by—Jurisdiction, excess of, effect of.*

Section 145 of the Criminal Procedure Code does not give the Magistrate charged with holding the enquiry under that section the right or power to delegate the duties which have been vested in him to any other person. The procedure laid down by the section does not contemplate that the question as to who was in actual possession should be delegated, even by consent of parties, to arbitrators. [p 514, cols. 1 & 2.]

Banwari Lal Mukerjee v. Hriday Chakravarti, 32 C. 552; 1 C. L. J. 432; 2 Cr. L. J. 347, relied on.

Taramoni Chaudhuran v. Gyanendra Mohan Chaudhuran, 7 C. W. N. 461, disapproved.

Where there has been excess of jurisdiction, the whole proceeding and the result following from that excess of jurisdiction is a nullity. [p. 515, col. 1.]

Criminal revision from an order of the Deputy Magistrate, Bhagalpur, dated the 21st November 1916.

Mr. *Lalit Mohan Ghose*, for the Petitioners.

Mr. *Nares Chundra Sinha*, for the Opposite Party.

JUDGMENT.—The Deputy Magistrate of Bhagalpur on the 5th September drew up a proceeding under section 145 of the Code of Criminal Procedure, between petitioner No. 1. and three other persons named as the second party and several persons who were nominated as the first and opposite party, relative to a dispute concerning 5 cottas of land in the town of Bhagalpur. After the proceeding was drawn up it appeared desirable to add further parties and accordingly a fresh proceeding was drawn up under section 145 of the Code of Criminal Procedure on the 24th of October 1916, with the result that there were 13 persons in all representing the parties of the second part and of whom the petitioners in this matter were five. This fresh proceeding, initiated on the 24th of October 1916, was fixed for hearing on the 13th November 1916. On that date a petition was filed by all parties to the proceeding signed by

their Pleaders only requesting that the dispute regarding their claim or right to possession of the land in dispute might be determined by three arbitrators, who were named. That petition, which is dated the 13th of November 1916, was signed by Mr. Chatterjee and Maulvi Wasi Ahmad on behalf of all the parties of the second part. The petitioners now allege that Mr. Chatterjee had no power to sign the petition on their behalf, as he was not their Pleader; and accordingly that they were not, and are not, bound by the reference to arbitration; and that, therefore, the arbitration, so far as they are concerned, is a nullity. The arbitrators sat and on the 19th of November 1916, drew up their award. The three arbitrators were, a retired District Judge, one of the Pleaders for the party of the second part, Maulvi Shahamat Hossain, and another Pleader; and their award provides that the first party was entitled to possession of the disputed land and that his possession was confirmed therein and the second party was prohibited from disturbing that possession until the 1st party was evicted therefrom in due course of law. On the 21st of November, a petition was filed before the Deputy Magistrate requiring him not to receive the award, as the petitioners believed that they were prejudiced by the conduct of one of the arbitrators, and that as they had not given authority to any person to sign the petition for submission of the dispute to arbitration they were not bound by the award. And they called upon the Deputy Magistrate to cancel the award made by the arbitrators and to adjudicate upon the case according to law upon the merits. The learned Deputy Magistrate declined to yield to this petition, and made an order on the 21st of November 1916 accepting the award, and ordered that the first party should remain in possession of the disputed land till evicted therefrom in due course of law.

Two questions are raised before me. One is that the Deputy Magistrate had no jurisdiction whatsoever, even with the consent of the parties, to make over the enquiry under section 145 to any person whatsoever, that the law imposes upon him the duty to make the enquiry contemplated by

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section 145 and that, consequently, he had no right to delegate that duty to any other person even with the assent of the parties before him. And *secondly* it is argued that even if there might have been a valid reference to arbitration, yet the petitioners are not bound by the award in this case, inasmuch as they never signed the petition for arbitration, nor authorised any one else to sign it on their behalf. Section 145 is a section designed to safeguard the interests of the public peace in reference to disputes concerning the possession of land, and the right of any person in or to possession of any particular land concerning which there is dispute and in connection with which there is likely to be a breach of the peace. The law casts upon the persons specified in section 145, sub-section 1, the duty of initiating proceedings under that section in the interests of public peace; and of calling upon the persons making rival claims to the property to appear before him and say by what right they claim possession to the property in dispute. And then sub-section 4 of section 145 directs the enquiry which the Magistrate is to make. Certainly when one reads sub-section 4 of section 145, it seems obvious and clear that the section contemplates only an enquiry by the person directed by the Statute to hold it and by that person and by no one else. No authority has been cited to me which seems to be directly in point. Section 145 read as a whole does not give the person charged with holding the enquiry under that section the right or power to delegate the duties which have been vested in him to any other person to hold an enquiry or to ascertain the facts which the law requires the Magistrate to do himself. In the case reported as *Banwari Lal Mukerjee v. Hariday Chakravarti* (1) and at page 555 of the report the learned Judges there say: "Apart from this, although it may not perhaps be a question of jurisdiction, we think that the Magistrate would have exercised a wiser discretion if, upon the application made by the second party to withdraw from the arbitration, he had cancelled the reference. The procedure laid down by the section apparently

does not contemplate that the question as to who was in actual possession should be delegated, even by consent of the parties, to arbitrators." In my opinion it is a question of jurisdiction whether a person has power to delegate his duties or not. If he has no power to delegate the duties which the law charges him with, then, in my opinion, the delegation of those duties is a violation of jurisdiction or an excess of jurisdiction; and by reason of that excess of jurisdiction the duty of this Court is to intervene and see that the proceedings are conducted with propriety and regularity. Therefore, having regard to the view I take on the *first* argument addressed to me, it becomes unnecessary for me to consider the other question. However, it may be desirable to refer on the first branch of the case to the case reported as *Taramoni Chaudhurani v. Gayanendra Mohan Chaudhurani* (2), where the learned Judges say that a Magistrate might delegate his duties to arbitrators to ascertain facts to assist him in coming to a conclusion, and that although he may not be bound by the finding of the arbitrators yet that the Magistrate should bear in mind the effect of the arbitrators' award when considering his own conclusions. Personally I cannot follow the logic or reason of that decision. It appears to me to be in direct contravention of section 145, sub-section 4, and I cannot find any warrant or authority for the suggestion that any Magistrate can delegate his duties as a Judge of fact or law to any body to discharge for him. Accordingly, in my opinion there has been an excess of jurisdiction in this case and the Magistrate has acted improperly in referring this matter or proceeding under section 145 of the Code of Criminal Procedure pending before him to arbitration. I mention this because the learned Deputy Magistrate in his judgment states that in law there is nothing for or against a reference of a case under section 145, Criminal Procedure Code, to arbitration by consent of parties. In my opinion he is entirely wrong in that view; and I have gone as carefully as I have done into this case so that I may correct the obvious error which the

(1) 32 C. 552; 1 C. L. J. 432; 2 Cr. L. J. 347.

(2) 7 C. W. N. 461.

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Magistrate is labouring under, and I hope that he will exercise a wiser discretion in future.

Mr. Sinha asks me to exercise my discretion and inquire into the merits of this case; because even if there may have been an excess of jurisdiction, he urges I should consider the merits of the case and not allow a mere technicality of this kind to override what really are the true merits of the case. Unfortunately I cannot yield to that argument. In my opinion where there has been an excess of jurisdiction, the whole proceeding and result following from that excess of jurisdiction is a nullity. Accordingly I will set aside the order of the 21st of November of the learned Deputy Magistrate and will remand the case for re-hearing within ten days from the date on which the record reaches the Deputy Magistrate's Court. In the meantime the property will remain attached until the final disposal of this case.

Order set aside; Case remanded.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 52 OF 1916.

April 14, 1916.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

KRISTO LALL MALLIK—ACCUSED—

PETITIONER

versus

CHAIRMAN OF HOOGHLY-CHINSURAH, MUNICIPALITY—OPPOSITE PARTY.

Bengal Municipal Act (III B.C. of 1884), ss. 44, 45, 230, 271, 353—Sanction for prosecution by public authority, whether to be under seal—Report of outdoor inspector recommending prosecution signed by Chairman, whether complaint—Notice against accused by Vice-Chairman, how validated.

In the absence of any legislative enactment a sanction for prosecution by a public authority does not require to be under seal. [p 516, col. 1.]

Where a report of offences under sections 230 and 271 of the Bengal Municipal Act was made by the outdoor inspector of a Municipality in a printed form, the columns of which were duly filled up and in the remarks column occurred the remark, "submitted to the District Magistrate with recommendation to prosecute the party under sections 230, 271 of the Bengal Municipal Act," and it bore a stamp of eight-annas and was signed by the Chairman of the Municipality:

Held, that the document was not a petition of complaint by the Chairman but was an order or

consent by the Chairman as representing the Commissioners for or to the prosecution as required under section 353 of the Bengal Municipal Act and was sufficient under the law for the purpose of the prosecution. [p 516, col. 1.]

Held, also, that the notice against the accused issued on the authority of the Vice-Chairman without any delegation of authority by the Chairman by a written order, was not invalid as the consent of the Chairman was subsequently obtained to the act of the Vice-Chairman. [p. 516, col. 1.]

Criminal revision upon a reference by the District Judge, Hooghly.

Babu Atulya Charan Bose, for the Accused.

Babu Manmatha Nath Mukherjee, for the Opposite Party.

JUDGMENT.—This is a reference by the learned Sessions Judge of Hooghly in the matter of one Kristo Lall Mallik, who was prosecuted under section 271 of the Bengal Municipal Act for having disobeyed a requisition under section 230 and sentenced to pay a fine. The learned Sessions Judge recommends that the conviction and sentence be set aside on two grounds, which he admits are technical. The first is that the prosecution was undertaken without the consent of the Commissioners. He concedes that, under section 44, the Chairman could give such consent. It appears from Exhibit 3 in the case that the report of this offence was made by the outdoor inspector; that the columns of that form were duly filled up; and that in the remarks column occurred this remark: "submitted to the District Magistrate, Hooghly, with a recommendation to prosecute the party under sections 230, 271 of the Bengal Municipal Act." That is signed by Mohendra Chandra Mitter, Chairman, Hooghly-Chinsurah Municipality. The learned Judge thinks that, because this document bears an 8 anna stamp, it must be regarded as a petition of complaint and that the Chairman of the Municipality was merely in the position of the complainant. We do not so regard it. Section 353 says that no prosecution for an offence under this Act shall be instituted without the order or consent of the Commissioners. This is clearly an order or consent by the Chairman as representing the Commissioners. It does not appear that the Chairman ever went before the District Magistrate; the complainant who appeared before him was the outdoor inspector; and he gave evidence as such complainant, as appears from his deposition. We have been

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referred on this point to a decision of this Court in *Rasul Baksh v. Municipal Board of Chapra* (1), in which the Judges are reported to have remarked: "The only evidence of sanction of prosecution by a public authority is a writing under the seal and signature of that authority." We have not been told of any enactment which requires a sanction for prosecution to be under seal. The facts of that case were somewhat different from the facts of the present case; but, so far as the seal was held to be necessary, we are unable to agree with that in the absence of any legislative enactment to that effect. The expression there "sanction of prosecution" is not quite in the wording of section 353, which speaks of the "order or consent." Exhibit 2 amounting to such order or consent in writing by the Chairman is, we think, sufficient.

The second point is that the notice, Exhibit 1, against the accused was issued on the authority of the Vice-Chairman and that there is no evidence that the latter derived authority from the Chairman. The learned Judge has referred to sections 44 and 45; but he has not directly referred to the proviso to section 45. Here it may be assumed that there was no written order delegating to the Vice-Chairman all or any of the duties or powers of a Chairman as defined in the Act, which would cover the particular order made by the Vice Chairman in this case. The proviso, however, to section 45 says: "Provided that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman, shall be invalid for want of or defect of such written order, if it be done with the express or implied consent of the Chairman previously or subsequently obtained." That the act of the Vice-Chairman was done with the express consent of the Chairman subsequently obtained is clear in this case from the order to which we have referred in Exhibit 3. It is clear that the Chairman must have given consent to the act of the Vice-Chairman; or he could never have written that order which has been designated a sanction to prosecute. On this point we have been referred to the case of *Kherola*

Prosad Paul v. Chairman of the Howrah Municipality (2). But the facts there were very different from the facts in the present case. There was no evidence of any such consent on the part of the Chairman as appears here. All that there was in that case to justify the order was a verbal order given some months before by the Chairman to the Vice-Chairman to institute all prosecutions under section 353.

We think, therefore, on the clear reading of the Act that the two points which the learned Judge has put forward cannot be supported. His recommendation to revise the proceedings is rejected.

(2) 20 C. 44; 10 Ind. Dec. (N. S.) 303.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION NO. 392
OF 1916.

November 9, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

MAHOMED GHOUSE RAHMAN
SAHIB, TRADING IN THE NAME OF MESSRS.
T. A. RAHMAN AND SONS—ACCUSED —
PETITIONER

versus

NATHU VALLABHJI—COMPLAINANT—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 185, 526, 527—Scope of s. 185—Transfer, powers of, of High Court—Conflict of jurisdiction of different High Courts—Transfer from Court subordinate to another High Court—Opinion, expression of, competency of—Practice—Procedure.

Section 185 of the Criminal Procedure Code gives no powers of transfer to the High Court even inferentially. The power to transfer vested in the High Court under the Code is dealt with solely by section 526. [p. 517, cols. 1 & 2; p. 518, col. 2; p. 519, col. 1.]

A High Court has no jurisdiction, under section 185, to transfer a case pending in a Court outside its jurisdiction and subject to the superintendence of a different High Court, though it has the power to prevent a Court subordinate to itself from grasping at jurisdiction or trying a case which had better be tried by another Court, whether subordinate to that High Court or not. [p. 518, col. 1.]

Hiran Kumar Chowdhury v. Mangal Sen, 20 Ind. Cas. 222; 17 C. W. N. 761; 14 Cr. L. J. 393; *Emperor v. Chaichal Singh*, 2 Ind. Cas. 36; 5 L. B. R. 17; 9 Cr. L. J. 581, dissented from.

(1) 15 Ind. Cas. 796; 16 C. W. N. 934; 13 Cr. L. J. 524.

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Queen-Empress v. O'Brien, 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72; *Babu Lal v. Ghansham Das*, 5 A. L. J. 333; A. W. N. (1908) 115; 7 Cr. L. J. 394, distinguished.

Emperor v. Chaichal Singh, 2 Ind. Cas. 261; 5 L. B. R. 17; 9 Cr. L. J. 531; *Babu Lal v. Ghansham Das*, 5 A. L. J. 323; A. W. N. (1908) 115; 7 Cr. L. J. 394, referred to.

The only person who has any jurisdiction to pass orders binding on different High Courts is the Governor-General acting under section 527. [p. 517, col. 2; p. 519, col. 2.]

Section 185 cannot be availed of by any High Court even to express a pious opinion that a case pending outside its jurisdiction should be inquired into and tried by a Court subordinate to it. [p. 518, col. 2.]

Per *Sadasiva Aiyar, J.*—Section 185 was intended only to apply to and provide for the following two sets of circumstances: (1) Where two cases 'are pending' in two Courts within the jurisdiction respectively of two separate High Courts, on the same set of facts, the High Court within which the offender is found has the deciding voice 'whether the Court within its own jurisdiction' shall or shall not proceed against the accused. If it decides in the affirmative, the outside Court cannot proceed further, as the High Court has full powers to prevent a person who is within its jurisdiction from being taken out of that jurisdiction till the case in its subordinate Court is concluded; (2) Where only one case has been instituted in a Court subordinate to the High Court in whose jurisdiction the offender is, that High Court can decide whether the case should be enquired into and tried by its own subordinate Court or should be tried in a Court within the jurisdiction of some other High Court. [p. 519, cols. 1 & 2.]

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of Case No. 171 of 1906 from the file of the Court of the Chief Presidency Magistrate, Bombay, to that of the Chief Presidency Magistrate, Madras.

Mr. C. Rajagopala Aiyangar, for the Petitioner.

Mr. R. N. Aingar (with him Messrs. Grant and Greutorex), for the Complainant.

The Public Prosecutor, for the Crown.

ORDER.

SADASIVA AIYAR, J.—I agree with my learned brother that this petition should be dismissed. I am clear that section 185 of the Code of Criminal Procedure does not enable a High Court to make an order transferring a case pending on the file of a Criminal Court, whether within or outside its jurisdiction, to the file of another Criminal Court, whether such other Criminal Court be within its own jurisdiction or without its jurisdiction. Section

185, in my opinion, has absolutely nothing to do with transfer or with a High Court's power of transfer. The power to transfer vested in the High Court, so far as the Criminal Procedure Code is concerned, is dealt with and was intended by the Legislature to be dealt with solely by section 526 of the Code of Criminal Procedure. That section gives full powers to a High Court to transfer cases pending in a Court "subordinate thereto" to any other "such" Court (that is any other Court "subordinate" to it or even to itself). It seems to me [with the greatest respect to the decisions in *Hiran Kumar Chowdhury v. Mangil Sen* (1) and *Emperor v. Chaichal Singh* (2), which I am unable to follow] to be wholly contrary to usually accepted canons of construction to infer from the language of section 185 (which does not use the word "transfer" or any word even remotely suggesting the idea of "transfer") a power in the High Court to transfer cases, especially to transfer a case pending in a Court outside its jurisdiction. As my learned brother points out, what power has a High Court to enforce its order transferring a case instituted and pending outside its jurisdiction? As he has further pointed out, section 527 (1) of the Code of Criminal Procedure clearly implies that it is only the Governor-General-in-Council that has the power to transfer a case pending in a Court subordinate to one High Court to be tried by a Court subordinate to another High Court. On this short ground, this revision petition should be dismissed.

As, however, it was argued that we are at least entitled to "decide" under section 185 of the Code of Criminal Procedure "by which Court the offence shall be inquired into or tried" and that this provision means that we are entitled to express an opinion (even though it might be a mere pious unenforceable opinion) that the Presidency Magistrate's Court within our jurisdiction should inquire into this case, I shall proceed to express my opinion on the whole scope of that

(1) 20 Ind. Cas. 222; 17 C. W. N. 761; 14 Cr. L. J. 398.

(2) 2 Ind. Cas. 361; 5 L. B. R. 17; 9 Cr. L. J. 531.

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section (185) of the Code of Criminal Procedure).

Reliance was placed on behalf of the petitioner on the cases of *Queen Empress v. O'Brien* (3) and *Babu Lal v. Ghansham Das* (4). Those, however, were cases in which the High Court's opinion was expressed *against* the jurisdiction (and competency to try) of the Court, subordinate to that High Court, which subordinate Court had taken cognizance of a criminal case (and not against the jurisdiction of a Court *not* subordinate to itself). Of course, every High Court has power to prevent a Court subordinate to itself from grasping at jurisdiction or from trying a case which had better be tried by another Court, whether subordinate to that High Court or not subordinate to it. It has also power to decide, when an accused person is found within its jurisdiction and a criminal case is pending against him in a Court subordinate to its appellate criminal jurisdiction, which of two courses is more advisable, (1) that the offence should be inquired into and tried by that subordinate Court or (2) that the offence should be inquired into and tried by a Court subordinate to another High Court (which subordinate Court is empowered to take cognizance of it under one of the sections 177 to 184). In other words, I am quite clear that section 185 was intended only to apply to and provide for the following two sets of circumstances: (1) Where two cases *are pending* in two Courts within the jurisdiction respectively of two separate High Courts on the same set of facts, the High Court within which the offender is found has the deciding voice *whether the Court within its own jurisdiction shall or shall not proceed against the accused* (such decision being intended to be based on grounds of *convenience*, jurisdiction, fairness to both sides, etc.). If it decides in the affirmative, the outside Court cannot proceed further, as the High Court has full powers to prevent a person who is within its jurisdiction from being taken out of that jurisdiction till the case

in its subordinate Court is concluded. (2) Where only one case has been instituted in a Court subordinate to the High Court in whose jurisdiction the offender is, that High Court can decide whether the case should be inquired into and tried by its own subordinate Court or should be tried in a Court within the jurisdiction of some other High Court.

I am consequently of opinion that *where a case is pending in a Court subordinate to a particular High Court*, section 185 cannot be availed of by that High Court to give a decision that a Court subordinate to it should or should not inquire into or try an offence charged in a case pending in a Court not subordinate to it. I wish to add that as my opinion numbered (1) as above is not consistent with the observations in *Rajani Binod Chakravarti v. All India Banking and Insurance Co., Ltd.* (5) (which observations are to the effect that grounds of convenience cannot be considered in giving a decision under section 185 and that where there is no real doubt as to jurisdiction, section 185 does not apply), I respectfully dissent from that decision also.

NAPIER, J.—This is an application by a person carrying on business in Madras to transfer to the Chief Presidency Magistrate, Madras, Case No. 571 of 1916 on the file of the Chief Presidency Magistrate, Bombay, in which the petitioner is accused of offences under sections 482 and 483 of the Penal Code on the complaint of the counter petitioner, who carries on business in Bombay. The application purports to be made under section 185 of the Criminal Procedure Code, the ground alleged being that the Chief Presidency Magistrate has no jurisdiction to try the case. I express no opinion on the question whether the section applies to cases where there is a doubt as to the existence of jurisdiction in the Court that has taken cognizance, as well as to cases where there is admittedly double jurisdiction under sections 179 and 181, Criminal Procedure Code. Whether this be so or not, I am clearly of opinion that this Court has no jurisdiction to entertain the application. In terms, section 185, Criminal Procedure Code, gives no power

(3) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72.

(4) 5 A. L. J. 333; A. W. N. (1908) 115; 7 Cr. L. J. 394.

(5) 22 Ind. Cas. 192; 17 C. W. N. 1207; 15 Cr. L. J. 48; 41 C. 305.

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to transfer at all, but it is argued that the power to transfer must be inferred as being requisite to make the decision operative. This is not so; for dealing with Courts under our own jurisdiction we have specific power under the Code, and we cannot possibly *infer* a power to deprive Courts not under our superintendence of the jurisdiction. Reliance is placed on a case reported as *Hiran Kumar Chowdhury v. Mangal Sen* (1), where the High Court of Calcutta made an order transferring a case pending before a Court subordinate to the Chief Court of the Punjab to one of its own Courts. I am unable to follow this precedent. Admittedly, a High Court cannot enforce such an order and we have no doubt that, on the true reading of the section, there is no such power. It was pointed out in the course of argument that the conflict of jurisdiction or double jurisdiction under sections 181 to 184, Criminal Procedure Code, usually arises where offences have been committed in one jurisdiction and consequences follow in another, and not owing to the place where a person charged is. If section 185, Criminal Procedure Code, is to be given the wide meaning sought to be put on it, it would follow that the High Court within whose jurisdiction a person charged is, could make an order where the conflict or doubt as to jurisdiction arose between two local Courts in the jurisdiction of another High Court; that is to say, for instance, the Court of the Resident of Bangalore, in whose jurisdiction a person was living at the time a charge was laid against him in a Madras Court, could decide as to which of two Courts under the jurisdiction of the High Court of Madras a person should be tried on the application of section 181, clauses 2, 3 and 4 or section 182, Criminal Procedure Code. It is hardly necessary to say that this could not have been the intention of the Legislature. In our opinion, the Court has no power to transfer under this section. What it can do is to decide by which Court the offence shall be enquired into or tried, and where a charge has been laid against and the accused person is at the time within its own jurisdiction and a question arises whether it should not more properly be tried in a Court subject to the jurisdiction of another Court, the High Court in whose jurisdiction the person is, can decide that

its own Court should not inquire into the matter and stay proceedings. It would be then open to the complainant to lay his charge in the other Court and any objection to the jurisdiction of that Court would be heard by its own High Court. This action has been taken on several occasions. [Vide the cases reported as *Emperor v. Chaichal Singh* (2) and *Babu Lal v. Ghansham Das* (4)] It is true that in those cases the Court did make an order that the foreign Court should try the case; but I desire to say that, even if we had jurisdiction in this case on our reading of the section above set out, we should not think it proper to make any such order because we should be unable to enforce it. It is suggested that the Magistrate of a foreign Court might act on the order and take cognizance of a case. Even if he did, it would be open to the accused to apply to the High Court having jurisdiction over that Magistrate, and it cannot be suggested that our order would be in any way binding on that High Court. The only person who has any jurisdiction to pass orders binding on different High Courts is the Governor-General-in-Council under section 527, Criminal Procedure Code, and I am satisfied that the Code did not intend to vest in any High Court, powers which were on the face of them, infructuous or might lead to conflict with another High Court.

The petition is, therefore, dismissed.

Petition dismissed.

V.R.P.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 2 OF 1916.

April 28, 1916

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

JITAN DUSADH—COMPLAINANT

versus

DOMOO SAHOO—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss 247, 43. Death of complainant in course of trial—Application by son to continue the case—Acquittal leaving off—High Court—Revision—Practice—Case affecting public tranquillity.

The complainant having died in the course of the trial, his son applied for permission to continue the

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proceedings. The Magistrate declined to do so and acquitted the accused, holding that under section 247, Criminal Procedure Code, he had no option but to acquit. On a reference by the District Magistrate, who stated that the matter was one which affected the tranquillity of the district:

Held, (1) that section 247, Criminal Procedure Code, applies primarily to the case of a complainant who is alive but does not appear, and not to the case of a complainant dying before trial, and that the order of acquittal was wrong in law; [p. 521, cols. 1 & 2.]

Madho Chowdhury v. Turab Mian, 26 Ind. Cas. 174; 18 C. W. N. 1211; 15 Cr. L. J. 726; *Purna Chandra Moulik v. Dengar Chandra Pal*, 28 Ind. Cas. 658; 19 C. W. N. 337; 16 Cr. L. J. 322, referred to;

(2) that, though it is the settled practice of the High Court not to interfere in revision with acquittals, the order of acquittal in this case which involved the peace of the district should be set aside, especially as the Magistrate had not exercised his discretion but acted on an erroneous view of the law. [p. 521, col. 2.]

Criminal reference made by the District Magistrate, Monghyr, dated the 23rd March 1916.

Mr. K. P. Jayswal (with him Babu Chandra Sekhar Prasad Singh), for the Complainant.

Sir Ali Imam, for the Accused.

JUDGMENT.—This is a reference by the District Magistrate of Monghyr, in which he recommends that an order of acquittal passed by a Deputy Magistrate at Monghyr should be set aside. The facts are as follows:—

Loka Mahton and Domoo Sahu are rival *zemindars* in a village and have been on bad terms with each other for some years.

One Paltan Khan, said to have been an influential resident of the village, was appointed *gomasta* by Domoo Sahu and succeeded in gaining over most of the villagers to the side of his master. Jitan Dusadh, a tenant in the village and *gorait* of Loka Mahton, was asked by Paltan Khan to give up service under Loka Mahton and go over to the side of Domoo Sahu. Jitan refused and it is said that, in consequence of his refusal, in the middle of the night of January 1914, Paltan Khan and others appeared at his house and carried off a quantity of paddy belonging to him. Jitan complained to the Police and subsequently also to a Magistrate, with the result that Paltan Khan and others were placed on their trial and were convicted under sections 379, 147 and 323 of the Indian Penal Code. As the

riot appeared to have been committed in the interest of Domoo Sahu, the employer of Paltan Khan, Jitan Dusadh applied to the District Magistrate to place Domoo Sahu also on his trial for offences under sections 154 and 155 of the Indian Penal Code. The District Magistrate on that application directed the prosecution of several persons who were supposed to have taken part in the riot, and ordered Jitan to file a fresh application against Domoo Sahu. Jitan did so and January 27th 1916 was fixed for the trial. There was an adjournment to February 11th, but on February 4th Jitan died. His son appeared in Court on February 11th and asked to be allowed to go on with the case. But the Deputy Magistrate acquitted the accused under section 247 of the Code of Criminal Procedure. It is quite clear from the order of acquittal and also from the explanation furnished by the Deputy Magistrate, that he was of opinion that he had no option but to acquit the accused in the circumstances. We have been referred to two cases on the construction of section 247 of the Code of Criminal Procedure, namely, *Madho Chowdhury v. Turab Mian* (1) and *Purna Chandra Moulik v. Dengar Chandra Pal* (2). In the former a servant of a *zemindar* had lodged a complaint of an offence under section 426 of the Indian Penal Code. When the case was called on it was found that the complainant was dead, and the Magistrate acquitted the accused. The High Court said: "When the day came for disposal, the servant of the *zemindar*, who had made the complaint, was dead, and the Magistrate adopted the rather extraordinary course, although he knew that the servant was dead, of acquitting the accused under section 247 of the Code of Criminal Procedure". The Court seems to have been of opinion that the Magistrate had no jurisdiction to pass an order of acquittal in the circumstances. In the second case, a complaint had been made of offences under sections 448, 352 and 323 of the Indian Penal Code, but

(1) 26 Ind. Cas. 174; 18 C. W. N. 1211; 15 Cr. L. J. 726.

(2) 28 Ind. Cas. 658; 19 C. W. N. 334; 16 Cr. L. J. 322.

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the Magistrate had summoned the accused to answer a charge under section 352 of the Indian Penal Code only. The original complainant having died, a nephew of the deceased asked the Magistrate to permit him to go on with the case. The Magistrate allowed the petition on the ground, apparently, that the accused had been guilty of contempt of Court. The learned Judges who disposed of this case said: "The case is one under section 352 of the Indian Penal Code which is compoundable, and we see no reason for the substitution of Bisseshur in place of the deceased complainant. An order under section 247 ought to have been passed by the Magistrate on the failure of the complainant to appear at the hearing of the case, and section 247 empowers the Magistrate to acquit the accused person, unless for some reason he thinks proper to adjourn the case to some other day." They then went on to hold that the reason given by the Magistrate for proceeding with the case was not sufficient and they set his order aside. It is open to doubt whether section 247 of the Code was intended to apply to such a case as this. It seems to apply primarily to the case of a complainant who is alive but does not appear, for the closing words of the first paragraph of the section seem to suggest that the case should be adjourned in order to enable the complainant to appear.

If section 247 does not apply at all to a case of this kind, there was nothing to prevent the Magistrate from going on with the proceedings. If it does apply to such a case, then we think that the case before us was eminently one in which the Magistrate should have decided to go on with the proceedings. The District Magistrate points out in his reference that the offence complained of is an offence against the public tranquillity, and he says that if he had contemplated the possibility of the case being dismissed on account of the absence of the complainant, he would himself have taken action. It is urged before us that we ought not to interfere with an order of acquittal except on appeal by the Local Government. There is no doubt that the practice of the High

Courts has always been to refuse to interfere in revision with acquittals except for special reasons. In the present case if the Magistrate had exercised his discretion and had given reasons for refusing to go on with the case, we might have been disinclined to interfere, but he seems to have thought that he had no option but to acquit the accused. It is a mere accident that the present case was instituted on the complaint of Jitan. It is a case of considerable importance involving the peace of the district, and under the circumstances we think that we ought to set aside the order of acquittal. The Sub-Divisional Magistrate's order is accordingly set aside and he is directed to proceed with the trial of the case.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 257 OF 1916.

December 12, 1916.

Present:—Sir William Ayling, Kt., and
Mr. Justice Seshagiri Aiyar.

PUBLIC PROSECUTOR—APPELLANT

versus

MANTRIPRAGADA MARKONDEYULU

—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 292—Obscene publication—Obscenity, tests for determining—Intention, whether material.

Where matter contained in a book is obscene, it is no justification of an offence under section 292 of the Indian Penal Code that the matter published was written by an eminent writer. [p. 522, col. 1.]

The term 'obscene' is not defined in the Indian Penal Code, but the test of obscenity is whether the matter charged as being obscene is likely to deprave and corrupt the minds of those who are open to such immoral influences and into whose hands the publication of the sort may fall. [p. 522, col. 2; p. 523, col. 1.]

Reg. v. Hicklin, (1868) 3 Q. B. Cas. 360; 37 L. J. M. C. 84; 18 L. T. 395; 16 W. R. 801; 11 Cox. C. C. 19; *Queen-Empress v. Parashram Feshwant*, 20 B. 193; 10 Ind. Dec. (N. S.) 637; *Sirat Chandra Ghose v. King-Emperor*, 32 C. 247; 2 Cr. L. J. 201, followed.

The question of intention of the writer is not germane to the consideration of an offence under section 292 of the Indian Penal Code, which can only be gathered from the character of the matter contained in the book, the publisher of which must be deemed to have intended the natural consequences of his act. [p. 523, col. 1.]

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Empress of India v. Indarman, 3 A. 837; A. W. N. (1881) 94; 2 Ind. Dec. (N. S.) 549, referred to.

Where a publication is devoted to depicting the illicit passion of a libertine towards the married wife of another and is priced so low as to be within reach of the man in the street, it is an obscene publication, even though the intention of the publisher was to publish the classical composition of a standard author in the true interests of literature. [p. 523, col. 2.]

Appeal against the judgment of the Court of the Stationary Second Class Magistrate, Ellōre, in Case No. 476 of the Calendar for 1915.

Mr. *E. R. Osborne* (Public Prosecutor), for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—The accused in this case has been charged with the offence of having printed and published for sale a Telugu booklet named '*Vidi Natakam*'. The author is said to be Srinadha who lived in the middle of the 15th century, and who has written some classical books in the Telugu language. Certain stanzas in this book have been selected by the prosecution as having a tendency to deprave and to corrupt the morals of the readers. The defence was that the author was a writer of repute, that the diction in which the stanzas are written is not easily understandable by the ordinary reader, that they are of artistic and literary merit, and that there is nothing in the verses selected which could be taken exception to. It was also stated that the book has gone through a number of editions and that the republication was not an offence. The Magistrate agreeing with the defence set up acquitted the accused. The Government have appealed.

I am of opinion that the acquittal is wrong. I cannot help saying that the Magistrate, who apparently has taken great pains and has written a very elaborate judgment, has misdirected himself. I agree with the Magistrate—in fact the learned Public Prosecutor did not challenge in this Court the correctness of that conclusion—that the work in question was written by Srinadha. But it is no justification under section 292 of the Indian Penal Code that the matter published was written by an eminent writer. In the 15th century when the book was written, the art of publication, as we

understand it now, was not known. It may have been permissible among great men in those days to indulge in compositions of doubtful morality. But when a publication of that kind is reprinted and sold broadcast at the rate of one anna per copy so that it may be available to the man in the street, the question whether by this conduct the accused has not committed an offence against public morality and decency, assumes a different aspect. Further the Magistrate throughout the whole of his judgment seems to regard the opinion of learned men and *pandits* as conclusive upon a question of this kind. The opinion of men of the world and of persons who belong to the classes into whose hands this publication is likely to find its way is more entitled to weight than the judgment of scholars and of men of undisputed moral character. Looking at the question from this standpoint, there can be no doubt that the evidence given by the prosecution witnesses is more entitled to weight than the opinion of the defence witnesses. I agree with the Magistrate that these latter witnesses are all men of high character and of social standing. I say nothing about their competency to pronounce an opinion upon the literary and artistic merits of a work of this kind. But I am not prepared to accept their conclusions as correctly representing the effect which a publication of this kind is likely to have on the popular mind. Among the witnesses for the defence, defence witness No. 5 may be selected as being entitled to speak with some authority upon the probable impression which some of the stanzas in question may have upon the public. He is a first class Deputy Collector and Magistrate and has had large experience of the world. I shall, therefore, in considering the character of the stanzas take into account his views upon them. There is no definition of the term 'obscene' in the Indian Penal Code. But there can be no doubt that the test of obscenity is what has been laid down by Cockburn, C. J., in the well known case of *Reg. v. Hicklin* (1). The learned Chief

(1) (1868) 3 Q. B. Cas. 367; 37 L. J. M. C. 89; 18 L. T. 395; 16 W. R. 801; 11 Cox. C. C. 19.

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Justice says that the test is whether the tendency of the matter charged as obscenity is to deprave and corrupt the minds of those who are open to such immoral influences, and into whose hands the publication of the sort may fall. This definition of obscenity was accepted by Jardine and Ranade, J.J., in *Queen-Empress v. Parashram Yeshwant* (2) and by Ameer Ali and Pratt, J.J., in *Sarat Chandra Ghose v. King-Emperor* (3). Following these decisions, I shall consider whether the stanzas, charged as being obscene, are of a character calculated to produce a pernicious effect on the minds of the persons into whose hands they might fall. It was strenuously pressed upon us by Mr. Narayanamurthi, who appeared for the accused, that the intention of the accused was not to encourage immoral tendencies, but to publish a classical work of a standard author in the true interests of Telugu literature. In the first place the question of intention is not germane to the consideration of an offence under section 292 of the Indian Penal Code. What the Courts have to find out is not the intention of the publisher, but the effect the publication is likely to have upon the public mind. If intention is any test, as was pointed out in *Empress of India v. Indarman* (4), it can only be gathered from the character of the matter contained in the book, and the publisher of such a work must be deemed to have intended the natural consequences of his act. Further, it can hardly be disputed that the avowed object of *Vidi Natakam* is to convey immoral ideas. Defence witness No. 1 says at page 48 that *Vidi Natakam* must have for its hero a *Dheerodhathudu*. It must indicate the love passion. An honourable wife should not figure as the heroine. The heroine should be a *samanya*, that is a stranger's wife who is not a professional prostitute, that is a stranger's wife who loves a person other than her husband. The witnesses both for the prosecution and the defence agree in substance with this description of *Vidi Natakam*. It is clear from this evidence that an honour-

able love is not what is intended to be depicted in these verses, and that the illicit passion of a libertine towards a married wife of another is the theme of these stanzas. Consequently there can be no manner of doubt that primarily the verses are calculated to engender lust and impure ideas in the minds of an ordinary reader, and when it is seen that the price is fixed so low as at one anna per copy so that it may reach the hands of as many as are capable of purchasing it there is no room for any speculation as to the object or intention of the publication.

Now we shall consider some of the verses which have been objected to and see how far the test of Cockburn, C. J., applies to them. Before passing, I cannot help remarking that the translation furnished to the Court has not been accurate. Mr. Osborne has placed in our hands a translation of the objected verses which we consider to be more in accordance with the spirit of the original composition than what the Court translator has given us. The first verse objected to is the 27th. The prosecution charges that the Telugu expression "*Manmadhuni Gopyamu Gahamu*" is objectionable. The literal translation of the expression is "Cupid's secret home". The defence theory is that the expression refers to the face of the damsel and not to any other part of her body. Looking at the context, I feel no hesitation in holding that the expression does not refer to the face of the girl but to a very objectionable part of her body. There are expressions in the stanza which are calculated to excite a libidinous desire in the reader. I may point out that Mr. Jayanti Ramayya, the 5th witness for the defence, concedes that the expression refers not to the face but to the private part of a female. The next verse which I shall consider is verse 37. A great deal of learned argument was addressed to us by Mr. Narayanamurthi on the meaning of the expression "*Dheerga Danda*". The Magistrate has considered the etymological meaning of the expression. Mr. Jayanti Ramayya says that he is unable to make out the true meaning of the author. I feel no doubt that the whole stanza is calculated to excite lust and to instil improper ideas into the minds of the reader.

The general trend of the stanza is this: The

(2) 20 B. 193; 10 Ind. Dec. (N. S.) 697.

(3) 32 C. 247; 2 Cr. L. J. 201.

(4) 3 A. 837; A. W. N. (1881) 94; 2 Ind. Dec. (N. S.) 449.

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breasts of a woman unable to bear the beatings of the male have fallen down and have reached up to the navel. Thereupon further progress has been abandoned, according to the prosecution, because of the fear of punishment by a stick, 'according to the defence) by reason of the proximity to a well. The defence contended that "Dheerga Danda" is a misprint for "Dheerghi Danda" (a deep well) and that what is indicated by the expression is the navel itself. In our opinion, that is not the correct meaning to be attached to the expression. It is not necessary to pursue the subject further, as we are of opinion that even apart from this reference to the punishment by a stick the earlier portion of the stanza is bad enough and is calculated to excite lust and evil passions. Stanza 43 is another of the objectionable ones, and we are satisfied that the reference in the stanza is to the private part of a woman. We are willing to give the benefit of the doubt to the accused so far as stanza 47 is concerned. It may be that an author of renown like Srinadha would not have that Lord Shiva should be addressed in the way suggested by the prosecution. It is not unlikely that the reference in that stanza is to what poets refer to as "Adhara Amirtham". Similarly we are willing to concede that in stanza 30, the reference may be to the Uriya women, some of whom are in the habit of wearing a veil, and that the removal of the *sari* is from the face and not from any other part of the body. Even leaving aside these two stanzas, there can be no question that the general tenor of the verses objected to by the prosecution is to create an unholy desire and to engender illicit sexual passion in the minds of the reader; and having regard to the avowed object of the writing and to the fact that it has been placed within the reach of the poorest among the people, we are constrained to hold that the effect of the publication is to corrupt those whose minds are open to such immoral influences.

The fact that some of the verses are written in a style which is not easily understood is no justification at all. It is true that the style is somewhat difficult, but there can be no difficulty in a person who is acquainted with ordinary Telugu from grasping the general effect of the stanzas.

For these reasons, I would set aside the order of acquittal of the accused and convict him of an offence under section 292 of the Indian Penal Code. Having regard to the fact that the accused has only republished what has already gone through a number of editions, and to the fact that the book is by a renowned author, we do not think it necessary that a very severe punishment should be inflicted upon the accused. We must sentence him to pay a fine of Rs. 100 and in default to undergo simple imprisonment for six weeks. The copies of the books in his hands must be confiscated under section 521 of the Criminal Procedure Code and he should hand them over to the Crown.

AYLING, J.—I concur.

Appeal allowed.

V.R.P.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 684 OF 1916.

CRIMINAL REVISION PETITION No. 561 OF 1916.

October 13, 1916.

Present:—Mr. Justice Krishnan.

In re MEDAI DHALAVOY TIRUMALAYAPPA MUDELIAR—PETITIONER—

RESPONDENT No. 1.

Criminal Procedure Code (Act V of 1898), s. 145—Rent of land, dispute as to—Dispute, whether should be between rival claimants—Jurisdiction.

A dispute as to the right to collect rent is a right concerning "tangible immovable property or land" within the meaning of section 145 of the Code of Criminal Procedure. [p. 525, col. 1.]

Abhayessari Debi v. Shilhessari Debi, 16 C. 513; 8 Ind. Dec. (N. S.) 339, *Sarbananda Basu Mozundar v. Pran Sankar Roy Choudhuri*, 15 C. 527; 7 Ind. Dec. (N. S.) 435, followed.

To take action under the section it is not necessary that the apprehended breach of the peace should be between the rival claimants. [p. 525, col. 1.]

The grounds of a Magistrate's belief need not be set out *seriatim* in the notice issued to parties under the section. It is enough if the Magistrate states in his order that he believes the statement of the petitioner which contains such grounds. [p. 525, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate, Tinnevely, in Miscellaneous Case No. 15 of 1916.

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Mr. P. N. Marthandam Pillai, for the Petitioner.

ORDER.—This is an order under section 145 of the Code of Criminal Procedure, which is sought to be revised. It is admitted that a revision does not lie except on the ground of jurisdiction, but it is argued that as the petitioner in the lower Court was not in actual possession this section does not apply.

It is, however, clear that a dispute as to the right to collect rents is a dispute concerning tangible immoveable property or land. See *Abhayessari Debi v. Shidhessari Debi* (1) and also *Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri* (2).

It is next urged that the breach of the peace apprehended was one between the petitioner's tenants and the counter-petitioners and not between the latter and the petitioner. To take action under section 145 it is sufficient if the Magistrate is satisfied that there is a dispute concerning land which is likely to lead to a breach of the peace. The apprehended breach need not be actually between the rival claimants but only on account of the dispute.

It is lastly urged that on the authority of the case of *Posuka Kulla v. Tandalagara Okikka Hina* (3), this application should be allowed. But I find in this case the Magistrate did set out the grounds of his belief of the likelihood of the breach of the peace, as he believed the statement to that effect made by the petitioner.

He has also found in his present order that such likelihood did exist.

I, therefore, dismiss the petition.

Petition dismissed.

V.R.P.

(1) 16 C. 513; 8 Ind. Dec. (N. S.) 339.

(2) 15 C. 527; 7 Ind. Dec. (N. S.) 935.

(3) 4 M. L. T. 213; 17 M. L. J. 449; 6 Cr. L. J. 345

MADRAS HIGH COURT.

ORIGINAL PETITION No. 122 of 1916.

October 18, 1916.

Present:—Mr. Abdur Rahim, Offg. Chief Justice; Justice Sir William Ayling, Kt., and Mr. Justice Seshagiri Aiyar.

MRS. ANNIE BESANT—PETITIONER

versus

THE GOVERNMENT OF MADRAS—

RESPONDENT.

Press Act—(I of 1910), ss. 3, 4, 17, 19, 20, 22—Deposit of security, order for—Order dispensing with security, cancellation of—High Court, interference by, under *Press Act*—Jurisdiction—Forfeiture of security—Interference by High Court, grounds for—Scope of ss. 3 and 4—Applicability to old Presses—Government of India Act, 1915, (5 & 6 Geo. 5, Ch. 61), s. 65—*Press Act* legislation, whether ultra vires in whole or part—Special Bench, jurisdiction of, to pronounce on legality of the Act—Procedure under the Act—Burden of proof—Intention of writer, when essential—'Government established by law', meaning of—'Exciting hatred and contempt', meaning of—Alien character of Government, criticism of, when privileged—Evidence—Articles, not the subject of proceedings, admissibility of, to prove general tone and policy of newspaper—Evidence—Home Rule or Self-Government for India on Colonial lines, agitation for, whether lawful—Methods of advocacy—Legitimate discussion and propaganda, principles governing—Interpretation of Statute—Proviso.

Per Curiam.—The High Court has no jurisdiction sitting as a Special Tribunal under the Press Act, to consider any other matter, save whether certain words contained in a newspaper and specified in the order of forfeiture by Government under section 4 are or are not of the nature described in clause (1) of the section. Proceedings under section 3, i. e., the imposition of security or the cancellation of an order dispensing with security are not subject to the revisional jurisdiction of the High Court under sections 17 and 22 of the Act. [p. 579, col. 1; p. 589, col. 2; p. 598, col. 2; p. 599, col. 1.]

The provisions of the Press Act are applicable to all Printing Presses, even those which were in existence before the passing of the Act and for which fresh declaration is necessary under the Act under certain conditions. [p. 578, col. 1.]

The words 'Government established by law in British India' are not restricted to the supremacy of the King and the British connection, but include the composite body of persons that constitute the Government in India. [p. 583, col. 2; p. 584, col. 1; p. 590, col. 2; p. 603, col. 2.]

The language of section 4 (1) of the Press Act is very wide, wider than the corresponding provisions in sections 124A and 153, Indian Penal Code. [p. 579, col. 2; p. 590, col. 1; p. 600, col. 2.]

Articles which are not the subject of the proceedings before the Court are admissible to show the general policy of the paper. [p. 592, col. 2; p. 603, col. 2.]

Per Abdur Rahim, Offg. C. J., and Ayling, J.—The language of the sub-clauses to section 4 of the Press Act is not so wide as to embrace within its scope writings that may even command approval, or writing

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attacking a degraded section of the public which lives on the misery and shame of others or unduly praising a class. [p. 583, col. 1; p. 589, col. 2; p. 500, col. 1.]

Per *Abdur Rahim, Offg. C. J.*, and *Seshagiri Aiyar, J.*—The question whether the Press Act or any portion of it is *ultra vires* of the powers of the Indian Legislature, as contravening the spirit of section 65 (2) of the Government of India Act, is not a matter which can be considered by the High Court sitting as a Special Tribunal under sections 18 and 19 of the Press Act. [p. 580, col. 1.]

Obiter.—A Magistrate has no jurisdiction under section 3 to impose security on a Printing Press after having previously dispensed with it under the proviso to the section, but the High Court has no jurisdiction under section 17 of the Press Act to determine the validity or otherwise of the proceedings of the Magistrate under section 3. [p. 578, col. 2; 579, col. 1.]

The onus is upon the person whose security has been forfeited to prove that the publications selected by the Government at their own discretion may not have the tendency described in the various sub-clauses to section 4 of the Press Act. [p. 583, col. 1.]

The advocacy of Home Rule for India or Self-Government on Colonial lines and suggestions for the carrying on of a propaganda to achieve the same are not *per se* obnoxious to the provisions of section 4 of the Press Act, but it is not permissible for a publicist discussing the Government's actions and failures to impute base and dishonourable motives to it. [p. 585, cols. 1 & 2.]

Per *Abdur Rahim, Offg. C. J.*—A proviso to a section is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause. [p. 578, col. 2.]

West Derby Union v. Metropolitan Life Assurance Society, (1897), A. C. 647 at p. 652; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820, referred to.

The words 'any order' in the proviso to section 3 (1) cannot include the order dispensing with security. [p. 578, col. 2.]

The Press Act imposes no duty upon the Government to issue any warning or to ask for any explanation before taking action under section 4 and the absence of warning cannot be relied on to influence the decision of the High Court on the nature of the alleged offending articles. [p. 579, col. 2.]

Section 4 of the Act is so wide in its scope that even a loyal newspaper whose general policy is above all reproach can be brought within it, if any letters or writings are let in through carelessness which offend any of the sub-clauses of the section. The vesting of such unlimited powers in the Government is a serious encroachment on the freedom which the Press in India enjoyed before the passing of the Act. [p. 580, col. 1.]

Mahomed Ali v. Emperor, 20 Ind. Cas. 977; 41 C. 466; 14 Cr. L. J. 497; 18 O. W. N. 1, referred to.

Obiter.—There is a fundamental difference between the Legislative powers of the Imperial Parliament which, according to the theory of the English constitution, can enact any laws it chooses and the authority of the Indian Legislature which is purely

derivative and subordinate. Any enactment of the latter in excess of its delegated powers or in violation of the limitations imposed by the Imperial Parliament is null and void. The 'unwritten laws' referred to in section 65 (2) of the Government of India Act, 1915, which, under the section cannot be violated by any enactment of the Governor-General in Legislative Council, are, generally speaking, the laws recognising the fundamental right of the subject to enjoyment of personal freedom and property of which he could not be deprived by a Court of Law. [p. 580, col. 2; p. 581, cols. 1 & 2.]

Norman, J.'s view in *In the matter of Ameer Khan*, 6 B. L. R. 392, approved.

Secretary of State v. J. Momen, 18 Ind. Cas. 22; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 191; 6 Bur. L. T. 1; 24 M. L. J. 49; 40 C. 391; 7 L. B. R. 10; 40 I. A. 48 (P. C.), referred to.

The words 'whether by inference, suggestion, etc.' in section 4 are used merely by way of explanation and do not in any way enlarge the meaning of the words 'which are likely or may have a tendency directly or indirectly.' By 'tendency' is meant the natural effect of the words used on the readers of the newspaper in question, and not the effect which they may produce on the minds of abnormally constituted persons, or persons whose acquaintance with the language is inadequate or those who might content themselves with reading certain passages or expressions apart from the context. All that has to be taken into account is the effect which the words are, by their nature, likely to produce on a normal average reader understanding them in their plain, natural meaning. [p. 583, col. 1.]

In applying section 4 (1), apart from explanation 2, the intention of the Editor or writer need not be considered, if it is not shown that the words, in their plain, ordinary meaning, may not tend to produce the objectionable effects mentioned in clauses (a) to (f). [p. 583, cols. 1 & 2.]

The intention becomes relevant only under explanation 2. It means that comments on the measures and actions of the Government are exempted from the operation of section 4, provided the person making the comments does not excite or attempt to excite thereby hatred or contempt against the Government. But the protection afforded by this explanation is extended only to comments on Government's measures and actions and not to attacks on the Government itself, which have to be judged by light of section 4 without reference to the explanation. [p. 584, col. 2.]

The words 'hatred and contempt' in section 4 mean something more than mere disapproval or dislike. [p. 583, col. 2.]

The words 'Government established by law in British India' in section 4 denote an established authority entitled and able to administer the public affairs of the country. It is not identical with any particular individuals who may be administering the Government. The law does not prohibit criticisms of the Government as constituted in a par-

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tical form, provided such criticisms do not bring it into hatred or contempt or excite disaffection against it. [p. 583, col. 2; p. 584, col. 1]

Emperor v. Bhaskar Balwant Bhopatkar, 8 Bom. L. R. 421 at p. 43; 4 Cr. L. J. 1; 30 B. 421, referred to.

The advocacy of any Home Rule propaganda for India cannot be regarded as illegal *per se*. It lies entirely with the Sovereign, that is, the King in Parliament, to establish any Government he chooses for India or any other part of the British Empire. There can be nothing wrong, therefore, in a subject of the Crown urging the desirability of a change in the machinery of the Government in India. In certain stages of society, reforms in the constitution of the Government are a biological and political necessity. To say that such questions are not open to public discussion, supposing that the law is not violated by the manner and the methods adopted in such discussion, would be opposed to all sound maxims of constitutional law. [p. 585, col. 1.]

Per Ayling, J. There is nothing in the Press Act which throws the onus on the applicant of proving that the words which are made the ground of forfeiture, do not fall within the scope of section 4. Whether the words are likely or may have a tendency to produce certain results must be determined primarily by inference from their own nature. The words, themselves, form the main evidence in the case. [p. 589, col. 2.]

The language of section 4 leaves the question of the intention of the writer quite immaterial. The Court has to confine its attention to the natural effect of the words without reference to what the writer meant or wished to be understood. To this, there is an important exception in explanation II of the section. Here the element of intention is present. The words 'attempt to incite' presuppose a sentient being and one animated by a particular intention. Therefore, in the case of comments on the measures of Government, an intention to excite hatred, contempt or disaffection is necessary to bring them within the scope of clause (c) of section 4 (1). The intention is, of course, deducible from the words of the articles themselves. [p. 590, cols. 1 & 2.]

The words 'Government established by law in British India' should be interpreted in the light of section 3 of the General Clauses Act (X of 1897), which governs the Press Act as regards definition of terms. So interpreted, it includes the Government of India and all local Governments. The addition of the words 'established by law in British India' seems to be intended to emphasize the fact that it is the Government existing at the time that is sought to be protected from attacks. [p. 590, col. 2; p. 591, col. 1.]

The word 'disaffection' in section 4 means, in addition to hatred and contempt, enmity, dislike, hostility and every form of ill-will towards the Government. It should not be restricted to courses of action that lead to rebellion or forcible resistance. [p. 591, cols. 1 & 2.]

Queen-Empress v. Bal Gangadhar Tilak, 22 B. 112 at p. 125; 11 Ind. Dec. (N. S.) 656, approved.

It is open to any one to draw attention to the non-Indian elements in the Government of India, and to

argue that these impair the efficiency of that Government, and that it would be to the public advantage, if they were replaced by Indian elements. That is legitimate criticism. But it is not legitimate to go further and to use the existence of the non-Indian elements of Government as a means of exciting hatred, contempt and disaffection against Government—as Sirachey, J., puts it, to hold up the Government to hatred and contempt by dwelling adversely on its foreign character and origin. It all depends on the manner in which and the object with which the circumstance is used in argument. [p. 592, cols. 1 & 2.]

It is not irrelevant to adduce in evidence articles in a newspaper which are not the subject of forfeiture in aid of the proof of the nature or tendency of the alleged offending articles, but it is most unsafe to judge of the intention of the writer in publishing the latter by reference to other articles previously published at long intervals of time, and mostly in other connections. [p. 592, col. 2.]

Per Seshagiri Aiyar, J. A declaration under section 22 of the Press Act is notice to all persons that the Government have declared the forfeiture, but not that the forfeiture has been legally made. [p. 598, col. 2.]

Obiter.—Section 4 of the Press Act is not *ultra vires* of the powers of the Imperial Legislature, as the subject is not deprived of the right of showing that the forfeiture has not been incurred. Instead of taking the decision of the Court first and then declaring the forfeiture, the process has been reversed: such a procedure cannot be said to affect the allegiance of the subject. [p. 600, cols. 1 & 2.]

It cannot be said that the intention of the writer is of no consequence in applying the provisions of the Press Act. While the operative portion deals purely with the language employed, divorced from considerations of motive or intention, explanation II furnishes a ground of exemption, if it can be shown that there was no intention to excite or to attempt to excite hatred, contempt or disaffection. It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed. [p. 601, col. 1.]

As the angle of vision has changed since previous pronouncements on the sections 124A and 153, Indian Penal Code, and political autonomy under certain conditions is declared legitimate, suggestions to the effect that an indigenous agency would be more suitable in certain departments of the administration and should be more largely employed, should not be regarded as exciting hatred or disaffection. Criticism attributing indifference to the welfare of the people would not always amount to sedition. If the criticism is couched in language which imports corrupt or malicious motives, the writer cannot escape. But if it aims to draw attention to a weak point in the administration in the hope that the criticism may lead to the redress of grievances or the removal of a disability, the writing cannot be condemned. [p. 601, col. 2; p. 602, cols. 1 & 2.]

Any discussion about 'Home Rule' for India is not *per se* objectionable. Two essentials should be kept in mind in asking for changes in the machinery

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of Government. The allegiance to the throne and person of the Sovereign should be held as inviolate, and there should be no suggestion that the connection which makes India an integral part of the British Empire should be severed. Within these limits, it is permissible to ask that the details of the administrative machinery should be readjusted to meet the exigencies of the times. [p. 602, col. 2.]

Emperor v. Baskar Balvant Bhopatkar, 4 Cr. L. J. 1; 30 B. 421; 5 Bom. L. R. 421 at p. 438, referred to.

The expression 'Government established by law in British India' means British rule and its representatives as such, the existing political system as distinguished from any particular set of administrators. [p. 603, col. 2.]

Clause (e) of section 4 is aimed at language which would render friendly co-operation between the different races living in India impossible. The language must be such as to lead to the breaking of the peace. [p. 603, col. 2.]

Articles evidencing the general policy of a Paper can be received in evidence and the right of adducing such evidence can be exercised by the Crown and the applicant, but there must be some connection between the subject-matter of the articles tendered and of the articles which are objected to. [p. 603, col. 2.]

[The Judges delivered varying opinions as to the nature of the various articles and how far they offended against section 4 of the Press Act.]

In the matter of the Indian Press Act, I of 1910, and in the matter of the Printing Press known as the "New India Printing Works" and in the matter of section 4 (1) of the said Act.

FACTS are clear from the petition of the applicant and the judgment.

The petition under section 17 of the Press Act of 1910 ran as follows:—

1. Mrs. Annie Besant, the petitioner above named, is the keeper and printer of the "New India Printing Works" and the Editor of the newspaper "New India" carrying on business at Nos. 13 and 14, Moore Street, George Town, Madras.

2. The petitioner is the absolute owner of the printing press known as the "New India Printing Works" and is the Editor of the newspaper known as "New India" which is being printed at the said press.

3. The said press and the paper called "The Madras Standard" and its good-will were purchased by the petitioner on the 13th July 1914, and the said newspaper was continued to be published by the petitioner from the date of purchase. The

petitioner registered herself as Proprietor at the Egmore Police Court on the 14th July 1914. The name of the "Madras Standard" was changed to the name of "New India" on the 1st August 1914, and under that name the petitioner has been continuing to publish the said newspaper since that date.

4. The sale-deed obtained in her favour from the proprietor of the "Madras Standard" and the notice of forfeiture under section 4 (1) of the Act are herewith annexed and marked as Exhibits A and B1 and B2 series to this petition.

5. On the 28th May 1916, the Chief Presidency Magistrate of the City of Madras served on the petitioner an order, dated 22nd May 1916, requiring her to deposit a security of Rs. 2,000, acting under section 3 (1) of the said Act I of 1910.

6. In pursuance of the said order and under protest the petitioner deposited the said sum and continued the publication of the said newspaper known as "New India".

7. Thereupon, again on the 28th of August 1916, the Governor-in-Council, acting under section 4 (1) of the said Act, I of 1910, served on the petitioner an order, dated 25th August 1916, declaring the security so deposited as aforesaid in respect of the "New India Printing Works" and all copies of "New India", wherever found, to be forfeited to His Majesty the King-Emperor.

8. The petitioner charges that under section 3 (1) of the said Act I of 1910, the Magistrate, having dispensed with the deposit of any security when the declaration was made in the first instance, had exhausted his powers under section 3 (1), that the proviso to section 3 can only apply to orders passed under the 1st paragraph, that he cannot cancel or vary the order, and that the said order, dated 22nd May 1916, was illegal and unauthorised, as the Magistrate had no jurisdiction to impose the said security on the press wherein the paper was being printed, the same being an old press which had been in existence as such prior to 1910 and as no notice was served on the petitioner to show cause why a security should not be demanded nor has the Magistrate brought his judicial mind to bear on the questions involved in this matter.

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9. The petitioner states that no issue of the newspaper known as "New India" contains any words, signs or visible representations of the nature described in section 4 (1) or section 3 (2) of the Indian Press Act and submits that the order of the Governor-in-Council passed on the 25th August 1916 is illegal inasmuch as the said order purports to forfeit not only a particular article or articles complained of but also all issues of "New India", past and future, and inasmuch as no notice was served on the petitioner prior to the said order calling upon her to show cause why the security should not be forfeited. The petitioner prays that the extracts filed herewith and marked as Exhibits B1 and B2 series may be read as part and parcel of this petition.

10. The petitioner further submits that no grounds exist either for the imposing of the security by the Chief Presidency Magistrate of the City of Madras or for the forfeiture thereof by the Governor-in-Council.

11. The petitioner prays that under the circumstances and for the reasons stated above and for the reasons stated in the affidavit filed herewith, (a) the orders of the Chief Presidency Magistrate and the Governor-in-Council, dated 22nd May 1916, and 25th August 1916, may be revised;

(b) that the said orders may be set aside;

(c) and that such further or other relief as to this Honourable Court may seem meet may be granted to the petitioner.

The notice to Mrs. Annie Besant, Keeper of the "New India Printing Works," Nos. 13 and 14, Second Line Beach, Madras, by the Chief Presidency Magistrate was in the following terms:—

"Take notice that under section 3 (1) of Act I of 1910, I hereby cancel my order, dated 2nd December 1914, dispensing with security in respect of the "New India Printing Works," at Nos. 13 and 14, Second Line Beach, Madras, and require you under section 3 (1) of Act I of 1910 to deposit security for Rs. 2,000 before me within 14 days from the date of this notice.

Dated this 22nd day of May 1916".

The notice served on 28th August 1916 under section 4 (1) of the Indian Press Act, I of 1910, was as follows:

"Whereas on the 5th June 1916 in compliance with an order made by the Chief

Presidency Magistrate, Madras, under the proviso to section 3 (1) of the Indian Press Act, 1910, security to the amount of two thousand rupees was deposited by Mrs. Annie Besant in respect of the Press known as "The New India Printing Works, Madras";

Whereas it appears to the Governor-in-Council that the said Press is used for the purpose of printing a newspaper entitled "New India"; and

Whereas the Governor-in-Council is of opinion that the passages published in the said newspaper and reproduced below are of the nature described in section 4 (1) of the Indian Press Act, 1910.

Now, therefore, in the exercise of the powers conferred by section 4 (1) of the Indian Press Act, 1910, the Governor-in-Council declares the security deposited in respect of "The New India Printing Works, Madras"; and all copies of "New India" wherever found to be forfeited to His Majesty.

(BY ORDER OF THE GOVERNOR-IN-COUNCIL)

(Sd.) LIONEL DAVIDSON,

Ag. Chief Secretary."

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3	Latest Sin of Arms Act ...	14th "
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	(g) The Way with the Apologists ...	29th "
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EXTRACTS

No. 1: BUREAUCRACY IN EXCELSIS

PROTEST FROM PRESS AND PUBLIC.

Anglo-India v. "New India."

Mr. M. Krishnamacharya, B. A., L. T., of Ottapalam, writes:

Out of evil cometh good. Out of the absolutism of Stuart monarchs constitutional Government was won for England. Out of the persecutions of Anraungzebe, Maharatta power attained its ascendancy. Out of the high-handed tyranny and overbearing imperialism of Lord Curzon sprang the National movement which is destined to play an irresistible part in Indian politics. And now, out of the blind hostility evinced by the Madras Government against "New India," our ultramoderate begging politicians are bound to learn the unwisdom of relying too much upon the sympathy of the Bureaucracy towards any of our truly higher aspirations.

For in the eyes of our high-minded rulers, especially with their new changed "angle of vision" what are the sins of which "New India" is guilty? None, specifically; its Editor could not be brought by the most wary and zealous scrutiny of Government under any of the sections of the ordinary Criminal Law. But we can well guess how the Journal has offended the Bureaucracy. The "Madras Mail" and others of its ilk, the professional calumniators of the most legitimate Indian aspirations and as such the real promulgators of sedition and unrest in India, against whom, however, there is no law in the statute-book—the "Madras Mail," among other bureaucratic barometers, has been of late giving unerring indications of how the strong plain-speaking of "New India" has grown intolerable for the over-delicate, self-adorant, flattery-loving ears of Anglo-India.

The real issue may indeed be expressed in one small phrase: Anglo-India *versus* "New India". The talk of Home Rule the un-English "Englishman" can manage to sneer at; but when "New India" mercilessly exposes any and every vagary of the "Englishman" in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interest. Thus, by speaking out the plain truth that a Bureaucracy, however benevolent,

that an alien Government, however theoretically well intentioned, can never in practice, so long as its officers are human beings, see eye to eye with the natives of the land; by exposing mercilessly, from day to day, the high-handedness of the Executive, by pointing out to the people of India that the only true remedy for all these manifold ills consists in claiming boldly, and in qualifying for, Home Rule by appealing to the sense of justice and love of liberty deep-rooted in the heart of the British people at home and calling upon them to undo the wrongs done by their countrymen in India;—thus, and in a hundred like ways, "New India," though only an infant of two years' old, has made itself the inveterate enemy of gigantic Anglo-India. The first stage of despising, or affecting to despise, the infant's strength is gone. The contest has begun in grim earnest for the ten-thousandth time of "Hirnya" against "Prahlada." Now, once more, for the ten-thousandth time in the history of the world's evolution, the attempt, bound to be futile, is made by Might to overawe and put down Right.

The question is not whether Mrs. Besant, for any fault shown, should not be bound to give a few hundreds of rupees as security; but whether the ideals for which "New India" stands, and the methods which it adopts to popularise those ideals, though perfectly lawful and constitutional, are to be altered at the bidding of the Bureaucracy. The point at stake is this: though the utmost licence is enjoyed by the Anglo-Indian Press all over the country, is all "liberty" to be denied to the Indian Press and is it to be restrained in its endeavours to bring about, by ways and means unforbidden by the ordinary law, the political regeneration of this ancient Land, so that it may become a true source of strength to the British Empire?

As yet we see only the faint beginnings of a mighty struggle between two opposite sets of forces. The struggle has commenced by Anglo-India putting forth its menacing arm. It can end only in one way, in the complete triumph of "New India". Mrs. Besant is prepared to face the thunderbolts with calm trust in the justice of the cause. What shall we do? Quarrel over asking for four-fifths or a whole of an Elected Legis-

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lature? Talk, wrangle, divide ourselves over petty planks? May the Gods forbid. Our duty is plain, it behoves us one and all to secure for our children's children the full rights of glorious British citizenship, to band ourselves into one indivisible array against all who dare deny such full rights. For God, Crown and Country—that is the battle cry of "New India", who will not respond?—"New India", 7-6-1916.

No. 2: BUREAUCRACY IN EXCELSIS.

PROTESTS FROM PRESS AND PUBLIC.

INJUSTICE DONE TO MRS. BESANT.

The unexpected and inexplicable imposition of a maximum security on the "New India" Printing Works has provoked universal indignation and protest. "New India" has been condemning anarchism. See for example what you said in Palghat. Are we to understand that the Government desire the existence of anarchism in India?

"New India" has been emphasising the importance of the connection of India with England. Does the imposition of security mean that the bureaucracy is opposed to this? Again the popular daily has been enthusiastically struggling for Home Rule. Lord Hardinge has told us that it is a legitimate aspiration. The Congress says it is its goal. Is the benign Government against this optimistic and legitimate struggle?

"They think rightly that Home Rule means the passing away of bureaucracy as bureaucracy. It does not mean that we want to drive the English out of India. It is the method we object to, not the person." This speaks of what metal the lady is made of.

In this special connection the drastic legislation was very drastically applied; the maximum security was demanded. No warning or sign of warning was given before this time; the amount is to be paid within a fortnight; to aggravate all this, no specific reason is assigned for such an unprecedented and inhuman action. Is the Government irrational? No. It is obstinate. Perhaps both.

What private cause has made the Government stoop to such a barbarous atrocity we know not. But this we know full well: the much-bated and ever-mischievous bureau-

cracy discountenances outspoken criticisms and no good Government should be afraid of criticism. We also know that the Government have a spite against the editor of "New India", for she is the head of an institution which works against the missionaries and the missionaries are the parasites of the Government. To say the exact truth, the security is demanded not from the "New India" Printing Works but from Mrs. Besant. Paradoxical as it may seem, this involves the whole matter. She supports everything Indian, says that Home Rule is her last job and means to carry it through, and musters all the leaders and wins their approbation; her Press pours out daily innumerable articles and pamphlets that fashion India to a new healthy national regeneration; she says: "I have not the fortune of being an Indian" and writes the true history of India. All this the Government do not like. Such a serpent should be crushed in the shell; such a plant should be nipped in the bud.

The Press Act is alike an insult to India and a disgrace to England. It is inconsistent with Nature and reason. To say it in A. B. Mazumdar's words, it has transformed the editor to "a humble suppliant before the District Officer". It should be expunged from the Statute Book. It is not a law but an oppression.

News of Prussian aggression and German atrocity are communicated to India to bewilder the Indian imagination. They are committed under pressure, during the War, under passion. They are common. But what does this mean? This perpetration of atrocity in civic life, in peaceful times, in a peaceful Province? This thunder during this sunny day sets the world a-wondering.

Let the bureaucracy do whatever it can and whatever it pleases. Home Rule propaganda is begun, and there is no going back in political evolution. It will be carried through. The Government may kill "New India" but cannot kill the New India. The Government may even kill Mrs. Besant, but cannot kill Besantism in Indian politics.

As Mr. Balasubramanya Aiyar suggested, let a fund called "New India Defence Fund" be started and many purses are

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ready to shower money for Mrs. Annie Besant and "New India": *E. R. Soobramoney Aiyar, Secretary, Y. M. H. A., Nagercoil.*—"New India", 8-6-1916.

No. 3: (ON THE LINE) LATEST SIN
OF ARMS ACT.

A dacoity of a very serious nature was committed on the night of the 9th instant, in the house of a rich merchant of Viddigudam, in Bhadrachalam Taluq. In all, besides havoc of an unknown nature, some 2,562 sovereigns, property valued at Rs. 12,000 and Rs. 2,000 in cash were stolen. The victim bitterly complains of the helplessness of the villagers to offer any resistance, "as they, one and all, in the village are unprovided with arms". Evidently the villagers were in a mood to resist, but were helpless, while enemies of Society felt so safe that they could enter a town "swinging swords and playing *kolattam*". Cannot he, too, who hoards up thousands of sovereigns—to offer them, alas, as Nazaras to dacoits—be credited with implicit loyalty and be exempted from the Arms Act? Are not his vested interests enough guarantee for his good behaviour? Or are his wealth and influence objects of distrust?—"New India", 14-6-1916.

No. 4 (a): "RESERVED FOR EUROPEANS."

Mr. V. G. Javadekar, Pleader, Dhulia, writes to the *Kesari* giving information of a very interesting case, *Mathradas Ramchand v. Secretary of State* (1). Mathradas was sitting in a compartment reserved for Europeans, when he was threatened by railway servants and obliged to go and sit in another compartment. This action of the Railway servants was held by the Court in this case to be illegal, as it cannot be done under any provisions of the Railways Act; besides it was observed that it is beyond the jurisdiction of a Railway servant to forcibly draw out passengers from the carriages. The Court said that the complainant may, if he so desires, file a separate complaint against the Railway servant who pulled him out. This will be news indeed for many of our readers. At times when there is a great rush, people

may take advantage of this information.—"New India", 22-6-1916.

No. 4 (b): "RESERVED FOR EUROPEANS."

We again invite the prominent attention of our readers to the following statement which appears in the *Bombay Chronicle*:

At page 140, Vol. V of the *Sindh Law Report*, a case of *Mathuradas Ramchandra v. Secretary of State for India* (1) has been reported wherein it has been held that a board, specifying "Reserved for Europeans and Eurasians," put upon a third-class compartment of a Railway carriage is illegal, as there is no provision in law made for such undue preference; and the learned Judge further held that an action would lie against the person who had dragged the Indian gentleman out of the said reserved compartment and not against the Railway Company. Many Indian gentlemen are until now under the impression that such a reservation is justified under existing laws, but after all it has been found to be nothing short of a myth, and any one can take advantage of the Court's decision and put it in practice whenever there is occasion of inconvenience or discomfort in travelling.

Such an illegal notice is attached to several trains connected with Madras, and we trust its illegality will be remembered by the Indian passengers.—"New India", 5-7-1916.

No. 4 (c): (ON THE LINE) "RESERVED FOR EUROPEANS."

There has been much jubilation over the judgment in a case brought against the Secretary of State for India, in which it was laid down that a Railway Company had no right to allocate separate accommodation in railway trains to Europeans and Eurasians. We remarked on it, and drew attention to the fact that such notices were attached to carriages on some railways in this Presidency, and that Indian passengers should remember that they were illegal. The extract from the *Bombay Chronicle* report and our comment were gleefully reprinted and circulated by thousands by some energetic youths!—"New India", 8-7-1916.

No. 4 (d): "RESERVED FOR EUROPEANS."

The following facts are of interest to the

(1) 13 Ind. Cas. 257; 5 S. L. R. 140.

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readers of your valuable journal, in connection with the recent judgment on the reserving of Railway carriages for Europeans, found in *Mathuradas Ramchandra v. Secretary of State for India* (1).

Knowing that such reserving was illegal, I got, yesterday evening, in the 5.15 P. M. train or the 'first Local', as it is otherwise called, into a compartment with a printed notice, 'Reserved for Europeans and Eurasians,' on it. Some Indian gentlemen were already in it keenly discussing the legality of such a notice with an Anglo-Indian who disputed their right to enter the compartment. Soon after the Chief Station Master of the Madras Central Station appeared and asked us to get out of that compartment. We refused and showed him a leaflet containing an extract of the judgment of the Sindh Law Court. But this was beyond everything that august personage could bear. He got wild, exclaimed that the leaflet had nothing to do with him, and threatened us with prosecution, because he said we got into that compartment wilfully when there were other compartments vacant, and thus disturbed the peace of the public. We then thought it prudent to get down, as it was past time for the departure of the train; and got down under protest.

True, there were other compartments vacant; but the question is, is the company justified in reserving compartments exclusively for one class of people? It is not uncommon to find in the M. & S. M. R. trains, local trains to Arkonam not excepted, carriages with printed "Reserved" notices running empty throughout, while the compartments near by are packed full. If the Railway Company is not responsible for it, as the Sindh Law Court finds, how does the name of the company find a place in the "Reserved" notices and why should the Company's servants take such an active part in reserving compartments for Europeans? Evidently the Railway Companies have taken advantage of the people's ignorance of the details of the Railway Regulations Act—which, as the Sindh judgment points out, does not provide for such reservation—and have allowed this unlawful custom to pass unnoticed. It is time for the Indian public to wake up and enter an emphatic protest against the illegal prac-

tice, now that its illegality is exposed. I appeal specially to the travelling public to take immediate and united action and see that such a notice is not put on the carriages at all.—*Srinivasan, Madras.*

[But why did you get out? It is this submission to illegality that causes half the troubles from which Indians suffer.—Ed.]—*"New India"*, 20-7-1916.

No. 4 (c): COMPARTMENTS "RESERVED."

This morning "Officers' train" was fully packed to the roof. Therefore we, about 14, got into a compartment in the last carriage at Chetput. There was no board on that compartment to say that it was reserved for Europeans and Anglo-Indians. We, therefore, got into that compartment. At Egmore the Assistant Station Master came, and asked us to vacate the compartment, saying that it was reserved. As there was no board to that effect and as there was no room elsewhere, we remained there and did not get out. After a few minutes he brought in a Sergeant, and the names of some of those who were in that compartment were taken down. The Station Master then came to the spot, and his presence too was of no avail. It is not known how long this will continue and how long this racial difference will exist. The train was unnecessarily delayed for about 10 minutes.—*A Sufferer.*

Certain non-Anglo-Indian passengers who were occupying a compartment in the last carriage of the 2nd Officers' train that arrived at the Egmore Railway Station at 9.30 A. M. were asked by the A. S. M. to get down to give room for the Anglo-Indian passengers for whom, he said, it was reserved. The passengers did not comply with his request. The A. S. M. returned and then came with the S. M. and a Railway Sergeant who took down the names and addresses of the non-Anglo-Indian passengers. The S. M. said the compartments were reserved for the Anglo-Indians, while the passengers said they got into a compartment where there was room available for them to get in. (Please note that 4 compartments are said to be reserved for about 10 or 15 passengers.) By this there was a delay of 15 minutes.—*C. Narasimhachari, Season Ticket Holder, Pallavaram,*—*"New India"*, 24-7-1916.

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No. 4(f): "RESERVED FOR EUROPEANS."
A SCENE NEAR POONA.

In Tuesday's *Dyan Prakasha* Mr. M. G. Kottibhaskar gives a very interesting account of a fresh act of unlawful repression by the railway petty officials. At Hadapsar he got into the train as usual. But this time, instead of taking his seat in the 2nd class by which he usually travelled, he went in the "European third" with three of his friends. The guard on duty wanted him to get out of it with his "native" friends as, he said, that compartment was not meant for them. Mr. Kottibhaskar at first courteously told him that they would all get down, if he could make room for them in any other compartment. But the guard instead of responding to this, his courteous request, with great obstinacy ordered him to clear out of the compartment. This Mr. Kottibhaskar flatly refused to do, saying he might lodge a complaint against him if he liked. The guard then tried with the aid of the Indian Station Master to persuade the gentleman to vacate the said compartment, but finding that it was hopeless, he took down the address of Mr. Kottibhaskar and went away.

Upon this, Mr. Kottibhaskar decided to take his seat in that compartment for the next three or four days. The succeeding guard, too, played the same game as his predecessor, and, finding Mr. Kottibhaskar was too much for him, sent for the Assistant Station Master, who in his official capacity arrogantly commanded him to get down; on his refusal for the second time, he asked the Railway Fouzdar to force him out of the compartment. The Fouzdar, after asking Mr. Kottibhaskar, a few questions, told the Station Master that the step he proposed was illegal and consequently could not be taken.

On this, the Station Master tried to threaten even the Fouzdar (Sub-Inspector of Police) with the detention of the train. The Fouzdar simply replied that he could not help it, but said that the proper way would be to complain. The frowning railway official took the address of Mr. Kottibhaskar, which he once more submitted with pleasure: and the official departed with all his staff of ticket collectors. In spite of his threats, the train

started and vanished out of the Station. - *"New India,"* 28-7-16.

No. 4 (g): THE WAY WITH THE
APOLOGISTS.

The comments of the Anglo-Indian journals on the incident that took place at the Fort Station of the S. I. R. on Thursday are specially noteworthy. They are anxious to apportion the blame to all agencies except the real offender, and in their opinion, the guilty people are not those who committed and persist in committing an illegal action, but those who pointed out the illegality, or who are not willing to tolerate the illegality, when circumstance forces that course of action upon them. The sermon is ridiculous, if the motive in preaching it were not reprehensible and dangerous. There is certainly nothing strange in these journals advocating an unjust cause, or abusing those who stand for justice, and we are willing to admit that in the present instance the incentive for that policy is far greater than usual. The patronage afforded to Anglo-India by the Railway Companies is so great that we rarely find any criticism of the latter in their journals, and to make matters worse for the cause of justice, it is Indians that in the present instance are anxious to fight against the illegal action.

Still one does not find words strong enough to characterise the action of these journals that abuse the Indians, young or old, that seek to put down the illegal policy of the Railways. The notice "Reserved for Europeans and Eurasians" is not only illegal and insulting, but is even more intolerable. When the trains are crowded to the utmost, and even the second-class compartments are full to the brim, the Indian passengers find one or two carriages more or less empty, and they are told that they should remain so empty for the benefit—prospective or otherwise—of a chance batch of favoured passengers. And to add to the humiliation such reservation is known now to be illegal. And yet those apologists come forward to abuse the Indian passengers for trying to enter these compartments. Can a more demented critical faculty be thought of? It should also be remembered that

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the Indians did not enter these carriages until the law proclaimed that their exclusion was illegal. Indians are always wrong whether they disregard the law, or enforce it.

We are not concerned here with the question as to who were the main perpetrators in the Thursday's affray. The matter will go up to Courts of law and we feel sure the real culprits will be brought to book. What we are now concerned with is the misrepresentations of these apologists of the Railway Companies. These critics have not a word to say on their illegal action—a deed the culpability of which is increased by the knowledge that its continuance has been creating a hitch between the two races. Instead of advising the Railway Company to remove the illegal source of evil, these apologists cry themselves hoarse over the actions of those who either point out the illegality of the mischievous policy, or who, in one constitutional way or other, try to end it. Has it become so heinous, in the opinion of these wise critics, that people should occasionally range themselves on the side of law and justice? Or do they foam with fury because the demand for justice concerns the Railway Company which they are anxious to shield?—"New India," 29-7-16.

No. 5: HOME RULE SECTION:

THE PRICE OF LIBERTY.

(From the Herald, London)

The price of liberty is death. If liberty is to survive at all it means that its lovers must be prepared to give their bodies to the common hangman if the occasion arise. Authority dislikes liberty since it challenges the very fundamentals upon which authority bases its claim to govern. The moment they are called into question they are found to be fictitious. Authority never appeals to humanity for a justification. It appeals to something artificial—a God which it creates for its own purpose, a Church or a Creed, a State all of which are simply phantoms raised up to scare poor human beings. Liberty, on the contrary, bases its claim upon humanity, and can, therefore, laugh at the shams of authority. But authority

has the power, and the price individuals have to pay for maintaining liberty is death.

Yet liberty never dies, its torch is borne on through the centuries by willing hands, and it is authority which has to give way. I have on my bookshelves two bulky volumes by Mr. J. M. Robertson, M. P., called a *Short History of Free Thought*. Now, of course, many of the statements of Mr. Robertson are *ex parte*, but the volumes are valuable in so far as they are a record of the struggle made by men and women during the centuries for liberty to think as they thought fit about such problems as God, the Soul, and the Universe. Stupid people in the name of authority tried to prevent them, with the result that freedom of thought grew and grew until the speculations of men went far beyond the small point which first aroused the ire of authority. For men and women were found who were willing to pay the price—death. It must not be forgotten that these people did not think the same things. Catholics, Protestants, Agnostics, and Atheists all paid the same penalty. They were martyrs to liberty. To-day it is grudgingly admitted that on questions of what is called religion we have liberty of thought and expression. Authority now and again makes an attempt at repression, but it stays its hand when it finds that liberty of thought has many defenders. Freedom has triumphed in this field, and men may think as they please about God and the Universe.

We are at a stage in the history of the world when again we shall be faced with the proposition that the price of liberty is death. Authority, having found that to base its claims upon an alleged divine sanction no longer finds acceptance, has put on a new dress. It does not appeal to God, it appeals to the State. Every one is called upon to give allegiance to this mysterious thing and to subordinate all to its demands. There are, however, some people who are prepared to be as heretical towards the claims of the State as others were toward the claims of Churches. Authority plays its old game and endeavours to stop expression. Hence Defence of the Realm Acts. From the point of view of authority

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this suppression of thought is a good thing, otherwise it will find that the foundation on which it rests will be undermined.

Now, what is the State? On what basis does it rest? It does not claim divine sanction, since no one would admit the claim. It does not rest on the will of the people, since in order to obtain obedience to its desires it has to coerce. No coercion is necessary when a group is also a unity. It acts by reason of the will of its members. The claim of the State, therefore, rests in force. But this presupposes at least two things—the thing that forces and the thing forced. Therefore the State represents the thing that forces, *i. e.*, a group of persons who are able to coerce the rest. Now if a group uses force it follows that it uses force for its own advantage. There would be no need of force if the thing wished for was for the advantage of all. From this then, as the State represents but a group it has no claim but that which it obtains by coercion of the allegiance of the people. But the price of liberty is death.

The State—*i. e.*, the group controlling it, have decreed that all men shall serve in the army. No real or valid reason has been advanced for this decree. It is a mere exercise of authority designed to destroy liberty. Therefore the lovers of liberty have to come forward in defence, for they recognise that the first principle of liberty is freedom of conscience. For if the individual man has nothing to which he can appeal as against authority then he is a slave. He ceases to be a reasoning being, and becomes but one of a herd. A man may voluntarily, by exercising his reason, submit himself to an authority whose claim he considers to be well-founded. But if he does so he is acting according to his conscience. If, however, his conscience will not permit him to accept the dictates of authority, he is entitled to refuse to obey. Therefore the conscientious objector is acting according to reason.

This point would be very much clearer to the average man if there was not so much confusion between the State and the Nation. The two things are not synonymous or interchangeable. They often are antagonistic. A person may be most anxious to preserve and to help the Nation to which he belongs, whilst at the same time be equally desirous of overthrowing the State. A Republican,

for example, living under Monarchical rule, or a Socialist in a Capitalist State. From which it follows that a Pacifist, who considers that War is a Nation-destroying and not a Nation-preserving and Nation-building action, is, whilst in every essence patriotic, justified in refusing to assist in helping the War party. He considers that the Nation is in danger by reason of War, and because the War is, or is not, carried on with vigour. But the State rides roughshod over the Nation, and the group which controls the State has decreed War as essential to the State. Therefore the conscientious objector is anathema. He is a heretic, a perverter of men's minds, a coward, a shirker, and so on through a whole gamut of epithets, polite and otherwise. In reality he is a fighter for liberty, a martyr of sociology, even as the heroes of Mr. J. M. Robertson's book were of theology.

To maintain the sacred fire of liberty he must be prepared to face every contumely, even death itself. Sir Thomas More was a Catholic, Bishop Latimer was a Protestant. Both were executed, because both conscientiously objected to certain religious beliefs. They gave their lives for freedom of conscience. We know to-day, judging events in the light of historical experience, that they were executed because the State of the time, as represented by Henry VIII and Mary, knew that its whole foundation was destroyed if it allowed the liberty these men claimed. Yet in their death they triumphed. They destroyed the claim of the State to decree the religion of men.

It is a great privilege to be living at a time when you can be called upon to testify to your faith. It does not come to every generation. It has come to this generation of young men. Francis Meynell, speaking the other evening at the Herald Reunion, mentioned the French poet of some five centuries ago, who considered that it was a perfect miracle that he should be living at the same time as the woman he loved. We, who are living to-day between the ages of 18 and 41, should also regard it as a perfect miracle that we have been adjudged worthy to make this stand for freedom of conscience and liberty. What matters it that the powers that be bully, chain, and imprison the body, what matters it that seventeen young men stand on the brink of the grave across the English

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Channel? Those who are in authority cannot destroy the soul.

For what is death, after all? It is a mere falling to sleep, a passing over, a dissolution of the soul from this physical body, leaving it free to continue onward in its path of development towards the divine. And if in dying one leaves behind the thought of liberty, of freedom of conscience, to germinate in the minds of men, one knows that like the grain of mustard seed, it will bring forth a noble and glorious tree; it is a miracle that we are privileged to testify to to-day.

We have not sought the battle, but the issue is joined. Let us enter the fight with no hatred in our hearts. Those who oppose us are acting through blindness. They walk in the darkness. Ours is the high mission, of which, let us hope, we may prove worthy, of showing them the way to the light. Let us each be animated, let us pray that we may be animated, with the spirit of Francis Sheehy Skeffington, who met death with a smile on his lips, and whose last words were: "They will find that my death was a mistake."

To few of us will be given the privilege given to Sheehy Skeffington of approaching so near to the Master-Christ. "Father, forgive them, for they know not what they do." But we have the privilege to stand for our faith. Let us not falter, let not bodily pain, social ostracism, loss of worldly goods stand in our way. Let us go on to the end: *John Scurr*—"New India", 23-6-1916.

No. 6:—PRUSSIANISM IN INDIA.

It is a well-known fact that in India we live hemmed in on all sides by repressive measures. The Press Act, the Seditious Meetings Act, the Official Secrets Act, the Defence of India Act, not to mention several despotic measures of early days—potential of mischief and capable of retarding democratic progress—are all there in the hands of a powerful Bureaucracy to be used as it thinks fit. That time and again they have been made use of we are all aware; we also know how they tend to terrify people; and make them behave as if their very souls were not their own. These iniquitous measures in the hands of people with vested interests of their own, naturally assume a shape and a form all too ghastly for the children of the

soil, and day and night exert a baneful influence over them, engendering at once fear and hatred. It was Sir Pherozeshah Mehta, who, in his own charming manner, described this well armed Anglo-Indian Bureaucrat, so far back as 1893, in these terms:

"Among the many delightful and inimitable delineations of typical character immortalised by Dickens, many of you, perhaps, remember the faithful portraiture of Sir Joseph Bowley, the Poor Man's Friend and Father. You remember, gentlemen, how Sir Joseph discoursed on their respective duties: 'Your only business, my good fellow, is with me. You need not trouble yourself to think about anything. I will think for you; I know what is good for you; I am your Perpetual Parent. Such is the dispensation of an all-wise Providence. . . . What man can do, I do. I do my duty as a Poor Man's Friend and Father; and I endeavour to educate his mind, by inculcating on all occasions the one great lesson which that class requires. That is, entire dependence on myself. They have no business whatever with themselves.' Now, gentlemen, can there be an apter description of the Anglo-Indian bureaucrat after his own heart than as the exact counterpart of Sir Joseph Bowley in relation to the poor Indian—the poor Indian's friend and father?"

Armed with all the repressive measures this omnipresent prop of all Indians, of masses as well as the educated classes, is finding his philanthropic job rather tough. He is beginning to find that his weapons are of an antique nature suitable for a museum of curios, but impractical and inefficient for the fight of the day. And yet, the conservatism and muddling through quality of John Bull perpetuates the same mistake over and over again. As if the Prussianism already woven in the fabric of the Indian administration is not enough, Englishmen belonging to the Anglo-Indian caste rigidly go after more repressive Acts. The War has brought the Defence Act into being, and all know to what use it is being put. Censorship was introduced, and who is not aware by now of the prerogatives it has bestowed on the Indian public! But the Madras organ of Prussianism is not satisfied with all these. It wants something more; it wants the Government to "compile a list of neutral papers admissible into India and prohibit all others". The Indian public

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is served with censored and belated news telegraphically, and now it is desired that post news should be cooked for us. Just like Sir Joseph Bowley! One has to ask where is the trust which the changed angle of vision is said to have brought into being? In these times of War, when Great Britain is fighting its battle of life, and when its very position in the European world is threatened, in this vast land there is peace and quiet; there has not been a single riot or disturbance; save for the few cases of anarchy, the country is going on with her business as usual; 300,000 of her sons are fighting the Empire's battle and yet the Anglo-Indians want repressive measures? When the mother country is waging War against Prussianism, are her sons in this land to fall a prey to it? We hope the insidious suggestion will be left unnoticed.—*"New India,"* 29-6-16.

NO. 7: THE LATEST POLITICAL CRIME IN CALCUTTA AND ITS MORAL.

BY BIPIN CHANDRA PAL.

The latest political outrage in Calcutta has called forth the usual protests from the Indian, and the familiar threats of greater and wider repression from the Anglo-Indian Press. But neither will help the situation. There is, really, a growing feeling, specially in official and Anglo-Indian circles, that whatever may be done, these outrages cannot be stopped. The experience of the last eight years seems, indeed, to justify this despair. Repression has been tried, and though the cry in the Anglo-Indian Press is for greater repression, even the Anglo-Indian publicist seems clearly to have lost faith in his own panacea. Commenting upon the assassination of Superintendent Basanta Kumar Chatterji, the *Statesman* says: "The anarchist is the master of the situation, for he can murder when he pleases"; and even this Zubardust and heroic Anglo-Indian organ does not hesitate to say that "it is a great deal safer to be an anarchist than to be a Policeman". The *Englishman* also strikes the same note of helplessness. It wants, of course, more repression, but at the same time it is forced to confess that, all previous measures notwithstanding, "a very disquieting feature of the situation is that this gang is receiving new recruits every year and for all that is known to the contrary, spreading its in-

fluence wider and wider afield." And the writer finally consoles himself with the idea that the difficulty of controlling the young men who furnish fresh recruits to the revolutionary propaganda "must be somehow got over". The *somehow* shews more faith than knowledge. And if it does not mean utter despair, we do not understand what it means at all.

Despair a Hopeful Sign.

This despair-might, in itself, be a hopeful sign if there was behind it any desire to go beyond the familiar bureaucratic diagnosis and treatment of these revolutionary crimes. The bureaucracy admittedly do not know how effectually to check this evil. The Anglo-Indian publicist knows no more nor better than his official friend and patron. Yet neither will confess defeat, and frankly take counsel with the leaders of the people, who, though not in any way identified or associated with this revolutionary propaganda, have yet an inside view of its psychology and environments more than is possible for either the Anglo-Indian official or the Anglo-Indian publicist.

What does it signify?

A very marked change has come over the whole community. This so-called anarchist propaganda is only a small and insignificant manifestation of this change. The bureaucracy sees the sign. The Anglo-Indian editor or leader writer recognises the outer result. But neither care to search for the thing which these signify. And so long as they have not been able to do this, so long the situation will be bound to remain what it is, and even grow from bad to worse day by day.

No Sympathy.

We do not sympathise with these murderous outbursts. We have protested against them all these years. No reasonable Indian politician or publicist, to whatever school he may belong, has ever either publicly encouraged these crimes. In fact, the Indian politician occupies a very queer, and possibly an unenviable position in this matter. He is trusted neither by the Government nor by the revolutionaries. The Government do not take counsel with him with full frankness and in perfect confidence.

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The revolutionaries never come near him, except perhaps as in absolute incognito, and in connection with some open and public business. But yet he knows, not the men, but the situation in the country which is really responsible for the birth and growth of this revolutionary movement. And knowing this situation, he knows its remedy also better than anybody else.

Change in the People.

In the first place, a very serious change has come over the character and temper of the people. Even the *Englishman* has noted it. The case of the late Superintendent Basanta Kumar Chatterji proves it. Two previous attempts had been made upon his life, once at Dacca, and the next time at Calcutta, when a bomb was thrown into his house last year. On both these occasions he had a very narrow escape. His family, naturally, did not like that he should risk his life any more by continuing in the public service. But as the *Englishman* says, "although he himself knew well that he carried his life in his hands, that assassins lurked in corners waiting their opportunity, he pursued his task with that quiet, unflinching heroism which is the characteristic of the best Bengali Policeman". The italics are mine; and they bear no small testimony to the birth of a new spirit in Bengal. The old estimates of Bengali, and for the matter of that, of Indian, character—drawn from or inspired by writers like Macaulay—must be re-cast and re-considered in the light of these new revelations. Whoever had heard before of "the quiet, unflinching heroism" of the Bengali gentleman class! In courage, pluck, devotion to duty, the Bengali police-official no longer suffers in comparison with his European superior or colleague. In fact, but for the consciousness that the honour of their race and the reputation of their people for courage, pluck and devotion to public duty were in their keeping, many of these Police Officers would have resigned their service and gone to private life. It would be doing a serious injustice to these brave officers if we thought that it was only their pay and prospects that tempt them to stick to their guns under these perilous conditions.

Consider, again, the conduct of the assassins themselves. There was a quiet

and even courageous determination in the way they went about their criminal business. Evidence of eye witnesses shows that there was not the least trace of nervousness about them. Having killed their victim they quietly walked away, in almost broad daylight, crossed a big thoroughfare without breaking their line, only once or twice firing blank volleys to scare away any one who might try to catch them. Heroism may, according to some people, be too noble a word to apply to men guilty of such ignoble assassinations, but that there was a kind of courage, in any case, an utter disregard of personal consequences even in these criminals, cannot be denied. This recognition does not condone their crime: this courage in no way takes away from the suicidal folly and cruel inhumanity of their acts. But it is essential to recognise it for a right understanding of the present situation.

Whence comes this determination?

And to the statesmen called upon to solve this problem of political criminalism in this country, the most important question is whence do these youthful revolutionaries derive all this dare-devil determination of theirs? What is the origin of this new courage in them? They are not ordinary criminals. They are not hardened criminals. They have had no training in crime such as creates the hardened murderer or assassin. Not one of the young men who have been responsible for these political murders has so far been detected, since the first attempt upon Mr. Kingsford's life at Muzaffarpore which miscarried and killed two English ladies. So we have had no opportunity of getting any insight into the personal temper and character of these people. But the boy, who killed the Kennedy ladies, was, on the testimony of all those who knew him, anything but a hardened criminal. Those who have followed him since in this criminal propaganda, also do not seem to be ruffians in the common acceptance of the term. Whatever else they may or may not be, it is impossible and it would serve really no purpose—to deny that they are idealists of a type. Their idealism does not condone their criminality but rather, perhaps, adds to it

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but the idealism must be noted and recognised in the consideration of any effective measures for checking their criminal activities.

Misguided Idealism.

When any one is driven to commit any crime under the inspiration of some sort of idealism, however misguided it may be, people generally pity them, but are not moved by any spirit of revenge or even retributive justice towards them. People do not approve of the crime of the man who avenges his honour by killing a faithless wife or a treacherous friend, yet all the same, they pity the criminal. The same feeling possesses the populace when they stand face to face with political crimes committed by youthful and misguided idealist. They know that these young men come fully prepared for sacrificing their own lives in the discharge of the work entrusted to them. The gallows have absolutely no terrors for them. To send them to the gallows would not hinder but, on the contrary, very materially help their criminal propaganda. This has been the universal experience of history in these matters. Those who are already in sympathy with this criminal propaganda will not be cowed down by their chastisement; but will rather look upon their punishment as martyrdom and draw fresh inspiration from it for carrying on their work; everybody except the official machinist and the purblind publicist understands all this. Everybody knows and feels that repression and punishment are not the right remedy for this evil. And this makes the work of suppressing this criminal propaganda by relentlessly punishing the revolutionaries so difficult and well-nigh impossible for the Government.

Other Weapons Necessary.

This revolutionary movement must be fought by other weapons. However misguided these young men may be, and however we may condemn their criminal activities, we must, if we are to cure the evil for which they are responsible, first of all recognise them as political offenders, moved by the desire to see their people occupying their legitimate place in modern history and politics. The Government

and the general public should acknowledge that the ideal they hold has in itself nothing wrong or criminal. And if this is done, half the battle will be won. It will give a common basis of mutual understanding between the party of constitutional progress, which has after so many years been openly recognised by the Government, and that of revolution. We shall then be able to convince these young men of the folly and futility of their ways. And if the Government will publicly accept Swaraj, or Home Rule, as the ideal objective of our immediate historic evolution, and will not interfere with our legitimate and constitutional Home Rule propaganda among the rising generations of the country on the one hand, and on the other start those reforms that will give a practical assurance of our future National Autonomy inside the coming Federation of the whole British Empire, this problem, with many others, may find an easy solution. There is no other way.—“*New India*,” 8-7-16.

No. 8: AVE CÆSAR.

The following order was served on me to-day.

ORDER.—Whereas in the opinion of the Governor-in-Council there are reasonable grounds for believing that Mrs. Annie Besant has acted and is about to act in a manner prejudicial to the public safety.

Now, therefore, the Governor-in-Council in exercise of the powers conferred by rule 3 of the Defence of India (Consolidation) Rules, 1915, published in the Notification of the Government of India in the Legislative Department, No. 86, dated the 9th December 1915, is pleased to direct that the said Mrs. Besant shall not enter and shall not reside or remain in the Province of Bombay, pending the further orders of Government.

And the said Mrs. Besant is hereby informed that if she knowingly disobeys this order, she will be liable to imprisonment of either description for a term which may extend to three years and will also be liable to fine.

Dated this 29th day of June 1915.

By order of His Excellency the Right Honourable the Governor of Bombay in

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Council. L. Robertson, Secretary to Government.

This is the explanation of Mr. J. D. Jenkins' belated letter in the *Times of India*. Some justification was wanted for this Order of Exclusion, so he suddenly attacked a book sold in Bombay since December last. "The said Mrs. Besant" will not "knowingly disobey this order," because to do so would be the act of a maniac; on the contrary, she respectfully sympathises with the fear of the Governor-in-Council that she may prejudice public safety for it must be in very unstable equilibrium if it can be so easily disturbed.

I wonder it does not strike our rulers that they cannot stop the desire for Home Rule by showing how objectionable is Other Rule. The more they try to strike me, the more resolved does India become to win freedom from such tyranny. Lord Willingdon has been very slow; I was in the Bombay Presidency at Christmas, and was there for a couple of days in May. And this is July 10th! What a pity I did not go to the Press Meeting to say "Good-bye" to my Bombay friends. I would have gone, had I known this was coming!

I am sorry to see on the Order the Royal Arms: "*Dieu et mon droit*," "God and my Right"; that is more suitable on my lips than on those of the Bombay Governor-in-Council. There should be a new escutcheon, justice gagged, sable and gules and the legend: "My strong arm and your Wrong."—*Annie Besant*:—"New India," 10-7-16.

No. 9: BY WHAT IT FEEDS ON.

The injury done to a man's character by arbitrary and irresponsible power is the chief cause of the difference between the English and the Anglo-Indian. Both are of the same splendid stock, both come from a race that has lived and died, fought and suffered for Freedom. The Englishman comes here with all his brave and free instincts growing within him. He is given irresponsible power over other men, he is courted, treated with subservience by his elders and superiors because of that power, and he gradually deteriorates, and becomes the haughty, tyrannical Anglo-Indian. What Englishman could seek to check a

constitutional propaganda, to punish outspoken criticism? But an Anglo-Indian, not content with the exercise of the Press Act against Mrs. Annie Besant, and the threat of throwing her into gaol and fining her if she dares to step into Bombay Presidency, asks that her "publications" may not be allowed to use the mails! He wishes to revive the days in which his forefathers suffered for freedom of tongue and pen, when their ears were cropped off and they were pilloried for opposing unjust laws and royal tyranny. Such is the "sympathy," which answers our noble King-Emperor's pleading to Anglo-India. And these people are called "loyal"!—"New India," 15-7-16.

No. 10: INTERNMENT.

What does internment mean, this power which is in the hands of Governors-in-Council, and is strengthened by the Offence Act? It means that by a mere arbitrary exercise of power, any man or woman may be arrested and imprisoned within an area laid down in the *lettre de cachet*. No trial can be claimed: no evidence is published: no reason is given. The property of the victim is seized—a punishment reserved by the ordinary law for the highest crimes—he is rendered penniless, no communication may he hold with any friend that does not pass under the eye of an enemy. He is subjected to the grossest personal indignity, and has no redress. And all this degradation is inflicted on him at the arbitrary order of a small group of four men, who may be his personal enemies, who are his enemies in thought and belief. And we run the risk of this treatment if we dare to advocate reforms in the Government of India, which would give to Indians the justice and the liberty which the meanest subject of the Crown enjoys in Great Britain.—"New India," 19-8-16.

No. 11: AN OUTRAGE IN CALCUTTA.

No, good reader; not an assassination; not a dacoity, motor or other; not a bomb. But the arrest of a respectable gentleman, Babu Shyam Sundar Chakravarti, Assistant Editor of the *Bengalee*, without reason given, without notification of his offence, without chance of clearing himself; the

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Editor, Babu Surendranath Banerji's safe was also searched by the Police. The *Bengalee* bears witness to the blameless life of the burgled man; for four years, save for one day's illness, he has been in its office from 10-30 A. M. to 6 P. M. He was known to condemn unlawful movements, and none has a harsh word to say about him. The arrest is legal, doubtless, but it is truly unlawful, the breaking of the sacred Law of Justice which holds society together. When injustice is perpetrated, when crimes are committed legally, when innocence is no protection, and harmless men are treated as criminals, then we live in a condition of anarchy, no matter what legal sanction may cover the wrong-doer. "Civilisation" does not protect us; we should be better off in a state of savagery, for then we should be on our guard, we should carry arms, and protect ourselves. We are helpless, we pay taxes to be wronged.—*"New India"*, 20-7-16.

NO. 12. THREE WAYS TO HOME RULE.

"Forward" writes in the *Commonweal*:

The conviction is growing that the Indian public have been deceived by the talk of the new angle of vision. A feeling is slowly coming over us Indians that our loyalty, so much praised by statesmen of the type of Lord Hardinge, is looked upon by the Bureaucracy in this country as mainly due to our impotency and our servile position, and not as rooted in a genuine devotion to the British Raj. Much talk of what is going to happen to India after the War is on the lips of our administrators, and their actions in the present lend a colour to what awaits us. The unfair and unequal treatment meted out to us in all matters, important or otherwise, leaves no doubt in the minds of the educated classes of India. That our loyalty is misunderstood, that our capacity is undervalued, that we are given everywhere the position of a dependent and an inferior, that we are not trusted, is evident to all. The enthusiasm and willingness to co-operate and help the Government in fighting the enemy that existed at the beginning of the War, has almost vanished. The avoiding of discussion on controversial topics is no more possible, the Government themselves having broken

the arrangement. Repression has taken the place of clemency since the departure of Lord Hardinge, and observing and intuitive people feel the troublesome nature of the era that has dawned. People are reminded of Lord Curzon's days and already comparisons are being made. The unfair position assigned to India has roused our people to work for and claim Home Rule.

Difficult Times.

That we are living in strange and difficult times is patent. As Paine said of the Americans in the most crucial period of their history, we are living in "times that try men's souls." This is an age for heroes who dare to enter the arena of righteous warfare loved by the true Kshatriya of old, to whom according to the *Gita*, "nothing is more welcome." A calm reflection on a thorough observation of the events of the day convinces us that in these hours our history is being made, and will form one of the most glorious chapters in the already big volume. With a little effort our mind's eye can see the vision of the gods, who try men's souls as well as national destinies, presenting a glorious opportunity to this ancient land and its peoples. We can see how through suffering and endurance India is being prepared to take her legitimate place among the great countries of modern culture, not only for her own good, but to the benefit of European civilisation. Nobody believes now, as was the custom some 40 years ago, that India has nothing to give and everything to gain by coming into contact with western culture. Many things have made it clear, and the War has conclusively proven, that Europe, with all its boast of material prosperity, is devoid of that higher outlook on life, that spiritual point of view, which is essentially eastern. The War and the ways of warfare have shown that the cruelty of the Indian religion, who, as reported by the *Padre* and the missionary, sacrificed not animals but babies in his temples—a lie and a libel to be treated with contempt—is nothing, even if it were as true as it is false, compared to the cruelty which the Christian Nations of the West have displayed; the exaggerated and mainly untrue reports of

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gross immorality of the Oriental are surpassed in every way by the Occidental as proved by the cold statements of facts arrayed in the Report of the Royal Commission on Venereal Diseases; our submerged sixth do not live in the slum depravity of the submerged tenth of Great Britain; the much criticised low status of our women does not compare at all unfavourably with the status of English women according to English Law, nor our missionary-portrayed cruelty to our fair sex with the imprisonment and forcible feeding of their English sisters; while even the exaggerated picture of our polygamous habits is certainly superior to that presented by London and Berlin, Paris and Vienna, who allow their men each to have one wife and many mistresses. No sane man refuses to acknowledge that the West has something good and useful to give to us, but he sees clearly too that the East also has its own message to give to the younger West. It is clear to the thoughtful of both hemispheres that an inter-relation, an inter-dependence, between the various branches of our great Aryan race would result in peace and progress for the world.

VALUE OF INDIA.

India, if she would be allowed to live normally and naturally her life, enabling her to fulfil her own *Dharma*, would gladly help in the building up of the Aryan Empire. Without India the Aryan Empire is not possible. Very few of Great Britain's children see this because of their inherent nature, conservative and conceited; vested interests of her sons in this land drive out of them their love of liberty, and push them on to mean and undesirable ways of action; the dangerous results thereof are not allowed to be revealed to the great Democracy ruled by the Mother of Parliaments; those very traits of habit and thought going under the name of Prussianism, which the Mother-country is fighting against, are displayed with self-satisfaction and pride by her sons in India. Naturally, therefore, all efforts that Indians make to assert their own rights, to gain Liberty for the Motherland, to win Home Rule for themselves, are resented, and our opponents have recourse to repression and Prussianism. Without arms, without the vote, we find ourselves worse than

useless. We pay, and if we resent, we will be forced to pay, taxes, and we have no representation; if we claim it we must ask for it as a boon, a favour, and not claim it as a right. This humiliating position is being resented, and rightly so, by thousands of Indians to-day. A new spirit is abroad and we do not say with our fathers that we are helpless. We are beginning to realise that we are being treated unjustly and that there are remedies which can be utilised by us.

A Just and Righteous Demand.

The first thing essential for us to realise is that our demand of Self-Government within the Empire is a just and righteous demand. Therefore all sorrow and suffering that come in our lives because we are engaged in the work of demanding Home Rule must be bravely and cheerfully endured. Not only that, but as Freedom is not easily gained for the mere asking, as opponents have to be encountered and overcome, it is but reasonable that we should expect everything from simple browbeating to ghastly repression. We must keep clear the conviction that ours is a holy cause and that, therefore, victory is assured, triumph is certain. It is only a question of time.

Unity is Strength.

Secondly, we must realise that unity is strength. Our opponents know this and, therefore, have followed in the past, as they are doing now, the principle of "Divide and Rule." Against the attack we must hold the shield of "United we stand," and not forget that "divided we fall." Much nonsense is talked about Brahmana oligarchies and Muslim autocracies. I am a non-Brahmana and I would say: "Better a Brahmana Bureaucracy than an Anglo-Indian Bureaucracy." I am not a Muslim but I have no hesitation in affirming: "Better a Muslim Oligarchy than an Anglo-Indian Bureaucracy." If we are to be tyrannised and lorded over, better that Indians do it—be they Brahmanas or Muslims—than that foreigners do it. But all that talk is over-exaggerated, and interested parties and their organs only utilise it in their own interests. If the Anglo-Indian Press attack Brahmanas as against

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non-Brahmanas and allow some of the latter class to rail against the former, it is done not at all in the interests of non-Brahmanas, but for the sake of Anglo-Indian self-preservation and self-aggrandisement. Indians, remember it: it pays the bureaucrat and the Anglo-Indian, whatever his sub-caste, trader, missionary, or administrator, to throw the apple of discord into the midst of a friendly gathering of Hindus and Muslims, Brahmanas and non-Brahmanas, Hindus and Indian Christians, Eurasians and Indian Christians, etc. "Divide and Rule" has been well observed by the ruling hierarchy in this hapless land, as Captain Gorvais Lyons pointed out (*Afghanistan*, published by Messrs. Higginbotham, Madras, "with the official sanction of the Army Council"), and we are traitors to our Mother and her peace and prosperity, if we allow these aliens' pranks to mar the harmony of our corporate life and labour.

Leave off Cringing.

Thirdly, have courage and leave off all cringing. Even our polite ways and manners are misunderstood. Even our happy disposition of not speaking unpleasantly has earned for us the title of "liars". Political petitioning and praying should be abandoned. Let us realise that it benefits Great Britain to have India, as much as it benefits India to have the British connection. The British Empire without India would be a farce; with Indian resources fully developed the Empire would be safe from all peril from without, as it would not be otherwise. The great minds of the Empire are seeing that even now. They recognise that if the advice of our National Congress had been followed, there would not have been this awful War, for Germany would not have dared to hurl itself against the ready millions of this land. Therefore, as Indians, let us recognise our own value and importance. This engenders self-confidence and that we require to a great extent. We are citizens of no mean country; our past history and achievements are no less glorious than those of other people; our present is not one of which we need to be ashamed; we are not perfect, but then neither is England nor France nor Germany nor America; if we have done what we have done under the existing state of things, just consider what

we might not have attained to if, like Japan, we had been free for only 50 years. Therefore let us have self-confidence and stand on our own feet and courageously demand our due and work hard to get it—and success is ours.

We want an ideal for our daily work; no better one exists than that which is presented in the *Bhagavad-Gita*. For constitutional fight, along safe lines, by law-abiding methods, there is no teaching so valuable and inspiring as that which the *Gita* yields. Do not look upon it as a Hindu scripture, but accept it as the National Song of India. I am not a Hindu but I have found in it inspiration to love and labour for the Motherland, and in this age of ours the common national cry should be—do not, once again, look upon it as Bengali or Hindu, but as Indian—*Vande Mataram*,—Worship the Mother.—*"New India"*, 24.7.16.

No. 13: BAL GANGADHAR TILAK.

A wave of anger will pass over India when the people hear that this great martyr of the Motherland is again in the toils of his enemies. His going abroad to carry on his suit against Sir Valentine Chirol had been announced. Maharashtra was celebrating his birthday, and had given him a birthday present of a lakh of rupees. Lord Willingdon sends him a birthday gift of a demand for security bonds of Rs. 40,000 against sedition. What chivalry and good taste are shown in thus breaking into the birthday festivities.

What is the object? To save Sir Valentine Chirol from being brought to account? Else, if the Bombay Government think him a preacher of sedition, why not rejoice to get rid of him out of the country? He could not preach sedition to India from England.

Mr. Tilak is to show cause why he should not be bound over to be of good behaviour for a year in a sum of Rs. 40,000. On the merits of the case our mouths are closed until after the hearing on Friday, but as "orally disseminating sedition" is the charge, and the Magistrate is asked to bind over Mr. Tilak to be of "good behaviour," we may quote the sections of the *Penal Code* and of the *Code of Criminal Procedure* which define sedition and the procedure

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adopted, so that the public may follow the case intelligently. Section 124A of the *Indian Penal Code* runs:

Whoever, by words, either spoken or written, or by signs, or by visible representations, or otherwise brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India shall be punished with transportation for life, or any shorter term to which fine may be added, or with imprisonment which may extend to three years to which fine may be added, or with fine.

Explanation 1.—The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

(This is apparently introduced in order to define “sedition,” as there is no question of any prosecution.)

Section 108 of the *Criminal Procedure Code* enables a Magistrate of a certain rank to require such person to execute a “bond for good behaviour” for not more than one year, with or without sureties. Section 112 only directs the form of the order. All India will watch the events of Friday with the deepest interest.

What will be the next action of Government? One action which shocks the people comes after another. First it is the *New India* security; then the order of exclusion against Mrs. Annie Besant; then the arrest of Mr. Shyam Sundar Chakravarti; then this attack on Mr. Tilak; and to-day some arrests of wealthy Marwari gentlemen. And all the time in Bengal, internments of smaller folk go on, every one of which means keen suffering inflicted on some helpless family. And all for what? Because the Government cannot govern well

enough to make the people contented, but wants to prevent a whole Nation from discussing its own affairs. Where is all this to end?—“*New India*”, 25-7-16.

No. 14: EDUCATION AND NEWSPAPERS

We have been reading a report in the *South Indian Mail* of a speech by the Hon. V. S. Srinivasa Sastri, in which he strongly objects to the intervention of newspapers in educational disputes. He said broadly that “any newspaper agitation was wrong, if it was against the examiners, professors, teachers, or against the University.”

That is a most extraordinary position to take up. Any abuse is to be allowed to continue, rather than that a newspaper should draw attention to it! A newspaper is expected to publish a report of a Senate meeting, but must not comment on that which it reports. Even if the education of Indian boys were in Indian hands, Mr. Sastriar’s position would be impossible; but when we remember that they are in the grip of foreigners, who impose upon them a crushing curriculum in a strange language, who force them to specialise at an age when their natural bent is not discernible, who have no regard to their miserable poverty, nor try to improve their indecent and insanitary surroundings, and who, when professors or teachers, often treat them with the greatest rudeness and address them in the most insulting terms—when this is the present condition of affairs, it is only the feeling that some sympathy is to be found in the press that saves the students from despair.—*New India*, 17-8-16.

LIONEL DAVIDSON,

Ag. Chief Secretary.

25-8-16.

Mrs. Annie Besant (with Mr. Ramaswami Aiyar).—The order of His Excellency the Governor-in-Council is that all issues of “*New India*” wherever found are to be forfeited to His Majesty. That meant all issues of “*New India*”, past and future.

[ABDUR RAHIM, OFFG. C. J.—Does it say ‘all issues of “*New India*”, past and future?’]

Mrs. Besant.—The words are ‘all copies of such newspaper wherever found,’ but not a single copy has since been seized.

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No article contains words, signs or visible representations of the nature described and the order is illegal, because it purports to forfeit not only a particular article or articles which the Press Act allows, but also all issues of "New India" wherever found, and there are no grounds for doing any of these things. There are six reported cases in all since the Press Act was passed in 1910, and only five of these are really of any use at all. About 220 newspapers have been forfeited under the Act. The first case is *Mahomed Ali v. Emperor* (2). It is important inasmuch as in that case Government exercised all its powers and it was held that, although an illegality had been committed, there was no power to remedy the illegality. The next case is *Abul Kalam Azad, In re* (3). There was no argument at all in that case. The gentleman concerned lived at Delhi, and the case has been struck out. We then come to 22 Indian Cases.* It is the case of a Magistrate's order and the Court had granted a Rule to show cause why the Magistrate's order should not be set aside. The order was by the Chief Presidency Magistrate to give security for certain publications. The gentleman concerned was the registered proprietor of the Press and he said that he was not liable, being registered keeper of the Press, to give additional security for publications which he had made under section 8, proviso 1. The Magistrate did not name any section of the Act under which he acted. The Court said that the Magistrate must have acted under section 8 because there was no other section under which he could act. It assumed that he had so acted. Their Lordships held, supporting the case of *Mahomed Ali v. Emperor* (2), that the order was not revisable by the High Court in spite of the proviso under section 8. The Court appeared to be, as was the Calcutta Court, paralysed by section 22. They held that the Executive had absolute power even outside the Act. That

is a case which is really against me. The Punjab Chief Court case [*Ghulam Qadir Khan v. Emperor* (4)] is the forfeiture of the Zemindar Press. There was forfeiture of the first security, and then the second security, Rs. 10,000, was put in, and the second security and the Press were all forfeited together.

In my case several articles have been charged. In the Punjab case there were only four articles published in July and August 1913. The trial was in July 1914. The articles were very violent in language, written when the public was very much excited with reference to the Cawnpore mosque. I find that the special words charged were "The Lieutenant Governor was a mosque-breaking Lieutenant Governor." He was also called the President of the Inquisition and it was said that he was fit to be the despotic ruler of the Tartar capital. Then the August articles were written while fighting was going on in the Balkans and the case against Muhammad Ali was *sub-judice*. It attributed disgraceful motives to Government and great exception was taken to the article while the case was pending in Court. The Court refused to cancel the forfeiture. The Court held it had power, but that the forfeiture was justified. In *Ghulam Qadir Khan v. Emperor* (4) the petition was against forfeiture of Rs. 10,000 and the Press, and in that case there were very strong comments on the indignity shown by Government to 70 millions of Muhammadans by its refusal to receive a deputation. It was held to come within the Act but that the Court had power to set aside orders under section 6 as a whole, though it could not vary it. *Amar Singh v. Emperor* (5) related to the forfeiture of the *Loyal Press*, Lahore. Only one article was charged. The argument is not given and the report gives only the judgment. From the judgment it seems that the Judges asked the Government Advocate to specify the passages complained of. It was admitted that he was not obliged to do it, but the

(2) 20 Ind. Cas. 977; 41 C. 466; 18 C. W. N. 1; 14 Cr. L. J. 497.

(3) 30 Ind. Cas. 746; 42 C. 730; 16 Cr. L. J. 698.

*See *Jalaluddin v. Emperor*, 22 Ind. Cas. 721—*Ed.*

(4) 24 Ind. Cas. 581; 211 P. L. R. 1914; 37 P. W. R. 1914 Cr.; 15 Cr. L. J. 493; 28 P. R. 1914 Cr.

(5) 29 Ind. Cas. 827; 15 P. R. 1915 Cr.; 33 P. W. R. 1915 Cr.; 16 Cr. L. J. 555.

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Judges said that the applicant would suffer an unfair disadvantage, not knowing what he had to answer. It was said that the articles were misleading and unfair and that they gave an inaccurate account of the *Komagatu Maru* riot. Other articles of the paper were admitted under section 20 to show the tendency of the article charged, but it was said that they did not bear on it or on the incriminating portions. There was no parallel between that case and the curious trivial set of extracts which are given in this case. Mine is the first case in which there is a trivial collection of odds and ends swept up together to justify forfeiture, that forfeiture leading to a heavier security and complete forfeiture of the Press through the Press Act.

[The Chief Justice asked the Advocate-General, if he could, to facilitate arguments, specify the clauses of the section under which the various extracts came.]

[The Advocate-General said that Extract No. 1 came under section 4 (1); Extract No. 2, under clauses (a) and (e); Extract No. 3, under clauses (c) and (e); Extract No. 4, under clauses (c), 2nd part of (a) and (e); No. 5, clauses (a), (c) and (e); No. 6, clause (c); No. 7, clauses (a), (c) and (e); No. 8, clause (c); No. 9, clause (c); No. 10, clause (c); No. 11, clauses (c) and (e); No. 12, clauses (c), (a) and (e); No. 13, clause (c); and No. 14, clause (c).]

Mrs. Besant.—In *Mahomed Ali v. Emperor* (2) Jenkins, C. J., held that section 22 bars all jurisdiction except the jurisdiction of the High Court. He points out that the onus of proof is on the Counsel for the applicant, not on the Government, to prove innocence. The Counsel retorts that while that is so, he is embarrassed. The onus is really on the Judges to decide.

A notification is essential to the action; without the notification, the action should not have been taken.

I have classified the articles which come under one or more of the different heads. No words are given in my case "of the nature described" as laid down in the Press Act. It cannot be pretended that all the words are "of the nature described."

[*ABDUR RAHIM*, OFFG. C. J.—Will it not be unfair to give only words that are violent and leave out the others?]

Mrs. Besant.—In order that the applicant might suffer no unfair disadvantage the words "of the nature described" should have been given. I shall argue that those words did not contain words of the nature described.

[*ABDUR RAHIM*, OFFG. C. J.—It might be easy for the other side to point out what words are objectionable, but there may be other words which modify the meaning of those words and in that case it would be hardly fair to omit to mention them. In that case, you are in a better position.]

Mrs. Besant.—I am quite content but the difficulty is that I do not know exactly what I have to meet. It is exceedingly vague at present. To multiply a series of pick-pocketing is to prove burglary, and to pile up a number of misdemeanors is to prove felony. That seems to be the attempt of the Advocate-General.

[*ABDUR RAHIM*, OFFG. C. J.—The action is yours.]

Mrs. Besant.—By the words of section 17 I am entitled to raise any question of jurisdiction or validity of the order which leads up to the forfeiture. Jenkins, C. J., held that a notification was essential for the action and he decided finally that the notification was illegal. A simple re-statement of the words of the section cannot furnish anything in the shape of grounds. Again the direction under the section is mandatory. The imperative requirement that the Local Government should state the grounds of its opinion is intended to be a check on the powers of forfeiture vested in the Local Government. Sir Herbert Risley laid stress on this safeguard of appeal to the High Court. The statement of grounds might for another reason be an essential part of the Legislative scheme. It might help the Court to perform its duties under section 17. The notification, therefore, in my case appears to be defective in a material particular. Hence there has been no legal forfeiture. Section 22 of the Act, however, provides that the declaration purporting to be made under the Act is conclusive evidence that the forfeiture

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therein referred to has taken place. The question of the legality of the forfeiture can still be taken by the Court.

[SESHAGIRI Aiyar, J.—The Chief Justice distinctly said that the whole notification may be illegal but the Court had no power. Section 17 is the only ground on which an application may be made.]

Dealing with the question of jurisdiction, he says "the notification is not according to law. Looking at the section as a whole the grounds of the opinion are mandatory and not directory." In that case they claimed that they had power to revise a Government order to a certain extent, "I cannot hold the notification void in such a way as to deprive us of jurisdiction. If our jurisdiction under section 17 is taken away there is no other remedy open to the person whose property is confiscated. We are depriving him of the only remedy that the law provides." I venture to submit that is a very strong argument. If an Executive Government which confiscates property can, by its own doing, leave out the grounds, and the Court can do nothing, there is no need for the paraphernalia of a Special Bench.

The judgment of the Calcutta High Court comes to this: you cannot challenge the forfeiture; that is protected by section 22. Any words may be brought within the purview of the Act. The words of the Act are so wide that it can be stretched to any point. Judge Stephen said that we must not even bring into hatred or contempt people who embarrass Government by murder or robbery. It makes the whole position fairly impossible for any newspaper to be published. Some other explanation must be found for the Press Act which would not render the whole legislation absurd and against all common sense. The statement that the Chief Justice makes is: "He could not interfere with the decision of the Executive. The Government may be in possession of information which may be impossible for them to declare." That view of discretion is not one that can be brought forward in dealing with the Government. The discretionary powers should not be interfered with in the absence of bad faith but the Executive

must not be permitted to act capriciously. He says that he has not the ability to question the wisdom of the Executive.

Mr. Hardly Norton began by quoting Sir Herbert Risley as throwing light on what was meant by hatred and contempt in the Act and, therefore, he was allowed reference to the *Gazette of India* which contained speeches, and he pointed out that they showed the atmosphere in which the Act was passed which may throw light on the kind of class-hatred contemplated and they all referred to it. The Advocate-General referred to the preamble of the Act. They are referred to in course of the argument. That point is important as regards history. The enactment was passed in an atmosphere of assassination.

[ABDUR RAHIM, OFFG. C. J.—The Calcutta Court does not say that the speeches can be taken into account in construing the Act.]

Mrs. Besant.—All the safeguards promised have been swept away and the Government promised to use the safeguards. Under these conditions the Act was passed. As matters stand there are no limits of law within which newspapers can be conducted. It is difficult to carry on the daily work and to understand the limits within which to keep. That which is safe in Bombay entails forfeiture here. It depends on what Government you are under. This is very embarrassing to the newspaper Editor. There is also the difficulty as regards the class of paper in the same Presidency. This is the second objection. An Anglo-Indian paper, as it is generally called, can publish a matter which a pro-Indian paper is not allowed to answer.

If the Government cannot give us the safeguards they are illusory. There is also a judgment of the Punjab Court on the question of jurisdiction. The Calcutta judgment is not binding on Madras.

Coming to the question of construction the Court must construe an act rationally and in consonance with other statutes and also with natural justice. A penal statute, which this is practically, must be construed in the way most favourable to the accused. In a law where penal consequences come in, any act which would render the whole subsequent proceedings illegal would make it null

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and void. A doubt arises in my mind as to whether the action here is civil or criminal. Going against the Magistrate's order must be in the nature of a petition for revision. I have both the Public Prosecutor and the Advocate-General against me. The Press Act is one of those statutes which bring about penal consequences. Seizure of property is one of the highest punishments. The strict construction of a statute requires that the language should be so construed that any case should fall within the reasonable meaning of its terms and the spirit and scope of the enactment. Where an enactment entails penal consequences, no violence must be done to the language so as to bring people under it.

This action is a link in the chain and does not stand alone. It leads distinctly up to a further forfeiture of actual money, a loss of over 2½ lakhs of rupees. Where such heavy consequences are involved, a very great strictness of construction should be used in the preliminary step. Where by an Executive order a huge forfeiture is brought about, and when it is realised that the power of revision is lodged in the High Court in order to prevent injustice being done by an Executive action, the public ought to have the assurance that it is the law that decides, that it is not a case of passion acting, but a decision of the Judges of the High Court. The powers of the High Court are very seriously involved in the action that it takes in this case. We have got the Government of India Act which practically includes the Charter Act. Section 39 says that, as regards power of appeal, there is a right of appeal to the Privy Council. This, as a matter of fact, involves that possibility, and is only a link which leads to a most crushing forfeiture which can only be inflicted by a Court of Justice. If Madras confirms Calcutta in holding it has no power, that the Court can declare the action illegal, but that it is powerless to interfere, the whole traditions of the British Courts, which used to stand between an injured subject and the Executive, will be lost to us. It is sometimes said in defence of this action that it avoids difficulties in the way of long drawn-out trials so that seditious words

may not have publicity given to them. But it is impossible to think the intention was not only to get rid of long drawn out trials, but to get rid of all powers which could stand between the person attacked and the Executive and deprive the aggrieved of any remedy so as to enable the Executive practically to seize all property at its will and pleasure without any reference to a Court of Law.

I now come to the ground of vagueness. There are 20 extracts under five heads. This multiplicity of articles contravenes the principle laid down by the Privy Council in *Sabrahmaniam Ayyar v. King-Emperor* (6).

[SESHAGIRI AYYAR, J.—That is on the special section of the Criminal Procedure Code.]

[ABDUR RAHIM, OFFG. C. J.—That was an irregularity, but there is no question of any irregularity before us.]

Mrs. Besant.—There are words in that judgment which indicate that a multiplicity of charges is embarrassing. The Lord Chancellor points out that the accused was charged with no less than 41 acts, and he says that the reason for limiting the number of charges, as in an English Court, is in order, obviously, that the Jury may not be prejudiced by the multiplicity of charges, and that it causes embarrassment both to the Judge and the accused, and would interfere with definite proof of distinct offences. The policy of such a provision is manifest. The necessity of a system of defining a criminal offence is, therefore, evident. No such accurate definition has been given of my offences. A hasty putting on of parts of section 4 (1) under the various clauses (a) to (e) does not give me the protection that I ought to have had.

The beginning of these proceedings, namely, the order of May 22nd by the Chief Presidency Magistrate to deposit security before him is illegal. There I have to meet section 22.

[ABDUR RAHIM, OFFG. C. J.—Does a difficulty lie there?]

Mrs. Besant.—That protects an Executive order, but it cannot oust the jurisdiction of the High Court for all criminal proceedings.

(6) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 L. A. 257 (P. C.); 2 Weir 271.

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[ABDUR RAHIM, OFFG. C. J.—There you are mistaken. Whatever power we have under this Act must be found within the four corners of the Act.]

Mrs. Besant.—It is possible that an act of the Legislature may have power to bar a suit against an Executive officer for a wrongful act, but it has no power to bar action which is intended to set aside a judicial action.

[ABDUR RAHIM, OFFG. C. J.—Do you mean that we are not barred under the Charter Act?]

[SESHAGIRI AIYAR, J.—We have to read sections 17 and 22 together.]

Mrs. Besant.—Supposing that the Magistrate imposes the security on me by a mistake and that is forfeited by the Local Government, am I barred from going behind the forfeiture to the illegal imposition of the security by the Magistrate? I submit that that cannot be the meaning of section 22.

[AYLING, J.—The question is whether you can go to that point in a petition which is under section 17.]

Mrs. Besant.—It has reference to sections 4 and 3 which will make us see that it does come. Suppose it is held that section 22 bars me, I say that the section itself is *ultra vires*. There is no power in the Legislature to make it. It ousts the jurisdiction of the High Court.

[SESHAGIRI AIYAR, J.—Do you mean that the Governor-General had no power to pass this section?]

Mrs. Besant.—Yes, if it is intended to prevent such interference.

[AYLING, J.—Section 22 may be *ultra vires*, but not section 17.]

Mrs. Besant.—The whole of the Act.

[SESHAGIRI AIYAR, J.—Do you apply under section 15 of the Charter Act? If you put in your petition under the Charter Act in view of our powers under that Act there may be some meaning. If the petition is under section 17 of the Press Act—]

[ABDUR RAHIM, OFFG. C. J.—You are petitioning under section 17 of the Press Act and if you want us to exercise powers under the Charter Act, you have to put in a proper application.]

Mrs. Besant.—I have a petition which will be pleaded by my Vakil as a criminal revision petition in the ordinary jurisdic-

tion of the Court. On some technical grounds it was returned to me and it is still pending.

[ABDUR RAHIM, OFFG. C. J.—This Court is constituted specially under the Press Act and we cannot hear that petition.]

Mrs. Besant.—I presume that it is within Your Lordships' power to hear that petition. The points are the same.

[ABDUR RAHIM, OFFG. C. J.—This Bench cannot hear it. We have to constitute another Bench for hearing a petition under the Charter Act.]

Mrs. Besant.—Even that will hardly deprive the High Court of its inherent powers of putting an end to forfeitures.

[AYLING, J.—We are dealing with a petition under the Press Act. In these proceedings we cannot go to the question whether the section with which we are dealing is legal or illegal. That ought to be done independently.]

Mrs. Besant.—I shall be obliged to raise it presumably in the other.

[ABDUR RAHIM, OFFG. C. J.—This is a specially constituted Bench but you can raise it and this Bench may be re-constituted as an ordinary Bench and then you can argue that matter.]

Mrs. Besant.—The Press Act as a whole?

[ABDUR RAHIM, OFFG. C. J.—You had better now restrict yourself to section 22. Is it an old Press?]

Mrs. Besant.—Yes, I say it in my affidavit.

[SESHAGIRI AIYAR, J.—You say that when you purchased the *Madras Standard* and gave a declaration, you ought to have been asked to deposit security.]

Mrs. Besant.—Yes.

The Advocate-General.—There is a proviso.

Mrs. Besant.—I am going to argue that it is an old press.

[ABDUR RAHIM, OFFG. C. J.—You say that the Magistrate having held that the security was not necessary, he had not power to vary it afterwards?]

Mrs. Besant.—Yes.

The Advocate-General.—That objection is not competent.

[ABDUR RAHIM, OFFG. C. J.—She contends that we can interfere.]

Mrs. Besant.—In the recent Patna case it was an old Press started before the passing

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of the Press Act, 1910. For some reasons not intelligible it was carried on from 1909 to 1914 without a declaration. Anyhow on 24th June 1914 the keeper of the Press filed the necessary declaration. It was not held that that took away the protection which was given to an old Press.

The judgment says: "The matter is very much one of form. We have not before us the previous proceedings under section 3 and it would undoubtedly be even better if the learned Magistrate had framed a notice."

I go to the question whether there is jurisdiction or not. I urge that this arises under section 17 which thereupon becomes the basis of my arguments. This is clearly within the competence of the Special Bench. The Act says in section 22, that everything is shut out except "the High Court on such application as aforesaid." That application aforesaid is under section 17. Section 17 does not apply unless an order of forfeiture has been made under section 4.

[SESHAGIRI Aiyar, J.—Under section 17 the forfeiture has been made. The contention is that the Magistrate having acted under section 3 proviso, you come under section 17. Where a security has been demanded by the Magistrate under these powers within section 3 (1) proviso, can you ask us under section 17 to revise that order?]

Mrs. Besant.—The proviso cannot be read into section 3. The order of forfeiture has been made under section 4. It says that if 'any security as required under section 3, etc.' If a deposit has not been made under section 3 the matter does not come under section 4. Section 3 runs as follows: [Here reads the section.] The Magistrate has no power to demand security after he has once exempted.

Section 3 must come into consideration because section 4 orders that it shall be demanded as required by section 3 (1). Hence there is no such legal order as is contemplated by section 17.

Going to section 4 (1), the nature described therein must be certain definite elements. In order to bring any article under that section the article must have been printed in a printing Press by which security has been deposited under section 3. *Secondly*, the Press must be used for the purpose described. I shall ask Your Lordships to consider whether a Press is used for the purpose of certain things

or they are merely isolated passages contrary to the policy of the paper as a whole. It must be shown that the Press is of the type described in section 4 (1). *Thirdly*, if the security under section 3 has not been deposited or is deposited independent of section 3 then section 4 has no application.

[SESHAGIRI Aiyar, J.—There must be a legal liability to deposit security.]

Mrs. Besant.—It must be legal and it practically means that the order of forfeiture under section 17 must be a real order.

I now come to section 3 on which so much turns. The Act under which we all have to make a declaration is the Act of the Press and Registration of Books and Newspapers. In that the Magistrate has no discretion of any kind. There is no security under that Act. Whenever the owner is changed or the Press is changed, a fresh declaration is necessary. When we come to the Press Act of 1910, then the giving of security is normal. It is not in the sense of any penalty at all. I shall read the proviso to that section. The Magistrate has discretion as to the amount of security. There is a proviso to section 8 of the Act also. The second proviso is identical with that in section 3. Clearly the second proviso cannot apply to the first proviso and it is of the nature of an exception to the original sub-section 8. A proviso of a sub-section cannot be taken as identical with, and cannot be read into the sub-section. Nor can it be read for the purpose of construing the sub-section unless the sub-section itself is doubtful. If the sub-section taken independently has two possible meanings, then it has been held to be legitimate to use the proviso in order to find out which of these irreconcilable or doubtful meanings is the proper one. Otherwise it must be taken as an independent thing bringing in a separate rule altogether. An exception to a particular set of circumstances obviously cannot be identical with the set of things to which it is an exception. I submit that an order under the proviso is not an order under the sub-section. See Craies Statute Law, 4th edition, page 198. The effect of accepting provisos is to accept the preceding enactment which but for the proviso would be within it. I should be within this sub-section 3 if it were not for the proviso.

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[ABDUR RAHIM, OFFG. C. J.—You argue that ‘any order under sub-section’ does not include the proviso. You further argue that the deposit of any security cannot apply to an order dispensing with security?]

Mrs. Besant.—That is exactly my submission. See also Cyclopædia of Law and Procedure. (Volume 32). “It is something engrafted upon the preceding enactments and is legitimately used for the purpose of taking special cases within general enactments and providing specially for them.” The Magistrate exempts them from that sub-section and puts them on to a separate class. After he has done that, he cannot either cancel or vary, or, as he has done, cancel and vary the order, and, therefore, I submit that his order imposing security is bad. He had no jurisdiction to make it, and he has utterly disregarded the Act under which he claims authority.

The dispensing with security is not an order but an exception to the order. Then it is impossible to cancel and vary an exception. The proviso gives the Magistrate no authority to do both. Supposing a Press became rebellious afterwards, there is section 12 applicable to it. By section 12 authority is given to cancel any issue of a newspaper which the Local Government thinks contains all those words, signs, and the rest of them. Then section 17 would at once come in after section 12; so that Government is not helpless.

[ABDUR RAHIM, OFFG. C. J.—The Government can deal only with the publications, and not with the Press?]

Mrs. Besant.—A newspaper, book or such document, and the offending one can be seized at once. It may be said that it is troublesome. But, on the other hand, if a Press was so exceptionally good, there is an exceptional mode of dealing with it.

[ABDUR RAHIM, OFFG. C. J.—Sub-section 2 to section 3 gives more power to the Local Government.]

Mrs. Besant.—Yes, there has been no break or stoppage in the conduct of my paper.

The *Advocate General*.—A new declaration has been made superseding the previous one by a different person.

Mrs. Besant.—That does not change the Press. The Press is the same. The neces-

sity, of course, was that the Local Government must give grounds for the action taken and from that necessity the Magistrate cannot escape. The fact that there was a new declaration by myself does not destroy its character as an old Press. The moment that an Act gives powers to a Local Government to give grounds for the purpose of action, it imposes on that Government a judicial character. For Executive acts, it does not give reasons. The Press Act indicates three bodies: the Magistrate, the Local Government and the High Court. I submit that all these under the Press Act are judicial bodies and they must give reasons for their decisions.

[AYLING, J.—You must take ‘signs, words or visible representations, etc.,’ under section 4, is it not a reason?]

[ABDUR RAHIM, OFFG. C. J.—Section 12 stands on a different footing, which says that you must give reasons.]

Mrs. Besant.—If they were judicial bodies they have a duty of hearing both sides.

[ABDUR RAHIM, OFFG. C. J.—How can you say that Government is a judicial body? You do not find those words ‘stating grounds’ in section 4. I do not know why they have made a distinction. They have made a clear distinction between section 4 and section 12.]

Mrs. Besant.—The Act was so hurriedly passed. In any case, even if your Lordships do not think that the Local Government has a quasi-judicial duty, the Magistrate has and the High Court has. Hence the Magistrate ought to have called upon me to show cause or ought to have heard what I had to say. I paid the money under protest. I paid the security really in order to find out what wrong I had done. The Magistrate entirely evaded doing his act in a judicial capacity but acted as a purely executive authority. Being not an executive but a judicial officer, he comes under the law laid down so very strongly in *Scott v. Scott* (7). Lord Shaw pointed out the difficulties arising in law, that there was a danger of remitting constitutional rights

(7) (1913) A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 57 S. J. 498; 29 T. L. R. 520.

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to the region of judicial discretion and that it shifted the foundations of freedom from rock to sand. He argued the whole question of judicial power to keep his proceedings away from the public and he held that there was no such power.

[ABDUR RAHIM, OFFG. C. J.—That has nothing to do with this case.]

Mrs. Besant.—The Magistrate refused to give me particulars.

[ABDUR RAHIM, OFFG. C. J.—What particulars had he to give?]

Mrs. Besant.—He had instructions of the Government Solicitor on the other side and a large number of papers which he refused to show me.

[ABDUR RAHIM, OFFG. C. J.—That cannot help us in this petition under section 17.]

Mrs. Besant.—I say he was not acting in a judicial manner.

[ABDUR RAHIM, OFFG. C. J.—You have to point out that it is a matter of being *ultra vires*. As to whether it is an irregularity or not, you cannot go into it now.]

Mrs. Besant.—Section 22 of the Act is *ultra vires*, even if the whole Act is not.

[ABDUR RAHIM, OFFG. C. J.—It is open to you to argue that section 22 is *ultra vires*.]

Mrs. Besant.—It is *ultra vires* because it restricts the High Court's jurisdiction. The High Court has powers which cannot be interfered with by any Statute. section 4 taken by itself is distinctly *ultra vires*.

[ABDUR RAHIM, OFFG. C. J.—You can argue that, but I do not know how you can make it out.]

Mrs. Besant.—As a British citizen I come under certain laws from which I cannot be dissociated. In fact they always clothe me as being born in the United Kingdom. I am not going to press that point but I put it as an extra reason. I lay special stress on forfeiture under section 4.

I am not concerned with the various clauses. The point is that the forfeiture which it gives is not forfeiture in law.

[ABDUR RAHIM, OFFG. C. J.—The Governor-General may pass any Act?]

Mrs. Besant.—Not any Act which is against a certain thing. The Government of India Consolidating Act, section 65, says

that the Governor-General has no power to make certain laws affecting certain things, unless expressly authorised by the Parliament of England and he has no power to make a law affecting the powers of Parliament, etc. The general principle will be that no Statute of a local Legislature can contravene a Statute passed by Parliament, nor can it make a law which affects the unwritten law or constitution. I do not propose to detain your Lordships with a long argument as to the many Charters and Regulations passed from time to time. All that is necessary for my argument is just to allude to what may be called the Standing Charters which deal with this special point. The first was of Queen Elizabeth which dealt with British subjects who came to reside in India. Then we dismiss all others until we come to Charles II's. I then go to the Regulating Act which gives power to make rules not repugnant to the Laws of the Realm. In every one of these, the powers of the Governor-General in Legislative Council were limited by the fact that they must not be contrary to the laws of the King of England whereof India was a dependency. This is repeated again in 3 and 4 William IV and in the Act of 1858 when the Crown took over the sovereignty of India, held in trust prior to that by the East India Company. And then came in the Indian Councils Act of 1861 in which these particular words were reproduced and in the Government of India Act of 1915 they are found in the exact form. That was one of the Acts which might not in any way be contravened by any law which might be passed in India.

The question must at once arise what is "Unwritten Law," which is rather a vague phrase. It is admitted that the unwritten Laws of England are recited in the Magna Charta which at that time were regarded as forming the laws and constitution of England. No. 39 of that runs:—"No free man shall be arrested, or imprisoned or diseised of free hold, of liberties or of customs, (customs being a technical word implying exactions by the Crown of money), nor in any way injured, except by the legal judgment of the Peers or by the law of the land." The words

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I lay stress on are "he shall not take property except by the law of the land." ["Stubbs's Select Charters", page 293.] In the 12th clause of the Petition of Rights given in Appendix 508 all the words which bear specially on this section 4 occur. "Several amounts were made of fines and forfeitures before any conviction or judgment against a person." I submit that forfeitures are not laws of the land, but as such are against the Bill of Rights, which is over every subject of the Crown, whether British born or Indian born.

[ABDUR RAHIM, OFFG. C. J.—Under section. 65, all subjects of His Majesty and servants of the Crown in other parts of India are referred to. It is a Parliament Act. Does it not include all British subjects also?]

Mrs. Besant.—As a British subject I cannot be separated from the Magna Charta and the Bill of Rights.

[ABDUR RAHIM, OFFG. C. J.—The Governor-General in Council has got power to legislate for every one in British India.]

Mrs. Besant.—Not against the authority of Parliament.

[ABDUR RAHIM, OFFG. C. J.—Is there any limitation there?]

Mrs. Besant.—Section 65 (2) has made a special exception as to what the Governor-General must not do.

[ABDUR RAHIM, OFFG. C. J.—It does not purport to pass a law against the unwritten law of Great Britain and Ireland.]

Mrs. Besant.—Yes. I took the sentence from the Bill of Rights. I quote from Stubbs's "Fines and Forfeitures," page 508.

[SESHAGIRI AIYAR, J.—Sir George Barnes considers how far the Petition of Rights affects persons outside the United Kingdom.]

Mrs. Besant.—A British subject wherever he goes can claim those rights.

[ABDUR RAHIM, OFFG. C. J.—Whatever law exists, England is governed only by that law and is not governed by any law in British India.]

Mrs. Besant.—It would mean that he carries with him certain fundamental rights such as liberty of person and right of property; unless deprived of them by ordinary Courts.

[ABDUR RAHIM, OFFG. C. J.—Everybody has that right.]

Mrs. Besant.—Without a sentence of a Court of Law, a person could not be deprived of property.

[ABDUR RAHIM, OFFG. C. J.—For depriving a subject of his property, there are various laws. Take the Income-Tax Act for instance. There are other Acts also which forfeit property, such as the Revenue Recovery Act.]

Mrs. Besant.—The right of taxation is a right which is specially reserved to the Government.

[ABDUR RAHIM, OFFG. C. J.—The Governor-General-in-Council also has power to make laws for recovery of property.]

Mrs. Besant.—That does not show that an action of the Executive is, therefore, justifiable.

[ABDUR RAHIM, OFFG. C. J.—It cannot be the meaning of the words unwritten law.]

Mrs. Besant.—I contend that the duty of a subject is to obey the laws. Those are relative and the King has the duty of giving protection to life, property and liberty except when a Court of Justice has pronounced that they are forfeited. I object to the arbitrary action of the Executive which before trial forfeits. Money is levied and then I am asked to go to Court. Practically my argument under this head may be divided into three parts. The *first* would touch section 22, *secondly*, that the law of the land as administered by the King's Courts of Justice could not take away or infringe the powers of the High Court by any law which is passed by the Governor-General-in-Council and which removes the power from the Judiciary and vests the same in the Executive. The jurisdiction of the High Court is ousted and in that way the protection of the subject, however legitimate the exaction by the Executive, is infringed by its action. The *third* point is that the Laws of England demand that the guilt of the accused should be proved before he is punished.

[ABDUR RAHIM, OFFG. C. J.—There is no question of guilt at all.]

Mrs. Besant.—I have a penalty of forfeiture against me before any wrong is proved,

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[ABDUR RAHIM, OFFG. C. J.—You are not found guilty of any crime.]

Mrs. Besant.—Forfeiture of property is punishment. It is a penal proceeding. The Bill of Rights gave a declaration that it should never again be done.

[ABDUR RAHIM, OFFG. C. J.—There is no sentence or order against you personally. There is no such sentence provided for in the Act. The Act does not deal with any crime committed by any person. It deals with certain documents which contain certain words and prohibits the publication of those documents.]

Mrs. Besant.—I am charged with incitement to murder, etc.

[SESHAGIRI AIYAR, J.—Your petition does not go to the root objection, but to the way in which the power is exercised by the Government. You are asked to come here to show that the forfeiture should not have been incurred.]

Mrs. Besant.—When a man is accused of doing a wrong thing he is punished first.

[SESHAGIRI AIYAR, J.—Can you say that the Government are wrong in having driven you to the Court after forfeiture? Can you say that the Government have no power to act in that way?]

Mrs. Besant.—My contention is that the Governor-in-Council has no power to inflict forfeiture before proving the wrong, because such a procedure throws the onus of proof on the accused person. It ought to be the duty of my opponents to show that I have done a wrong.

[SESHAGIRI AIYAR, J.—It is with regard to the mode of legislation and not the power of legislation.]

Mrs. Besant.—It is a point which I press, particularly because it has been the point on which the Bill of Rights was based. Had the King a right to take money, fines and forfeitures without anything behind him of legal decision? It has been decided that no such right exists. I claim that the people are under the protection of that right which exists in England. The *third* point is that the Laws of England provide for forfeiture after a sentence. What the Press Act says is: "We have taken from you your money. If you like you can go to the High Court, and under

impossible conditions, you can try to get it back." It is that which is a distinct breach of the law. It is one of those Acts which has penal consequences and forfeiture of property is one of the highest penalties known to English Law. The Press Act permits this forfeiture by a notice in writing and not by a sentence after trial.

[ABDUR RAHIM, OFFG. C. J.—Could a British subject be interned under the Defence of India Act?]

Mrs. Besant.—There you have a measure of urgency.

[ABDUR RAHIM, OFFG. C. J.—It is an Act of the Governor-General.]

Mrs. Besant.—Yes, just as England is now under Martial Law.

[AYLING, J.—England under Martial Law?]

Mrs. Besant.—Under the Defence of the Realm Act.

[ABDUR RAHIM, OFFG. C. J.—Ordinary Courts are not suspended. Special Tribunals are appointed no doubt, but that does not make it Martial Law. If the Defence of India Act is within the competence of the Legislature, I do not see why the Press Act should not be. The Defence of India Act affects persons, while the Press Act affects property.]

Mrs. Besant.—The Defence of India Act is only current during the War and six months afterwards, with the special object of defending the Realm from riots, etc., and it certainly has been always held where a country was imperilled special Acts of emergency were permitted, and, if the Press Act were an Act of emergency, I doubt whether I would put forward this argument. It is a statute of a permanent character.

In the Ameer Khan case the point of allegiance arose. Instead of a sentence of forfeiture we have an order giving the Local Government's opinion. Government has not even stated any reasons and the result is that it may forfeit illegally as much as it pleases and nobody can help the unfortunate victim. We have, therefore, the difficulty that no one under this has any cause to defend himself. The Government says: "Go and get the money back by going to the High Court," It makes the Court helpless

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and it is the reverse of all rightful Governments under the Crown of England. I rely on the statement of Mr. Justice Norman who puts it very much better than I can [*In the matter of Amcer Khan* (8)]. It would be a startling thing that rights of so sacred a character could be taken away by an Act of the subordinate Legislature. It is to those fundamental laws that I refer.

According to the Bill of Rights and Magna Charta the right stands on the same level. In the Bengal case the Judge regarded it as an emergency legislation and the power was given to the Governor-General to pass emergency legislation when the state of the country required it.

[ABDUR RAHIM, OFFG. C. J.—There is a special power given to the Governor-General-in-Council to pass emergency laws.]

Mrs. Besant.—If the condition of the country requires it.

The Advocate-General.—The Governor-General's Executive Council can pass an Ordinance which can last for six months. The power of the Governor-in-Council is the same. The Defence of India Act is not an Ordinance but a legislative enactment.

Mrs. Besant.—I am contending that we are not dealing with an emergency Act but an Act on the permanent Statute Book. I would very briefly draw your Lordships' attention to the legislation on the Press. The present Press Act is entirely different from every other Press Act except the Vernacular Press Act which gave exceptional powers to the Executive and was abolished. In 1867 we have the first of this series of laws.

[ABDUR RAHIM, OFFG. C. J.—Why are you going to the past history of the Press Act?]

Mrs. Besant.—To show to your Lordships that there is no other Press Act except the Vernacular Press Act and the present legislative enactment, which allow any forfeiture or any penalty to be inflicted except by a Magistrate after hearing the person affected.

[ABDUR RAHIM, OFFG. C. J.—That may be so. The Press Act does go very far. There is no doubt about it.]

(8) 6 B. L. R. 392.

Mrs. Besant.—With regard to the Vernacular Press Act it is against the whole tendency of the English Legislation under which the Crown assumed the sovereignty of India.

I now turn to the incriminating passages. The crimes against which this Act was specially directed are recited in section 4. In a paper where there are a large number of very weighty and argumentative articles dealing with fundamental questions of public importance, all that the Government could find in order to bring me under the security section of the Press Act are these trivial extracts. I ask your Lordships now to turn to the passages and see whether they in any way approach the object for which the Press Act was enacted.

[ABDUR RAHIM, OFFG. C. J.—What you have to satisfy is that what is written here does not come within the scope of the words, signs or visible representations, etc.]

Mrs. Besant.—The word "otherwise" includes everything and anybody can be caught technically within it. I am going to ask your Lordships to construe the words hatred and contempt not as any passing feeling of anger nor a passing feeling of annoyance against an act of Government but as meaning such hatred and contempt as would lead to the crimes which are here laid down.

[AYLING, J.—Crimes referred to in clause (a) ?]

Mrs. Besant.—In all the other clauses also. Offences which will lead to murder, to explode under the Explosive Substances Act and to draw officers from their allegiance.

We come to the answers to the attacks of the Anglo-Indian journals. That I shall deal with later in detail. But I say that they are justifiable answers unless the Court holds the Anglo-Indian papers may attack and that Indian or pro-Indian papers may not reply.

So far as Home Rule is concerned, it is enough to point out that in *Beni Bhushan Roy v. Emperor* (9) it was laid

(9) 34 C. 991; 6 C. L. J. 699; 11 C. W. N. 1050; 6 Cr. L. J. 257.

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down that advocacy of Home Rule, *Swaraj* or Self-Government is legitimate. It cannot be that on that point it is attacked. The attempt is to build up the Empire and to urge law-abiding methods and absence of cringing, and we are told it comes under clause (a) which includes bomb throwing. That is not my view. There is nothing more in these extracts except what I have there touched on. I ask your Lordships to say whether in the whole of these extracts there is incitement to murder, to outrages, to intimidation, violence, treason or bomb throwing. Those are the crimes against which the Act is levelled.

These are the worst passages or rather the best passages for the purpose of the Press Act that the Advocate-General and the Public Prosecutor have been able to find in my paper and that is a great testimony to the value of my paper. I think in this Act hatred or contempt towards the Government established by law in British India is not hatred towards individuals. On that I shall have a careful argument to put forward.

It means the system of Government, the Crown and Government in the sense in which it would be used in England. Government would have to be read in the light of that meaning. There is no reference to unconstitutional methods, provided that nothing is done to derogate the authority of the Crown and break the connection between Great Britain and India but only to change the powers of certain classes of people and make them constitutional instead of arbitrary.

[ABDUR RAHIM, OFFG. C. J.—To advocate change in the form of Government does not come under the clause (c).]

Mrs. Besant.—If it were a proposal to wage war against the King it would be. If it is a change of functions and powers in Executive Council or of the civil servants generally, or what we call the bureaucracy, all these things might be legitimately urged. I shelter myself, therefore, under the exception mentioned in the Penal Code.

[SESHAGIRI Aiyar, J.—That India should be split up into various Provinces and governed like Indian States.]

Mrs. Besant.—Yes, my Lord.

The Advocate-General.—It is quite possible to advocate Home Rule in a way and by means calculated to excite disaffection, hatred and contempt. It is those things against which action is intended. I am instructed to say that any advocacy of Home Rule does not come within the scope of the Press Act.

[ABDUR RAHIM, OFFG. C. J.—You may then leave it out.]

Mrs. Besant.—That narrows the field. Disaffection includes disloyalty and feelings of enmity. I have always been most intensely loyal. Feelings of enmity do not exist. Explanation 2 is still more useful to me. That is an attempt to obtain alteration in the methods of Government by lawful means. That exactly covers everything that I have done through the whole of my agitation. I express disapproval of the measures with a view to obtain their alteration by lawful means and reiterate it over and over again.

[ABDUR RAHIM, OFFG. C. J.—Section 20 relates to evidence, in aid of the proof.]

The Advocate-General.—It is for me to give evidence in aid of the proof.

[ABDUR RAHIM, OFFG. C. J.—Suppose the nature of the articles is perfectly innocent.]

[AYLING, J.—Do you mean that the prosecution can put in other articles than this?]

The Advocate-General.—Yes.

[ABDUR RAHIM, OFFG. C. J.—Do you mean articles of an incriminating nature or of the nature and tendency which are alleged? You are reading words which are not there.]

The Advocate-General.—Evidence in proof of the nature charged.

[ABDUR RAHIM, OFFG. C. J.—It is open to Mrs. Besant to put in other articles. Do you argue that she cannot do so?]

The Advocate-General.—I will indicate to your Lordships what I mean. With respect to these particular articles which are included in the order of forfeiture, if there is anything that has a bearing that may go. But protestations of loyalty and various other things, the general policy of the paper in other matters, will not throw any light upon words which are included in this order of

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forfeiture and which are charged as coming under the Press Act. That is the nett result of the rulings.

[AYLING, J.—Suppose Mrs. Besant puts in an article to show that the tendency of an article charged is not what you say it is. Is it relevant or not? If you put in an article to show that the tendency of a charged article is bad, surely we must allow her to put in an article to show that it is not.]

The Advocate-General.—What has been decided is that the other articles relied upon must relate to the exact matter and throw light on it. If a certain intention is entertained by the Editor, or a proprietor of a newspaper upon other occasions upon other subjects or general professions of loyalty to the Crown, they are irrelevant for the purpose of qualifying the nature of the words which are attacked as coming under section 4.

[ABDUR RAHIM, OFFG. C. J.—Do you mean to say that any articles which show the policy of the paper cannot be put in?]

The Advocate-General.—The question is, what is the effect of the words which are implied in a particular article.

[ABDUR RAHIM, OFFG. C. J.—When you are charging certain articles as inciting to murder, creating disaffection or class hatred, surely all articles to show that the policy of the paper is not that, would be relevant.]

The Advocate-General.—They would be irrelevant. With regard to the nature of the articles which would be relevant under section 20, the words used there are "in evidence" not of the nature or tendency of the articles but the effect they produce on the minds of the reader. I submit the decisions are clear.

[ABDUR RAHIM, OFFG. C. J.—There is nothing with regard to the intention or motive. The question is only with regard to the effect.]

The Advocate-General.—What is the effect of the articles on the readers? They are the real persons to judge. There are a number of decisions of the Punjab Chief Court which say that mere general protestations of loyalty are not enough.

[ABDUR RAHIM, OFFG. C. J.—Have you any decisions of the High Courts?]

The Advocate-General.—No, only of the Punjab Chief Court.

[ABDUR RAHIM, OFFG. C. J.—Is the Punjab Chief Court equivalent to the High Court?]

The Advocate-General.—Yes. It is the High Court within the meaning of the Criminal Procedure Code. Of course, it is not a Chartered High Court; anyhow it is a tribunal constituted under this Act. It is a High Court for purposes of this Act.

[SESHAGIRI Aiyar, J.—The articles must throw light on the nature and tendency of the writer.]

Mrs. Besant.—The section has two explanations. The first is disaffection which includes disloyalty and all feeling of enmity. The second relates to expressing disapproval of the measures of Government, etc., with a view to obtain their alteration by lawful means or of the administration or action of the Government or of the administration of justice in British India without exciting or attempting to excite hatred or contempt. This does not come within the scope of clause (c). For the moment leaving explanation I and taking explanation II relating to expressions of disapproval of measures to obtain change by lawful means, that is an exception in the form of explanation. Now, the allowance deals with measures of Government without causing disaffection as regards Government and so on. The explanation really covers hatred and contempt of a class as well as of Government or of measures of Government.

The Advocate-General.—It is specific.

Mrs. Besant.—It is in the same sub-clause; so that it might be taken to apply to the less as it is stated to apply to the larger.

[ABDUR RAHIM, OFFG. C. J.—If the comments are to affect a particular class, that argument is right. If the comment expressing disapproval of Government affects a particular class or a section of His Majesty's subjects, then explanation II would apply.]

Mrs. Besant.—Chief Justice Jenkins says any attack upon a religious class does not come within this clause. I desire to narrow down his reasoning of the clause in which he stated, and Justice Stephen agreed, that even speaking against a class commit-

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ting robbery would come within the clause. I am trying to narrow down the clause for purposes of this case.

[ABDUR RAHIM, OFFG. C. J.—The comment must be expressive of disapproval of the measures of Government. Is it necessary to argue that point, namely, that any of the articles was directed against Government?

Mrs. Besant.—Sometimes criticisms on measures of Government are made. I traverse the whole contention that there is anything in the paper to excite hatred and contempt of Government. On this point of hatred and contempt to which I desire to draw your Lordships' attention, I shall refer to *Queen-Empress v. Kahanji* (10). It is a case heard by Jardine and Ranade, JJ. There it is a case of a dangerous riot. At such a time a poem was published which was held to increase the excitement. Mr. Justice Jardine goes to say: "Many sermons especially in factious times raised ill-feelings in the minds of the opposite party. Yet, it is not generally a reason for interference with the liberty of speech or the liberty of the Press. Such interference with legal rights would only cause oppression." Mr. Justice Ranade puts the matter more strongly.

This case has a bearing on the construction of the words 'Hatred' and 'Contempt'.

[ABDUR RAHIM, OFFG. C. J.—It does not define the words 'Hatred' or 'Contempt'.]

Mrs. Besant.—It shows the fact that even if it had been held to make the man angry, the anger is the fault of the man who felt angry and not that of the writer. The words of the Press Act are taken from the Penal Code, section 124A. It has three explanations. Disaffection includes disloyalty. Comments expressing disapprobation of the measures of Government with a view to obtain alteration by lawful means do not constitute an offence under this section.

Explanation 3 says comments without expressing hatred or contempt do not constitute an offence under this section.

I then turn to section 153A. The expla-

nation says that it does not amount to an offence if comments are made without malicious intent. To bring the charge home to an accused under this section, the Court must be satisfied that the accused had a conscious intention of promoting, causing or exciting enmity and hatred between the various classes of His Majesty's subjects, i. e., Europeans and Indians. There must be a deliberate attempt to incite one class against another. By my paper, on the contrary every opportunity is taken to bring the various classes together, and, if there be any reference to any special treatment, it must be taken to be an attempt to bring the various classes together and to remove any unnecessary difference in treatment. The explanation requires dishonesty and malicious intention. I shall draw your Lordships' attention to section 4 (a). The words 'Government established by law' only apply to certain cases. There is a distinction to be made between what I may call the substance of the Government and the accidents that surround that Government. The Government means the continuance of that of which the substance is the supremacy of the Crown and *secondly* India is part of the Empire, so that anything, which tended to argue that India should go outside the Empire, should leave the Empire or break the British connection, would be an attempt to injure the Government as established by law in the full sense of the term; but the form of Government, I submit, does not come under that heading.

[ABDUR RAHIM, OFFG. C. J.—That was admitted by the Advocate-General. You say it is possible to advocate Home Rule without severing the British connection and the means suggested are not such as would bring you within the meaning of the section; that is admitted.]

Mrs. Besant.—Then I need not argue about the autocracy or bureaucracy, etc. But whatever the form of the Government may be, any attempt to excite feelings will be unlawful; any appeal to force is unlawful. That I am admitting to the fullest extent. Therefore, if any articles are put in as tending towards the direction of inciting to violence, my object will be to show

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that there is nothing of that character either in the paper as a whole or in the parts used by the Advocate-General.

'Government' does not mean the person or persons in authority for the time being but the existing political system. One particular set of persons may be open to objection and to attack them or excite hatred against them is not necessarily exciting hatred against Government, because they are only individuals and are not representatives of that abstract Government. See *Emperor v. Bhaskar Balvant Bhopatkar* (11).

[ABDUR RAHIM, OFFG. C. J.—Is that Justice Strachey's dictum.]

Mrs. Besant.—Justice Batty's. At page 441* Mr. Justice Batty says that changes in policy and measures are liable to criticism and to criticise and urge objections to them is the special right of a free press in a free country. The British nation boasted, that it has a press; but the freedom of that press is confined to the expression of opinions so long as they do not reduce that to the injury of others including the State. It is only on that condition that it is possible to have a free press. See also *Apurba Krishna Bose v. Emperor* (12) and *Joy Chandra Sarkar v. Emperor* (13).

Now with regard to the "New India" which is now being attacked, it was specially established for certain definite reasons which are laid down as its policy.

One policy of the paper is to work for the obliteration of racial distinctions and to consolidate the various classes, which is essential to real progress.

It is one of the points against me that I incited one class against another.

Several articles are said to come under clause (c) of section 4, i.e., in bringing into hatred or contempt His Majesty or the Government established by law in British India, etc. There are other quotations. I am most loyal and devoted to the

King-Emperor and I always advocated the maintenance of British connection. On the extracts collected by the learned Advocate-General, if the paper is destroyed which is teaching these doctrines in India, the Press Act is being used against its rightful purpose.

The next point is that I advocated violence. Several articles were brought under clause (a). These articles by themselves are sufficient to show that I was the enemy of anarchy. Advocacy of good feeling and deprecation of all differences between races and communities are the characteristics of the paper.

The Advocate-General, for the Crown.—The question is a simple one, though the petitioner has dealt with it with great skill. All those other questions which Mrs. Besant has dealt with have no bearing on the question. What is the right which Mrs. Besant has to come to your Lordships? The only application provided for by the Act is that which is contained in section 17. The application is limited to the ground mentioned in that section. It leaves to the Government the question of taking the initiative.

It does not enlarge the scope and authority of the High Court to go into other matters. Under section 22, every declaration of forfeiture purporting to be made—not made—will be conclusive evidence that forfeiture has taken place.

[SESHAGIRI AIYAR, J.—The factum, that there has been forfeiture, you cannot question.]

[ABDUR RAHIM, OFFG. C. J.—That is notice to the public that there has been forfeiture and it means that the public should not traffic in the paper. But there is nothing to show whether the forfeiture is legal or illegal.]

The Advocate-General.—Sections 17, 19 and 22 show that the external and conditions of forfeiture cannot be gone into. The validity or legality can be questioned on one ground only. If a forfeiture is made, the question is whether it was rightly made or wrongly made. The question is whether Government exercised the power rightly or wrongly, not whether the matters which enabled Government to take that step were there or not.

(11) 8 Bom. L. R. 421; 4 Cr. L. J. 1; 30 B. 421.

(12) 35 C. 141; 7 C. L. J. 49; 7 Cr. L. J. 10; 2 M. L. T. 500.

(13) 10 Ind. Cas. 945; 38 C. 214; 12 Cr. L. J. 343.

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[ABDUR RAHIM, OFFG. C. J.—I do not think it is meant to apply to the High Court. The first portion of section 22 of the Act provides what happens if a paper is forfeited. The Police can seize a paper.]

The Advocate-General.—It is not limited to any particular purpose. The decision come to by the Calcutta High Court in *Mahomed Ali v. Emperor* (2) is right on the first part of the question. The decision is that the first part of the section bars interference by the High Court on the question of legality. Can any evidence be let in to show that a declaration has been wrongly made? Mrs. Besant says that there was no forfeiture under the Act.

[ABDUR RAHIM, OFFG. C. J.—If there was no forfeiture, there would be no case before us.]

The Advocate-General.—The forfeiture has to be set aside on the ground that the words do not come within the section.

[ABDUR RAHIM, OFFG. C. J.—Forfeiture has in fact taken place, whether valid or not. There is no evidence of validity.]

The Advocate-General.—When there is a declaration of forfeiture, the order or notice containing it is not intended to be proof that Government forfeited under first part of section 22.

[ABDUR RAHIM, OFFG. C. J.—There need not be actual seizure.]

The Advocate-General.—It is a simple declaration that a certain property is liable to be seized. Forfeiture itself determines the license which is given to the Press. The Press Act determines that license and it forfeits the deposit and forfeits the paper, but as a matter of fact that is really within section 4.

[ABDUR RAHIM, OFFG. C. J.—If the first portion of section 22 meant that forfeiture is legal and that a declaration was made, what is our position? Is it to set aside a valid act?]

The Advocate-General.—The Court does not go into the question whether Government conformed to the requirements of the Act for the purpose of making a declaration of forfeiture, but so long as there is a declaration, it takes that declaration and the Act gives the Court power to go into the question of declaration on one ground. It is the power of declara-

tion that gives right to the applicant to come to this Court.

[SESHAGIRI AIYAR, J.—The fact of forfeiture gives her right.]

The Advocate-General.—The power that is given to the High Court cannot be higher than the right given to the applicant under section 17.

[ABDUR RAHIM, OFFG. C. J.—If you say that "all persons" include the High Court, the wording would be different.]

The Advocate-General.—The wording of the section makes it clear that it is not affirmative power given to the High Court.

[SESHAGIRI AIYAR, J.—Forfeiture under this section cannot be called in question except by the High Court?]

The Advocate-General.—Yes.

[SESHAGIRI AIYAR, J.—How can a valid forfeiture be called into question?]

The Advocate-General.—The question is whether Government rightly decided that a particular article could be forfeited, being obnoxious to section 4 of the Act. The question whether a security was validly demanded by a Magistrate or whether a declaration was properly made—all those are not questions with which the High Court has anything to do.

[SESHAGIRI AIYAR, J.—Not upon external questions but upon the fact of forfeiture.]

The Advocate-General.—Section 22 recognises it and repeats it. If Mrs. Besant's contention were right, it would really mean that there was no forfeiture. Your Lordships will have then no power. The security does not purport to be under this Act, the forfeiture does not purport to be under this Act and consequently there can be no application before this Court. In order to give relief to the applicant, it is necessary to assume that all the steps have been rightly taken and the only thing for the High Court is to decide as to the correctness of the opinion of the Government that words are of the nature discussed in section 4.

[ABDUR RAHIM, OFFG. C. J.—Suppose there is an extreme case where a Government servant by some mistake put down the word Press Act. There would be no remedy. How do you get out of it?]

The Advocate-General.—It is not a declaration which purports to be done under this Act.

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[ABDUR RAHIM, OFFG. C. J.—In that case you must put a narrower meaning to the word “purporting.”]

The Advocate-General.—What I submit is that “purporting” means in excess of the strict letter. It would include action beyond the strict letter of statutory authorities. In the case that your Lordships put there is no question of the Press Act.

[ABDUR RAHIM, OFFG. C. J.—Even then he would be deprived of his remedy. I do not think a Court can interfere in such a case but Government may interfere.]

The Advocate-General.—I cannot add very much to the exhaustive discussion contained in *Mahomed Ali v. Emperor* (2). The judgment consists of two parts of what may be called the policy of such an Act and naturally the learned Judges made observations in answer to arguments. The legal portion which is the second part of the judgment stands entirely apart and it is a weighty pronouncement.

There is a difference between section 4 and section 12. Section 12 applies to any newspaper wherever printed, in England or America etc. Jurisdiction is very closely confined by the terms of section 19 with which sections 17 and 22 must be read. To that extent it is a satisfactory state of affairs.

[ABDUR RAHIM, OFFG. C. J.—It may be satisfactory if the Calcutta interpretation is correct. If that interpretation is not correct, where is the satisfaction? Then you speak of the Courts as powerless and helpless. If you are going to contend that section 4 is so widely worded that Courts are helpless; I do not know where there is satisfaction to anybody.]

The Advocate-General.—I have nothing to do with the policy of the Act.

Section 22 gives the only right to an applicant to have an opportunity of having the case decided on merits, whatever those merits are. The first part of section 3 refers to declarations of presses after the Press Act came into force. Old Press means the Press of which a declaration has already been made. [Reads sub-s. 3]. Where a proviso is regarded as an exception, it would affect my point.

Though clauses (1), (2) and (3) of section 3 are put separately, each clause is really a sub-section. The words ‘under this section’ in the end of the proviso refer to the whole clause (1). A proviso should be read as part of the sub-section. To take an illustration. Suppose the initial order demands a security of Rs. 500, and the Magistrate afterwards increases it to Rs. 1,500 or Rs. 2,000 or again reduces it to Rs. 500 in virtue of the power to cancel or vary ‘from time to time,’ the varying order is necessarily an order made under the proviso, which he is at liberty to cancel or vary.

[SESHAGIRI AIYAR, J.—Can you cancel or vary an order made under the first part of the proviso.]

[ABDUR RAHIM, OFFG. C. J.—The object of the proviso is to dispense with security or vary or cancel an order made by the Magistrate.]

[SESHAGIRI AIYAR, J.—When the security is increased or reduced, you say it is varied. Is it not simply carrying out the sub-section itself?]

The Advocate-General.—I do not think it is. When a declaration is made and the Magistrate demands security of, say, Rs. 500, the first portion of that sub-section is exhausted. Then comes the proviso. Under the proviso, the Magistrate has the power to raise the security at his discretion. Suppose he raises it to Rs. 1,000 and subsequently, under the terms of the same proviso which empowers him to vary the order *from time to time* as occasion arises, he reduces the amount again, in this last order passed under the proviso or the first part of the section?

If I am right in my contention that the proviso is a part of this sub-section and it is shown conclusively by the fact that an order can be cancelled or varied ‘from time to time,’ it follows that an order dispensing with the deposit of security is an order under the sub-section. The term ‘from time to time’ is defined in the General Clauses Act.

The Advocate-General.—The proviso contains two powers, a power to vary or cancel an order made under the first paragraph and also a power to vary or cancel an order made under the sub-section. The term “from time to time” is defined in the General Clauses Act. The argument was that it could be used only

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once. My submission is that you can make "from time to time." It follows that an order dispensing with the deposit of security is an order within the sub-section.

[ABDUR RAHIM, OFFG. C. J.—The use of the word "or" makes some distinction.]

The Advocate-General.—At the time when a person makes a declaration the Magistrate if he thinks fit may dispense with security. Then it is an order which is made under the proviso or under the first portion of the section. When that is done then clearly he can cancel or vary any order under this sub-section. This power is a power which the Magistrate must have as occasion and necessity may arise from time to time. It is inconsistent with the words "any order" which will include any order requiring security or dispensing with security.

[ABDUR RAHIM, OFFG. C. J.—The Local Government is also given similar powers.]

The Advocate-General.—In the case of those who had existing rights under the prior law and invested money in the case, purchase of machinery and starting of a particular newspaper more protection is given than it is necessary in the case of persons who declare with eyes wide open after the passing of the Act.

[SESHAGIRI AIYAR, J.—What is the greater protection given to an old press? So far as I can see, there is none.]

The Advocate-General.—Greater control is obtained in respect of presses for which declaration is made after the Press Act than before the Press Act. See *Jalaluddin v. Emperor* (14).

Mrs. Besant's next point was that the Magistrate did not exercise his judicial mind in calling upon her to furnish security. She did deposit security in pursuance of the order made by the Magistrate.

[ABDUR RAHIM, OFFG. C. J.—We do not want to hear you on that point.]

The Advocate-General.—Her other point was that the whole Act was *ultra vires*. She said that section 4 was *ultra vires*. As regards that my submission is that this is itself an application under the Press Act. If section 17 depends for its application upon section 4 and if section 4 is *ultra vires*, then section 17 falls to the ground.

(14) 22 Ind. Cas. 721; 17 C. W. N. 1245; 15 Cr. L. J. 145.

[ABDUR RAHIM, OFFG. C. J.—She also contends that section 22 is *ultra vires*.]

The Advocate-General.—Any enactment which is merely consequential upon the other must drop if the primary thing falls to the ground. Further there is no substance in the contention. The *Moment* case (*Secretary of State v. Moment*) (15) has nothing to do with this, because this power which is taken is a new power altogether. It is not a power which the East India Company had. It is not a question of right of suit.

The other point taken was that the enactment contravened the unwritten laws of the realm. In *Amir Khan's* case (6 Bengal Law Reports), which related to a deportation regulation it was decided that that legislation of the Governor-General in Council was not obnoxious to the powers vested in it by Parliament. It cannot be said that every Act which is against the common law of England at any time was law derogatory from the allegiance of the subject to the Crown depends. If that be the case, all Acts of Parliament would never have been made and it cannot be said that the Indian Legislature has less power.

It only means that these Legislatures should not take upon themselves to say that they need not give allegiance to the Crown, but allegiance only to themselves. If it has any meaning at all that is the only reasonable meaning. The only case is that of the Wahabi case. It was finally decided that such a legislation even regarding the liberty of a subject was perfectly valid. It cannot be said that allegiance of a subject to the Crown depends upon there being no laws which trench upon the privileges of subjects. That may be a valued constitution, but it is not every legislation of that kind which is obnoxious to the Government of India Act, and that is certainly not the basis of the *Moment* case (15). I submit that the basis of the argument regarding the Magna Charta and the Bill of Rights has nothing to do with the declaration under section 4, which requires to be set aside by a petition of appeal presented to this Court. If the declaration is a nullity there is no necessity to ask to set it aside. If section 4 which is

(15) 18 Ind. Cas. 22; 11 A. L. J. 49; 6 Bur. L. T. 1; 18 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 17 C. L. J. 194; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10; 40 I. A. 48.

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the keystone of the whole Act goes, the Act goes. The petition under section 17 assumes that there has been a forfeiture under section 4 and there is really no substance in the contention.

The only other point is that the Government of India Act says that the Legislature has full power with respect to all persons and things. A printing press is a thing and *prima facie* there is absolute power in respect of it. You must show that an Act of the Imperial Parliament is infringed by this. It has not been pointed out that any Act of Parliament is infringed by this Act. The only way attempted was by showing that it withdraws the privileges of the subjects. Therefore, under the Government of India Act, it cannot be contended that this legislation of the Press Act is *ultra vires*. No doubt it deprives a person of the right of property in money or a press or a newspaper. But any one of these things cannot be said to be the possession of property. The possession of a printing press or forfeiture of security are things which ordinarily happen every day. Forfeiture may be imposed by statute but that cannot be said to infringe the allegiance of a subject to the Crown.

[ABDUR RAHIM, OFFG. C. J.—Her position is this; that it can be done by a sentence of an ordinary Court of Justice and not otherwise.]

The Advocate-General.—My submission is that the whole act of forfeiture apparently rests on the footing of the Act of 1867 as well as Act I of 1910. It is clear that printing presses are licensed. It is the determination of the license. I am not entering into the policy but I submit that but for the license there is no right to keep a press; it is not to be assumed as an inalienable right of a subject.

[ABDUR RAHIM, OFFG. C. J.—It is more than a license. It means the forfeiting of the press.]

The Advocate-General.—Even in England a press will be kept only under a license. The conditions which are now imposed are far more serious. The Legislature took away property under the Estates Land Act from *zamindars* who happened to be possessed of *kudivaram* rights. The Limitation Act does it after 12 years. And there are so many Acts with similar provisions.

Another point which Mrs. Besant urged was that there must be a notice and that no notice was ever given. This itself is called a notice of forfeiture. The section does not require it. It has been so held in *Karam Chand v. Emperor* (16). Mrs. Besant next said that all issues of "New India", past and future, were forfeited. The language of the order merely follows the language of the section.

[ABDUR RAHIM, OFFG. C. J.—How is it that no copy has been seized?]

The Advocate-General.—Section 4 (1) does not say "all such copies" but only all copies of such newspaper. A newspaper is not a particular issue but the whole.

[ABDUR RAHIM, OFFG. C. J.—From beginning to end? Look at section 20. Do you mean all the issues?]

The Advocate-General.—Yes, all copies.

[ABDUR RAHIM, OFFG. C. J.—You do not mean that all the copies can be given in evidence. A newspaper means a copy of any issue or particular number.]

The Advocate-General.—Newspaper means the whole, the copy means an issue. What is forfeited is "newspaper," that is, "all such copies." It means all copies of "New India." I only state that it was within the language.

[ABDUR RAHIM, OFFG. C. J.—It does not mean future copies?]

The Advocate-General.—No. A newspaper is apparently treated as an entire book.

[ABDUR RAHIM, OFFG. C. J.—It means all copies of the paper up to the date of forfeiture?]

The Advocate-General.—Yes. It merely follows the language of section 4. What the meaning of the section is will be the meaning of the order of forfeiture too. The other point made was that this was an old press. I venture to draw a distinction between sub-section 1 and sub-section 2 of section 3. In this case, Mrs. Besant says, that she made a declaration. Section 5 (2) says that as often as a printing press changes hands, a fresh declaration shall be made. She was required to make a declaration by law in 1914 and she made a declaration, and the declaration of her predecessor could not continue in her favour.

(16) 18 Ind. Cas. 347; 6 P. W. R. 1913 Cr.; 14 Cr. L. J. 52; 37 P. L. R. 1913; 14 P. R. 1913 Cr.

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The next question is with regard to the nature of the articles, whether they come within section 4. Your Lordships will find that this section has been the subject of construction. The judgment of the Calcutta High Court is a weighty and elaborate pronouncement on this question. There can be no doubt that the language employed is of the widest character and goes far beyond the criminal law. The whole attempt on the part of Mrs. Resant was to show that section 4 must be limited to offences of inciting to murder, etc., and that it must be read in the light of sections 124A and 153A of the Penal Code and must be read as supplementary to or auxiliary of the two sections. But nothing is made an offence here. There is no question of any person being charged with any offence or there being any prosecution. What is done is it is stated that a printing press should not be used for certain purposes in the opinion of the Government. The policy underlying the Act is that the Government is responsible for maintenance of peace and order in the Province. It can decide for itself as to whether a particular matter which is being published would be inconsistent with the maintenance of that law and order. Of course, it has got sources of information which are inaccessible to the public. Looking merely to the language of the section, the question is whether the words are not wide enough to hit the present case. The words are "whenever it appears to the Local Government that a newspaper is used for purposes which are likely or may have a tendency, directly or indirectly," etc.

[ABDUR RAHIM, OFFG. C. J.—What do you say is the difference between "may have a tendency" and "has a tendency"?)

The Advocate-General.—It is only the possibility that is required. That is why Chief Justice Sir Lawrence Jenkins said to the Counsel for the petitioner: "What you have to prove is a most hopeless task."

[ABDUR RAHIM, OFFG. C. J.—What is the meaning of "may have a tendency"?)

The Advocate-General.—That it is possible in any way to have a tendency.

[ABDUR RAHIM, OFFG. C. J.—Goes beyond 'likely'?)

The Advocate-General.—Much beyond 'likely'. 'Or likely' has reference to probability, while

"May have a tendency" refers to the inherent quality independent of a particular case. If it is possible to have that effect, it is sufficient. If it appears to the Special Bench that the words, 'signs, etc.,' were not of the nature described in section 4, the Court is relieved from the task of saying whether particular words are likely or may have a tendency. The Court is only bound to enquire whether the words are likely or may have a tendency.

[ABDUR RAHIM, OFFG. C. J.—The power of the Government is wider than that of the Court?]

The Advocate-General.—Your Lordships can say in a particular case that it is not likely. It is the mere possibility that is contemplated.

[ABDUR RAHIM, OFFG. C. J.—It must be according to the circumstances of the case read in the light of the context.]

The Advocate-General.—The question is not how a particular thing is written, the question is not how a person who sits calmly and reads an article with all the limitations and recollection of all that has been previously written understands it and the question is not what effect it has upon the mind of such a man so far as this Act is concerned. The question is how any reader of a newspaper who may be ignorant or biassed understands the writing.

[ABDUR RAHIM, OFFG. C. J.—Ignorant of the language?]

The Advocate-General.—No, then there is an end of it. It does not mean that he has read all the previous issues and will read subsequent issues. It has nothing to do with the impression produced upon the mind of any given person. 'May have a tendency' may be applicable even to one man.

[ABDUR RAHIM, OFFG. C. J.—One selfish man?]

The Advocate-General.—The question is whether the language is possible of such construction, whether by implication, suggestion, allusion, metaphor, inference or otherwise.

[ABDUR RAHIM, OFFG. C. J.—You keep the words "May have a tendency, directly or indirectly" and eliminate the whole of the rest. Will not those words be taken with the words retained?]

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The Advocate-General.—The two parts refer to two different things. The words “directly or indirectly” refer to the effect of the tendency. The words “inference, suggestion, etc.”, refer to the quality and meaning of the words themselves. They are not identical. The language may be veiled in a variety of ways. It may be by innuendo.

[ABDUR RAHIM, OFFG. C. J.—If the words “have that tendency directly or indirectly to incite murder, etc.” be retained, do not they by ‘inference, suggestion’, etc., come within those words. They do not extend the meaning; they all come within it.]

The Advocate-General.—The words “may have a tendency” have a wider scope. It is the possibility of tendency, namely, whether it tends in that direction, not whether it actually produces that effect or whether the Court is able to say that the actual result is likely to be produced. Can the Court say that it is impossible to produce it?

[ABDUR RAHIM, OFFG. C. J.—Supposing it is said that the words read in their natural meaning in the circumstances have not the tendency.]

[SESHAGIRI AIYAR, J.—It is possible that some men may have a tendency.]

The Advocate-General.—The possibility does not include reasonableness.

[ABDUR RAHIM, OFFG. C. J.—He must be a man who understands the language. He must be possessed of sufficient knowledge and not a man absolutely carried away by prejudice. If you have all those elements, does it not mean that he is a reasonable man?]

The Advocate-General.—It does not follow. People are intelligent, but they are not possessed of all these elements.

[ABDUR RAHIM, OFFG. C. J.—Good many men do not take newspapers. I do not mean that class, but I mean the men likely to be influenced by newspapers, and they also can come under the category of reasonable men.]

The Advocate-General.—It is practically upon a perusal of these passages Government gives its opinion.

[ABDUR RAHIM, OFFG. C. J.—It seems to me that our jurisdiction is simple. We are not asked to say that the Government is wrong.]

The Advocate-General.—I have not said that your Lordships have no jurisdiction to say that the Government is wrong. The onus is on the applicant and the question that the Court has to decide is whether the words which are included in the order of forfeiture were not of the nature described. That is why I stated that “not of the nature” means “were not likely or would not have a tendency.” If your Lordships say that it could possibly have no tendency, the Court would have jurisdiction.

[ABDUR RAHIM, OFFG. C. J.—Read in its natural meaning it would not have a tendency? In any document we have to take the natural meaning. That criterion of judgment cannot be done away with.]

The Advocate-General.—What is the standard of result? How the consequence is to be measured is the only question that is in dispute.

[ABDUR RAHIM, OFFG. C. J.—One must judge for oneself.]

The Advocate-General.—So far as the effect is concerned the opinion of the Court should be on the question whether there can be no possibility of such effect.

[ABDUR RAHIM, OFFG. C. J.—You must construe the meaning of these words in the light of the context. As regards the tendency, it must be such as will be produced on men of average intelligence. Surely that must be the standard, whether you call it possibility or probability.]

The Advocate-General.—I do not mean what its effect would be on a lunatic or one who does not understand the language.

[ABDUR RAHIM, OFFG. C. J.—Nor on an abnormally excited person.]

The Advocate-General.—Disturbed conditions have to be considered. The question is not of average temperament or of finding a normal man and seeing what its effect would be on that person.

That would be so if the words were “are likely” and the other words were left out.

[SESHAGIRI AIYAR, J.—If your interpretation is upheld no newspaper can exist.]

[ABDUR RAHIM, OFFG. C. J.—You seem to accept the position taken up by the Calcutta High Court?]

The Advocate-General.—Yes.

[ABDUR RAHIM, OFFG. C. J.—If a newspaper incites criminal tribes or pickpockets

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to offence it comes within the purview. If you condemn a criminal class or class carrying on a shameful profession it comes under the purview of the Act. Is that the argument that you are contending for?]

The Advocate-General.—The construction placed on the section by the Calcutta High Court.

[ABDUR RAHIM, OFFG. C. J.—We are not compelled by the language. They may use any number of synonyms.]

The Advocate-General.—In an ordinary case of a construction of a document your Lordships may not say mere suggestion, allusion, etc.

[ABDUR RAHIM, OFFG. C. J.—Take libel for instance.]

The Advocate-General.—Attenuated effect is also the effect which is protected by this Act. Those are the various ways by which the language can be made to have effect but the effects themselves are described in the words "which are likely or may have a tendency." It is by reading both together. I say the variety of language is covered by expressions such as inference, suggestion, implication, metaphor, allusion and then the words directly or indirectly refer to the words. Then come the words "which are likely or may have a tendency." It means "may possibly have a tendency." Whether your Lordships go as far as the learned Judges of the Calcutta High Court go or not is a different question. It cannot be said that the interpretation placed by the Calcutta High Court is wrong. These words are contrasted with the words "which are likely." The policy of the Act is to leave it to the Government to decide the exercise of the power, and the Court to say whether the power was validly exercised.

Explanation I deals with disaffection and explanation II deals with comments and expression of disapproval of Government measures without exciting disaffection or contempt or hatred against Government established by law in British India.

[ABDUR RAHIM, OFFG. C. J.—That is bodily taken from the Penal Code. That involves an element of intent. Explanation II shows that the person charged must have a certain intention.]

The Advocate-General.—The person charged need not have intention. The keeper of the Press may be proceeded against.

[ABDUR RAHIM, OFFG. C. J.—Then how do you interpret explanation II?]

The Advocate-General.—Comments excite.

[ABDUR RAHIM, OFFG. C. J.—It means that there must be some agent.]

The Advocate-General.—The intention may be in the writer or may not be. The editor may be innocent of what appears in the paper.

[ABDUR RAHIM, OFFG. C. J.—Comments attempt to excite. You mean the person making the comments?]

The Advocate-General.—Read in the light of the section that is all that it means. The Penal Code says: "whoever does a particular thing", but here it is not a person but the words that do it.

That must be found on the face of the article itself. This is one of the cases in which no question of intention or motive affects. A newspaper may be conducted by one person, matter may be printed by another and the keeper may be a third person. This does not deal with criminal intent but only whether a particular written matter is of a particular description and then there is a safeguard so far as comments are concerned.

[ABDUR RAHIM, OFFG. C. J.—Comments are taken from explanation 2 to section 124 A. "Comments" means whoever makes comments without exciting hatred or contempt.]

The Advocate-General.—The explanation itself does not show any intention. That is merely a description of a fair comment and has nothing to do with the intention of any particular person. Here the primary question of intention is absent.

[ABDUR RAHIM, OFFG. C. J.—Look at the explanation. The explanation implies intention.]

The Advocate-General.—That depends upon the governing words of the section. If they do not require intention, there is no difficulty in reading the explanation along with that.

[ABDUR RAHIM, OFFG. C. J.—Suppose the words have a particular tendency but the comments do not excite or attempt to excite. That would be quite enough.]

The Advocate-General.—If comments come within explanation 2 that will cover the explanation.

[ABDUR RAHIM, OFFG. C. J.—When you give a proper meaning to the body of the section, when you come to explanation 2, it is exactly the same meaning as in the Penal

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Code. Clause 1 of section 4 is much wider than the language in explanation II.]

The Advocate-General.—This does not import into the governing words of the section an intention which otherwise is not necessary.

Explanation II deals with comments relating to disapproval of measures of Government. Justice Strachey in *Queen-Empress v. Bal Gangadhar Tilak* (17) drew a distinction between disapproval of measures and attacking Government. To attack a measure is one thing and to attack a person is another thing. In the one case, you attribute motive, in the other hostility to people's welfare. That at once rouses antagonism to the Government. Whereas if you attack a particular measure only and do not attack a person, that is a different thing. Not only should it be a fair comment but it should be a comment that does not excite or attempt to excite hatred or contempt. If it fulfils all these things, it does not come under clause (c). There is a further point in *Mahomed Ali v. Emperor* (2). Clause (d) deals only with comments expressing disapproval of Government measures with a view to obtain alteration by lawful means. It leaves out those things which bring into hatred or contempt any class of British subjects. If you compare section 153A of the Penal Code with section 4 of the Press Act, the words are not identical. Bringing into hatred Indian Princes or a Magistrate and exciting hatred between one class and another class are all omitted there. The explanation is embodied and the words are not hatred between different classes of His Majesty's subjects. You can bring any class or section of His Majesty's subjects into hatred or contempt even in the estimation of one or two men.

[ABDUR RAHIM, OFFG. C. J.—To bring into hatred or contempt does not mean in the estimation of one or two men. Does it not mean in the estimation of the public or a class of the public?]

The Advocate-General.—It has nothing to do with the public.

[ABDUR RAHIM, OFFG. C. J.—Can there be disaffection between one person and Government?]

The Advocate-General.—Yes, my Lord.

[ABDUR RAHIM, OFFG. C. J.—Is it a majority?

(17) 22 B. 112; 11 Ind. Dec. (N. S.) 656,

of the public or is it any proportion? It does not mean an isolated individual. It must mean bringing into disrepute.]

The Advocate-General.—The words are simply 'bring into hatred or contempt.' Ten persons or five or even two persons would be quite sufficient. It cannot be said that hatred or contempt means hatred or contempt of a considerable number of the public.

[ABDUR RAHIM, OFFG. C. J.—It means that it creates an evil reputation.]

The Advocate-General.—The words are hatred or contempt. The persons against whom are not defined.

[ABDUR RAHIM, OFFG. C. J.—The Government has to try its best and we have got to try our best.]

The Advocate-General.—In speaking of the different classes of His Majesty's subjects, it does not say that it means different classes of His Majesty's subjects in India and elsewhere.

[ABDUR RAHIM, OFFG. C. J.—Suppose a newspaper produces evidence to show that there is no malicious intention.]

The Advocate-General.—I take my stand on the letter of the Act.

[ABDUR RAHIM, OFFG. C. J.—I suppose a newspaper has to praise such acts. A newspaper ought to keep quiet. Then you are taking away the legitimate province of a newspaper.]

The Advocate-General.—I have nothing to do with that. The Calcutta case is a distinct authority on that position. There the question was upon the clause relating to hatred. Therefore all the more it was a considered opinion of the Court upon this very question. I submit that, as your Lordships have merely the words "hatred and contempt" and words "which are likely or may have a tendency," it is impossible to say whether it is applicable to an average man or the whole public or the majority of the public. The volume of hatred or contempt and the group within which these feelings are prompted are not within the competence. It is only the quality of the words that is intended. Section 153A says "between class and class." Here no such limitation is to be found.

[ABDUR RAHIM, OFFG. C. J.—Take all cases.]

The Advocate-General.—It is an argument against the Act.

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[ABDUR RAHIM, OFFG. C. J.—Are we bound to impute such absurd intentions to the Legislature?]

The Advocate-General.—I have tried to construe the language of the statute.

[ABDUR RAHIM, OFFG. C. J.—You must put a reasonable construction and give the words their natural meaning. I do not know why you should depart from that classical rule.]

The Advocate-General.—I am not referring to those decisions in Maxwell's.

[ABDUR RAHIM, OFFG. C. J.—If general words are used, you must give them their ordinary meaning.]

The Advocate-General.—What is the reasonable construction that a layman can put? Every word must have its effect given. How can it be said that this Act contemplates crime, sentences and criminals? It has nothing to do with the question of crimes. That is the basis of the whole argument. It is to prevent to a certain extent crime and possibly other disturbances. It may be right or wrong. It is not identical with the Criminal Law. It is different and there is no necessity to import elements of criminal offence.

[AYLING, J.—It may be much wider than the Penal Code.]

[ABDUR RAHIM, OFFG. C. J.—In some respects it is not in the sense in which the Advocate-General regards it]

The Advocate-General.—To bring into hatred any class of His Majesty's subjects in British India does not mean between class and class.

[AYLING, J.—You apply the extreme meaning and you are paraphrasing the section of the Penal Code. The Calcutta Judges rushed to the extreme meaning. It would be better if you took the various articles and said if they fitted in with this section.]

The Advocate-General.—That is what I am going to do after finishing this part of the argument. Maintenance of law and order is not such a light thing. The policy of this legislation is altogether different.

[AYLING, J.—We speak of words as exciting. I do not know how we can speak of words as attempting to excite.]

The Advocate-General.—There is no difficulty in that. I do not think it can be regarded as bad English or unidiomatic English. It is the nature of the tendency that we have to look to. Explanation II does not enable importation into the section all the intention which the section does not require. There

is no question of intention in the case of only one particular clause. The definition of "comment" was transferred here from the Penal Code, but it does not bring in the question of intention.

I am not in the position of the prosecution, and I submit that the applicant should have satisfied the Court that these articles did not come within the section. The purport of the articles was stated and she passed on. It was assumed by Mrs. Besant that it was for me to show how every article comes within the section and that she is in the position of a person defending herself against an attack. That is really not correct, because the onus is on her. I will read these extracts which she did not read. Whether it is a correspondent or the Editor or any other person that writes it does not matter. My whole position is that the way in which Anglo-Indians, bureaucracy and Government are all identified and treated as identical is objected to, and the whole attempt has been to attack these classes as well as the Government.

Before I go through the articles I think it will be convenient if I place my submission as to the exact scope of explanation II to section 4 of the Press Act. In going through the articles I am putting aside the Calcutta case and I am dealing with them irrespective of the powers which your Lordships have and the way in which those powers have to be exercised. Explanation II to section 4 says: "Comments expressing disapproval of the measures of the Government or administrative acts without exciting hatred or contempt do not come within the scope of the clauses." It must first be a comment and it should not express more than disapproval and the expression of such disapproval should not excite hatred or contempt or attempt to excite hatred. These three conditions are on the face of the explanation stated clearly. Assuming for a moment the question of intention is immaterial, my submission is after all what the words which are employed mean. It is the same thing as in the law of defamation. It is not necessary to show criminal intent. We must judge what is the intention of the writer by the words he used. That is the ordinary canon. I submit, therefore, that really the discussion of the intention ultimately resolves itself into merely a question as to

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what the meaning of the words used is. As regards this matter even under the Penal Code with respect to explanation II some principles have been laid down in the case of *Queen-Empress v. Bal Gangadhar Tilak* (17). That was before the amendment of the Penal Code which has made them stricter. It is said disloyalty is a general term comprehensive of bad feeling towards Government. The amount of intensity of ill-feeling is not required. It is absolutely immaterial whether the feelings of disaffection have been excited by the publication or not.

As regards explanation II to section 124A, the old explanation was very much wider than the present. If your Lordships come to the conclusion that the writings are not attacks on the measures of Government or against the Government and its essential characteristics, its motives or its feelings towards the people, then you must put aside the explanation altogether and apply the first clause of the section.

I shall now refer to Mayne's Criminal Law, page 95. The old explanation was that you can disapprove measure of Government with much severity, but still if it is compatible with a disposition to obey Government that will not come within the section. There must be no intention to subvert Government at all. It will be perfectly compatible with paying due obedience to Government. A person may be inimical to Government and still obey Government. The present law is that it is not necessary to enquire into the question whether the comments are of the character which are compatible with due obedience to Government. The only question is whether, if the articles are taken as a whole (putting aside the Calcutta case) it is possible for your Lordships to say that there was any possibility of exciting or attempting to excite hatred.

[SESHAGIRI AIYAR, J.—In the one case the intention to subvert Government must be shown and in the other, you say if he does so intend and at the same time obeys Government, he is not liable.]

The Advocate-General.—Here disaffection is explained as disloyalty and all feelings of

enmity, not the absence of affection. It means hatred, dislike or every form of ill-will towards Government. A person may bear ill-will to Government, but does not want to destroy it. It is quite possible for a person to entertain feelings of hatred against Government and still he might not wish to destroy it.

[SESHAGIRI AIYAR, J.—If he tries to subvert Government by secret plotting?]

The Advocate-General.—He does not come within the explanation. What I venture to submit is the effect of the words. The difference between the Penal Code and the Press Act is very great. Taking the explanation and the general principle as they stand, the comment should be the expression of disapproval of Government measures. The strength or the severity of disapproval does not matter provided the language employed is incapable of exciting hatred or attempt to excite hatred or disaffection. I am using *hatred* in a compendious way. Hatred may be stronger and disaffection includes all categories of ill-feeling towards Government. That positive ill-feeling need not be of a high degree. It is sufficient if that positive ill-feeling is introduced. That is all that the Statute requires. I do not want to go into the English Law. The two systems, no doubt, differ. The only thing that Mrs. Besant can ask your Lordships to do is to ask you to apply the law of the land as it stands. Chief Justice Best said that the only question is what the words mean.

[ABDUR RAHIM, OFFG. C. J.—If it is a question of intention, it can only be gathered from the words.]

The Advocate-General.—I go further and say that under the Press Act no intention is material.

[AYLING, J.—I quite appreciate that; you say where there is a comment on the measures of Government, intention is immaterial. That is a point on which I am not quite clear. The explanation takes out of clause (c) comments on the measures of Government made without exciting or attempting to excite hatred. Does not that imply the question of intention?]

The Advocate-General.—I shall draw your Lordships' attention to the language of the

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section—"Words which are likely or may have a tendency, directly or indirectly, to bring into hatred or contempt." It is words that bring a person or institution into hatred. Comments of a particular description are taken out of that: By virtue of the explanation, the intention is not a condition precedent, if the governing parts of the section do not require that intention.

[AYLING, J.—I do not follow you. Explanation II takes out particular classes of comments.]

The Advocate-General.—Comments made without bringing into hatred or contempt any measures of Government. I shall substitute for 'exciting' the words 'bringing into hatred or contempt.' It is merely a change of language.

[AYLING, J.—The section says 'tending to bring into hatred or contempt.']

The Advocate-General.—Only a word is used for a phrase. What is within the explanation must first fall within the clause in order to be taken out of it. Therefore, I would ask your Lordships to read the explanation along with the whole wording. What are the words: "words which may have a tendency to bring into hatred or contempt." But any comments which do not excite contempt and which are of a general character come within the explanation. If a man makes a comment with an innocent intention, action lies under the Act.

[ABDUR RAHIM, OFFG. C. J.—The Legislature might well have said that if a man makes a comment without intending anything wrong against Government measures, then the provisions of the Act need not apply.]

The Advocate-General.—The question is whether the keeper of a press who uses strong and violent languages escapes the Act when he says that he did not intend it.

[ABDUR RAHIM, OFFG. C. J.—As far as the section is concerned there is no question of intention.]

The Advocate-General.—The same words are used in the explanation.

[ABDUR RAHIM, OFFG. C. J.—Can you with comments attempt to excite? Can words attempt to excite disaffection?]

[SESHAGIRI AYYAR, J.—Can you give us an instance where words attempt to excite disaffection?]

The Advocate-General.—Exciting is bringing into hatred or contempt Government established by law. I submit your Lordships will read this explanation as co-extensive with the original clause.]

[AYLING, J.—Has this explanation II been considered in any of the reported cases?]

The Advocate-General.—In *Amar Singh v. Emperor* (5) (the "Komagata Maru" case) the Judges follow the language of the section. My contention is that the explanation does not add anything to the section, and but for the explanation, it would come within clause (c).

As regards the words "Government established by law," I submit that the General Clauses Act says it is the persons charged with the Executive Administration of the Government.

[ABDUR RAHIM, OFFG. C. J.—How is it possible to have Home Rule without changing the persons?]

The Advocate-General.—What I said is it is possible to advocate Home Rule but without doing any of the things which come within this clause.

[ABDUR RAHIM, OFFG. C. J.—The tendency of the articles comes to this—that the present machinery is not suitable to India. Therefore the machinery must be changed and it ought to be substituted by Home Rule.]

The Advocate-General.—To attack the existing political system is one thing and to paint the virtues of an ideal system of Government is another.

[ABDUR RAHIM, OFFG. C. J.—If you want to understand the position, you must suppose that the attitude taken up by this article is that the present machinery of administration in India is not suitable and it ought to be substituted by a different machinery.]

The Advocate-General.—That is a very large question.

[ABDUR RAHIM, OFFG. C. J.—Do any of the articles tell us what is meant?]

The Advocate-General.—I am entirely in your Lordships' hands.

[ABDUR RAHIM, OFFG. C. J.—I want to know how your admission affects it.]

The Advocate-General.—If you can advocate Home Rule without offending the Press Act, you are at liberty to do so, but it may not suit Mrs. Besant's views.

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[ABDUR RAHIM, OFFG. C. J.—The drift of the articles is that the present machinery of Government established by law is not suitable. Therefore, it has to be substituted by a different machinery. That is what is called Home Rule. Five means are suggested to attain it. Would they come within the purview of the Act apart from the language used?]

The Advocate-General.—It does. Everything depends on the nature of the arguments advanced. Supposing a person brought himself under section 124A by advocating Home Rule, my admission cannot prevent him from being convicted. The question is not one of intention but is one regarding the meaning of the words used. Assuming intention is material, it is a question of the meaning of the words. It depends on the arguments put forth. The matter is explained in *Regina v. Burn* (18). Mayne's Criminal Law, page 300. My submission, therefore, is that it must be shown to be a comment on a measure of Government, or its administration. Home Rule is not a measure of Government or administrative action, therefore, you can advocate Home Rule. It does not require the aid of the explanation. Urging Home Rule cannot be said to be any comment expressing disapproval of Government measures.

[The Advocate-General then commented on the various articles, the subject of the charge.]

Mrs. Besant, in reply.—The Advocate-General desired to introduce into section 22 before "forfeiture" the word "legal." If it is said that it is a valid forfeiture, then it is necessary that the Court shall not go into the nature of the words described, because they were also included in the proceedings purporting to be made under the Act. If a legal procedure which may be entirely erroneous is shut out by section 22, then the enquiry into the nature of the words described which is ordered in section 19, would equally be shut out and it would not be possible even on the narrower ground which is contended for the Press Act, which allows and penalises the person referred to, and the words because the forfeiture being valid, it must be presumed that the words were such as were described by the Government order.

The Advocate-General's contention implied (18) 1 State Trials 1.

that the Court had power to set aside a valid forfeiture. It seems to reduce the whole argument of the Advocate-General to an absurdity. He said that a forfeiture is valid and must not be questioned. On the other hand, he has told us that the Court must set it aside.

Another point that was raised by the learned Counsel was that the powers of the High Court are as limited as the powers of the applicant, that the High Court had no more power to interfere with this supposed valid forfeiture than the applicant had under the Act. From that it clearly follows that, however gross a mistake may be, which happens in the course of the proceeding, the High Court has no power to intervene nor to protect any one who may be suffering from the consequences of that mistake. There is no wrong without a remedy, but that maxim will then certainly be traversed and proved to be inaccurate.

He argued that the sub-section includes the proviso. A proviso has never been held to be a part of a clause which it qualifies; see the very strong views put forward in the House of Lords by Lord Herschell, Lord Watson and Lord Halsbury.

There is one other point about the statute with which I shall deal because of a curious result in connection with section 8. There are two provisos. If the proviso to section 3 is to be read as part of section 3 (1), then it would imply that provisos 1 and 2 must also be read as part of section 8. That would be a very inconvenient argument when pressed to a point. But what puzzles me still more was a statement made by the learned Advocate-General that exceptions and explanations and provisos were apparently different words for the same thing. The point was introduced in dealing with the explanations to section 4 and they were said of the provisos. I propose to deal with it fully when I come to explanations. Proviso is not explanation and proviso to section 3 cannot be read as explanation to the section and to make such a change would make all reasonable construction impossible.

I was using the *Moment* case (15) in order to show that a section of the statute might be declared *ultra vires*, even although the whole statute might not reasonably be challenged

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under the present conditions of the Special Bench. The whole of my argument turned on the question of unwritten law and constitution. I traced down these words from the first Act as they occurred in the Act of 1813 and traced them to William IV and down to the India Councils Act of 1861, but only in order to show that the Act of 1915 was simply repeating the words that formed part of previous legislation for a long time and the whole argument depends on the validity of those words. Another argument was put by the learned Advocate-General with regard to forfeiture and allegiance. I feel a little doubtful whether the Calcutta Judge considered the whole constitutional law of the country when he stated that no failure on the part of the Sovereign could absolve a subject from his allegiance. It has been held over and over again and emphasised by the facts of history that allegiance to the King is a corollary to protection by the Sovereign. Sovereign and subject are two people tied together by protection and on the valued protection of the Sovereign must depend the allegiance of the subject. That is most certainly the constitutional law of England, as laid down by the greatest of our constitutional lawyers, and it may be within your Lordships' memory that Mr. Justice Norman quoted one or two appeals pointing out that if it were denied, we were denying the right of self-defence to the subject and that it would be contrary to law and justice. It seems to me then that the words read are more of the nature of a sentence thrown out without very careful thinking, than having to do with the main subject which was before the Court. I admit that the question of allegiance was introduced as a substantial part of that question, and yet it was dealt with so lightly by his Lordship and brushed aside as a view impossible for him to accept, giving one the idea that he was swayed in that by the law that he was administering, more than by the political opinions which he held, for it is certain that there are people of political opinions in England who would be shocked that the King could forfeit the allegiance of his subject. English history has shown that such a forfeit is possible and the most important point turned on that very

question. It was because of forfeiture and fines levied by the power of the Crown without the consent of a Court of Justice that there were great struggles in the 7th century in England, from the time of Henry VIII onwards in the constitution because of the illegal exactions by the Crown, right down to the time of Charles when the struggle went on without a break.

[ABDUR RAHIM, OFFG. C. J.—We are only to construe those words in the Government of India Act. The question of allegiance of the subject to the Sovereign has hardly any bearing.]

Mrs. Besant.—The Petition of Rights presented for the disregard of which James II was driven away and the Bill of Rights passed in Parliament, which is one of the main points of the grievances of a subject, led to the exile of James and recognition of the claim of a subject that he should not be deprived of any part of his property.

[ABDUR RAHIM, OFFG. C. J.—The question is what bearing it has on unwritten law. It is common law.]

Mrs. Besant.—In the Magna Charta it is laid down that we have unwritten laws. Those are fundamental laws of the King but I would not venture to urge that. I confine myself to this one point, the illegality of taking a subject's property where a Court of law has not definitely given the claim to that property to the Crown. I grant that any forfeiture or fine inflicted by a Court of Law does not and ought never to touch the allegiance of a subject. Where the law speaks I do not for a moment pretend that any law-abiding subject has any complaint. If the law has spoken, it should be accepted, no matter how hard it may press. So long as a man feels himself wronged and so long as opportunity is given to go to higher and higher Courts, so long a man has a right to resist.

[ABDUR RAHIM, OFFG. C. J.—Yet a man commits a crime and the Police arrests him. In certain cases a certain procedure is necessary to be followed.]

Mrs. Besant.—In all those cases there is always an opening. That is not on all fours with my case. Where a man is accused of crime and is arrested by the Police, *Habeas Corpus*, though asked, will be refused. Certain offences are non-bailable by law,

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[SESHAGIRI AIYAR, J.—Take the case of a man who absconds. His property is attached and is not made over to him until he surrenders to the Court.]

Mrs. Besant.—There is a difference, my Lord, between forfeiture and attachment.

[SESHAGIRI AIYAR, J.—Government has a right to forfeit a man's property, if he absconds. The property is restored to him when he is found. That is exactly like this.]

Mrs. Besant.—Government had apparently a right to seize and hold property for a time. But I was not aware except in some cases of revenue that special power was given to seize and keep property.

[ABDUR RAHIM, OFFG. C. J.—The forfeiture is operative until it is set aside. There is a right of appeal to the Court.]

Mrs. Besant.—In England even in the question of taxes, a competent Court has to decide before a forcible seizure of property has to be made. In the Revenue Laws here, there are certain exceptions which do not come in the ordinary Courts. If it were that the ordinary Courts of Law here permit such forfeitures, I am afraid that I should say that those laws were made without proper consideration and would be broken if appeal were made to higher authority as in England. There was one word which struck me from a remark of Mr. Justice Seshagiri Aiyar in regard to absconding persons. Is it not a different case, a man seeking to evade a process of law? He does not submit himself to a trial which he has a right to demand. There seems to be very great difference between a man who remains with personal property within the area where the Court exercises the jurisdiction and a person who runs away and evades the process of law to which he should subject himself. If a man conceals his person from due process of law, I do not know if such a man has not lost his right to property.

[ABDUR RAHIM, OFFG. C. J.—The Police arrest such people and deprive them of the liberty before they are found guilty.]

Mrs. Besant.—Even those men can be bailed out except for certain offences.

[ABDUR RAHIM, OFFG. C. J.—In non-bailable offences a man is arrested by the executive authority first and tried afterwards.]

Mrs. Besant.—That is the case when a

man runs away. Even then the liberty of the person is strained. There are certain limits of other liberties which I have not dealt with at all. I do not plead they are questions relating to the liberty of the press, because I did not feel I could bring it under the unwritten law. While that was a tempting side on my case, it could not bring it under that particular clause. On that very question I heard with great surprise a statement from the Advocate-General that except with a license there is no right to keep a press here at all. With all submission it is an entire misreading of the Act. There is no license under the Act of 1867.

[ABDUR RAHIM, OFFG. C. J.—The Advocate-General probably meant declaration.]

Mrs. Besant.—I do not know, my Lord. The Advocate-General said that we are given license and that we have no right to keep a press without a license. He went on to say that every press in England is licensed.

[ABDUR RAHIM, OFFG. C. J.—He may be perfectly wrong.]

Mrs. Besant.—He is absolutely wrong. In the year 1878 no paper could be printed without security, which is analogous to the condition here. But that limit on the liberty of the press was swept away in 1878 in a famous case, in which Charles Bradlaugh was concerned and he refused to give security. Liberty of unlicensed printing was ours for a long time and the very word licensing is rather held in disrepute and disliked so that some pains were taken to argue that this particular Act did not impose a license. It is perhaps that which brought to my mind the error in putting it. So far as the press of India is concerned it is an unlicensed press.

The next point is the action of the Court in the famous case of Ameer Khan. That is with regard to the difficulty the Judges felt there with the issue of the *Habeas Corpus*. I feel sure that this High Court will declare that the forfeiture to recognize though the Government may no sion. and give affect to the Court's decision.

[ABDUR RAHIM, OFFG. C. J.—If the forfeiture is wrong, there need be no anxiety as to the result.]

Mrs. Besant.—The learned Advocate-

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General contended that the order of forfeiture followed the language of the section. The Government may know such limitations in its order. It is said that all copies of "New India" wherever found should be forfeited without any limitation and without confining itself to the words of the section. Hence I submit that the words of the order themselves were wrong. The only point to which I intend to invite your Lordships' attention is the question of the proviso read along with section 8 with its two provisos. If the proviso to section 3 is read in the sense in which the Advocate-General read it, then it must also be in a similar way read as regards section 8. According to the Advocate-General the proviso takes away the protection given and would enable the Magistrate to impose security, although he has specially exempted once by proviso 1. On that general point I venture to suggest that the ordinary discretion of the Court is not taken away, because the effect may be proved in the substance of the proceedings. I would invite your Lordships' attention to the curious omission of the word 'tendency' from sections 17 and 19. In section 14 tendency as well as the nature of the words are brought in. But both in sections 17 and 19 that is omitted. The Court is directed to set aside the order of forfeiture, if the nature of the words is not such as is described in section 4 and similarly in section 17 under which I have presented my petition, nothing is said as to tendency.

With regard to the words 'hatred and contempt' on which so much stress was laid in regard to these extracts the Legislature is endeavouring to take certain acts out of the section by means of the explanation what it is unable to do by words. The Legislature put in the explanation in order to prevent the Press Act from being resorted to in cases to which it is not really intended to apply. The general position and tendency of the articles and the nature of the articles, whether the writer was wholly loyal, honest and straightforward, are all to be taken into consideration. This explanation was intended to protect the honest editor and bring to book a man who in carefully chosen words is trying to insinuate disloyalty. In this connection I refer your Lordships

to the same volume 22 Bombay, the case of *Queen-Empress v. Ramchandra Narayan* (19), which was heard by a Full Bench. Three Judges concurred as to what is the real meaning of the words 'hatred and contempt.' Farran, C. J., observed that disapprobation is not incompatible with thorough loyalty, provided that it is compatible with a disposition to obey Government and to support its lawful authority against attempts to resist or subvert it. That view was also concurred in by Parsons, J., at page 161 and Ranade, J., also agreed in that view.

The explanation deals with comments on measures of Government, on the administration of Government and on actions of the Government. So that all comments upon Government would be covered by the explanation. Outside Government measures anything said must be judged on the merits, whether the writing is right or wrong. The learned Advocate-General said that intention was immaterial. If a man does a thing, he must have the intention to do it. In the main part of section 4 we have it stated that if a Press is used for the purpose of so and so, then it certainly implies an intention on the part of the keeper or the editor of the Press; and similarly where a tendency comes in, the writer must be held to have an intention to do that towards which his words tend; and so I submit that under section 4 intention is a necessary ingredient of the offence. There it comes under sections 124A and 153A. What I meant was that India should be within the Empire and be connected with Britain, but that we may criticise the views of the persons composing the Government for the time being.

I took up this newspaper two years ago at the age of 67. A woman of that age does not take up a paper simply as an amusement to play with. I took it up with the one object of helping India to gain Home Rule and nothing except that is the object of the paper. All that conduces to that I try to use. All that is against it I leave on one side. When I find that Government is doing things—bureaucracy or

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autocracy—which undermine the supremacy of the Crown and which tend to lessen the allegiance of the people to the British Empire, I think it then my duty as a publicist to draw attention to the facts in order that they may be changed, and in that I am acting under the explanation of the Penal Code. Drawing attention to facts which cause hatred and contempt is a legitimate thing to do and in every case where I have spoken against the bureaucracy and autocracy, I have spoken under the belief that their action tends to make Indians despair of law-abiding and constitutional means and drives them to that secret conspiracy which finally seems their only hope. I believe that by that policy, my Lords, I have rendered a great service to the Empire. I believe that during this terrible time of War the fact that I have spoken out openly has saved the British connection, and that, if it were not for those who are following this policy, there would be a serious danger to the British connection with India, for it is written, and written truly, that the tears of the weak undermine the throne of Kings. My Lords, my devotion to the King-Emperor is very deep and strong. I believe that the English connection is beneficial to India. I have never pleaded independence which would be a blunder and would lead to endless difficulties and wars. So I have taken up this paper in my old age and shall continue it as long as the law permits me to do it. But if the law should say that the second security is forfeited, that I must not criticise, that I must go along the lines of *Mahomed Ali v. Emperor* (2) and that we must accept that as the rule of journalism in this country, then I drop journalism. It has no interest for a woman like me and I simply throw the thing away and go to the platform.

[ABDUR RAHIM, OFFG. C. J.—What is the answer to the Advocate-General that it is possible to advocate Home Rule without bringing into hatred or attempt Government established by law in British India?]

Mrs. Besant.—My answer to that would be that there is nothing to bring Government here into hatred and contempt and I do not know of any way of advocating it except on the lines I have adopted. For thirty years it has been asked for by the Congress without any result.

[ABDUR RAHIM, OFFG. C. J.—You say that Government really means the supremacy of the British Crown?]

Mrs. Besant.—Yes, and the connection.

[ABDUR RAHIM, OFFG. C. J.—Supposing it means also the Government of India as constituted by law?]

Mrs. Besant.—I should fall back on the statement that the real Government of India is the British Cabinet which is represented by the Government of India, and it is ultimately the British Cabinet that is the Government of India.

[ABDUR RAHIM, OFFG. C. J.—I am not expressing any opinion. But supposing the Government means the Madras Government or Bombay Government, then in that case, supposing in order to push forward the cause of Home Rule, you wanted to show that the Government as now established are unfavourable or are not interested in the people and it creates hatred against the Government?]

Mrs. Besant.—If hatred and contempt are to be construed as they were construed in *Mahomed Ali v. Emperor* (2), I believe my case would be, alluding to the Madras Government, that I could not prove that I have written nothing. I confess that that task is impossible and I have not tried to do it. I have attacked the bureaucracy because I believe it to be injurious to the Crown. I have attacked these actions of Government because they have turned the hearts of the people against the Crown and, therefore, I am not exciting the kind of hatred and contempt which would bring me within the Act reasonably construed, but I am exciting a feeling which would make people think that there is still a hope for us in England and that these actions are only a few of the kind which we can get rid of by getting a change. I, therefore, come within the explanation of the Act.

[ABDUR RAHIM, OFFG. C. J.—If you disapprove of the present form of Government you would not come within the mischief of the Act?]

Mrs. Besant.—I think not. It distinctly says that disapprobation of measures is admissible and is covered by the explanation.

[ABDUR RAHIM, OFFG. C. J.—That is as regards comments on certain measures.]

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Mrs. Besant.—Administration, actions and everything—comments expressing disapproval of measures or other actions of Government. Every comment is under the protection of that clause. My contention is that I did not excite hatred and contempt. I excite a desire for change, an effort for change, but always on constitutional and law-abiding lines, in order that it may lead to no disturbance. I am not even advocating passive resistance. If this and the other securities are forfeited, I must turn to the platform. For that would be my only resource, holding it to be my duty to urge Home Rule for the safety of the Empire. If, however, the decision goes that the paper shall not be destroyed, even if your Lordships think that even if one or two comments are harsher, it would be fair for Government to warn and that, therefore, you will not allow the whole paper to be destroyed because of the two or three unwise or hysterical remarks, then it seems to me that the whole press of India will be relieved by your Lordships' decision. Since this happened, the whole of the press has been writing against the Press Act. There is now an agitation going on in the whole country, because it has been so misused in this case as to bring within its net a paper which should never have been touched. Seldom, I venture to say, has a Court had to sit to decide an issue more important than the present, for on your decision, my Lords, the whole liberty of the press of India depends. If your Lordships re-affirm the Calcutta decision, as the learned Advocate-General has practically asked you to do, it is the death of journalism in India. The only remedy then will be in the Parliament, and an agitation which at the present time is most undesirable. I am not pleading that, if your Lordships think it right, you should not give such a decision, because I have not forgotten that Judge who in Wilke's case said that God forbid the Courts of Justice in England should ever cease to declare the law because of the danger of agitation. That I feel must guide your Lordships, as it guides the Courts of Justice in England. That decision was given, although it was a triumph of agitation, and against the action of the High Court of Parliament. I

am told that this is not a criminal procedure, yet I am debarred from the Privy Council unless I point out, as I hope to do on Friday next, if the judgment go against me, that the forfeiting section is *ultra vires*. But I do submit that the whole Indian Press will be muzzled and the injury would be added that practically it will tell India that there is no hope for her in constitutional and law-abiding agitation. There is only one remedy for India, which would be to try and break the British connection. Because I feel that that connection is necessary not only for India but for England and for the Empire at large, and because I believe breaking off connection with Britain would mean invasions from other countries and quarrels here, I do appeal to your Lordships to construe the Act which is tyrannical in its essence if applied in the strictest sense as the Calcutta High Court decided, and construe it in a way which will rejoice the heart of every loyal and patriotic newspaper here in India and give to India that freedom of discussion without which no nation can be peaceful and without which it can never become truly great.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—This is an application under section 17 of the Indian Press Act of 1910 by Mrs. Annie Besant, the keeper and printer of the "New India" Printing Works, and the Editor of the newspaper, "New India." The applicant seeks to have set aside an order of the Chief Presidency Magistrate of Madras, dated 22nd May 1916, requiring her to deposit security of Rs. 2,000 under section 3 (1) of the Act an order of the Governor-in-Council, dated 25th August 1916, declaring under section 4 (1) the security so deposited and all copies of "New India" wherever found to be forfeited to His Majesty. No copies of "New India," it may be mentioned, have actually been seized.

The order of the Chief Presidency Magistrate is attacked, *firstly*, on the ground that inasmuch as the press and the newspaper in question were in existence before the passing of the Press Act under the names and styles respectively of 'The Standard Press' and 'The Madras Standard,' the fact

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that the applicant, having purchased the said press, made a declaration before the Magistrate with respect thereto on the 2nd December 1914, under section 4 of the Press and Registration of Books Act of 1867, in the new name of the "New India Printing Works" did not bring this press under the operation of section 3 (1) of the Press Act. But clearly the provisions of the Act are applicable to all printing presses: under section 3 (1) the Magistrate is to take security from any person who makes a declaration before him with respect to any printing press, apart from any question whether it was set up before or after the Act, and by sub section 2 the Local Government may in certain circumstances require the keeper of a press in respect of which a declaration was made before the commencement of the Act of 1910 to deposit security. Section 4 of the Press and Registration of Books Act of 1867 prohibits any person to keep a printing press without making a declaration to the effect that he has a press for printing purposes at a particular address, which he is bound to disclose. It is directed against the keepers of printing presses for the time being: so with every change of hands, a fresh declaration becomes necessary. In this way, the "New India" Printing Works became amenable to the action of the Chief Presidency Magistrate under section 3 (1), when as required by the law a fresh declaration was made before him by the applicant. I may mention that a certified copy of a judgment of the Patna High Court, dated 5th June 1916, in Criminal Revision No. 93 of 1916, was cited before us in support of the applicant's contention, but it is sufficient to say that I have not been able to find out what exactly was decided in that case.

The Chief Presidency Magistrate, however, chose to dispense with the deposit of security at the time the applicant made the declaration. And it is thereupon argued that he became *functus officio* so far as the press was concerned and was not competent to pass his subsequent order of 22nd May 1916. By section 3 (1), all keepers of printing presses are required to deposit security at the time of making the required declaration to such an amount, not exceeding Rs. 2,000, as the Magistrate may fix. Then comes

the proviso, which says: "Provided that the Magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section." It is contended by the learned Advocate-General on behalf of the Crown that the words "to cancel or vary any order under this sub-section" gives the Magistrate the power to cancel his order dispensing with security, although he derived authority to pass that order from the proviso itself. But it seems to me that the use of the words "or may" before the words "cancel or vary any order under this sub-section" goes to negative such a construction: it indicates that an order dispensing with the deposit of security is not included in the words "Any order within this sub-section."

It is true in one sense that a proviso is part of the section to which it is attached. But in ordinary legal parlance a proviso is to be distinguished from the enactment, to which it is generally appended either for the purpose of explaining what particular matters are not within the meaning of the enactment [see *West Derby Union v. Metropolitan Life Assurance Society* (20)], or for providing exceptions and qualifications to the enactment or for other similar purposes. The proviso is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause.

When a reference is made in the proviso to what is enacted by the section or sub-section to which it is appended, one would not ordinarily read it, unless so compelled, to include anything contained in the proviso itself. Here the main purpose of the enactment is to authorise the Magistrate to fix the amount of security and it is to enable him to cancel or vary this order from time to time that he is given the power under the latter part of the proviso.

It was argued that the Legislature could not have intended that if the Magistrate once dispensed with the deposit of security,

(20) (1897) A. C. 647 at p. 652; 77 L. T. 284; 61 J. P. 820; 66 L. J. Ch. 726.

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he should have no further power to require security if he so chose. But it must be remembered that he is to dispense with security only for special reasons which have to be recorded by him and it is not unlikely that the Legislature thought that where such reasons existed, the particular keeper of the press who was so exempted should not again be called upon to furnish security.

However that may be, I do not feel called upon to put any construction on an enactment such as this which would tend to extend its scope beyond what is warranted by the natural meaning of the words used by the Legislature. Section 3 (1) imposes a serious disability on persons desiring to keep printing presses. It must have the effect of hampering the carrying on of what is ordinarily not only a perfectly legitimate business, but one which has played such an important part in the diffusion of knowledge and progress of civilization.

Upon this application, however, it is not open to us to set aside the order of the Chief Presidency Magistrate. Whether section 22 of this Act bars all interference on our part or not, is a question which will have to be considered in connection with another application which will be dealt with later. But in any case, there is no provision in the Press Act of 1910, under which this application is made, which enables us to deal with the order of the Magistrate purporting to be made under section 3 (1).

As for the order of forfeiture, section 22 read with sections 17 and 19 debars us from interfering with it except on the ground, namely, that the extracts in question are not of the nature described in sub-section (1) to section 4. This is quite clear.

Before dealing with the application on the merits, I should mention that the applicant repeatedly complained to us that the Government before passing the order of forfeiture did not give her sufficient intimation as to the kind of matters published in the paper which they regarded as objectionable nor did they call upon her to show cause why the security deposited by her should not be forfeited.

The Act imposes no duty upon the Government to issue any warning or to ask for any explanation before taking action. There may be force in Mrs. Besant's plea that if she knew what it was in the policy of "New India" or in the nature of the matters published in it to which the Government had objection, she would have been in a position to take steps to prevent anything appearing in the paper which might reasonably be considered to be offensive. She has told us that there was only one letter which appeared in "New India" written by an Englishman on the subject of Indian Servants to which the Government took exception but that, as a matter of fact, the editorial note had made it clear that the views of the writer found no sympathy with the editor. She says she received no other warning of Government disapprobation. It seems quite possible, judging from Mrs. Besant's attitude before us, that if her attention had been properly drawn in time, greater check would have been exercised over the language used in some of the letters and articles published in "New India." But that is a matter which the Government can and legitimately take into account; it can in no way influence our judgment on the questions for decision.

The scope of section 4 was considered by the Calcutta High Court in the matter of a petition of *Mahomed Ali v. Emperor* (2) and the learned Advocate-General has supported the interpretation put upon it by Chief Justice Jenkins and the other learned Judges of that Court. That, generally speaking, the terms of the section are extremely wide and most comprehensive cannot be doubted. They vest the Local Government with a discretion so large and unfettered that the keeping of printing presses and the publication of newspapers become an extremely hazardous undertaking in the country. A press may be devoted to the printing of most useful and meritorious literature or other publications of an entirely innocent and non-controversial nature, yet it will be liable to forfeiture if any matters printed in such press are considered by the Government to be objectionable within the meaning of the Act. It may be doubted if it is possible for the keeper of any printing press in the country to maintain such an

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efficient expert supervision over matters that are printed as to detect everything that might be regarded to fall within the "widespread net" of section 4.

Similarly a newspaper may be consistently staunch in its loyalty to the Government, its general policy may be above all reproach, the sincerity and *bona fides* of the intention of the editor may not be liable to question, but if any letters or other writings are let in, may be through carelessness, which come within the scope of any of the clauses to section 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself. That the influence of a periodical on public life of the country is on the whole decidedly beneficial need be no bar to the Government's action. The Local Government, it may be assumed, will not indiscriminately exercise the power which it possesses under this enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious encroachment on the freedom which the Press in India enjoyed before the passing of the Act.

The Act, as is well known, was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. How far it has been instrumental in accomplishing that object is not a question with which we are concerned; nor are we concerned with the question whether the Legislature was justified in applying such a drastic press law to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionaries in one part of the country.

Mrs. Annie Besant has argued having regard to the nature of the enactment that so far at least as it affects European British subjects, section 4 of the Act is *ultra vires* of the powers of the Indian Legislature. The Indian Legislative Council is a subordinate Legislature exercising only a delegated authority and section 65 (2) of the Government of India Act, which lays down that "the Governor-General in Legislative Council has not power to make any law

affecting...any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom." The contention is this: in the words of Sir William Blackstone, "allegiance is the tie which binds the subject to the King in return for the protection which the King affords to the subject," and to use the language of Bracton "the King is under the law, for the law makes the King." What is meant by allegiance is more fully explained by Norman, J., in *In the matter of Ameer Khan* (8), "It is the true and faithful obedience of the subject to the Sovereign. Everyone born within the dominions of the King of England, whether in England or in the Colonies or dependencies, being under the protection, therefore, according to our common law, owes allegiance to the King."

By "the unwritten laws" are meant, generally speaking, the laws recognising the fundamental right of the subject to enjoyment of personal freedom and property of which he could not be deprived except by a sentence of the Court of Law. They were embodied in England in the Great Charter and the Petition of Rights which, as pointed out by Norman, J., "are for the most part declarations of what the existing law was, not enactments of any new law." That learned Judge also observes that the infraction of such laws may be carried to such an extent as to give rise to the right of self-defence on the part of the subject, a right which, says Sir Michael Foster, "the law of nature giveth and no law of society hath taken away." Then further on: "It would be strange indeed if a great popular assembly like the Parliament of England had put into the power of a Legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws." Norman, J., however, refused to issue a writ of *Habeas Corpus* to the jailor who had charge of the body of Ameer Khan who had been imprisoned under Regulation III of 1818, holding that its validity had been duly recognised by the Legislature, and that even

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if the writ was issued, it would be infructuous, as the jailor acting under the warrant of the Governor-General-in-Council was not bound to obey the writ.

The decision of Norman, J., was upheld in appeal by Phear and Markby, JJ.*; but the learned Advocate-General has relied upon the judgments in appeal as modifying the propositions cited from Norman, J.'s judgment. Phear, J., says (page 477): "But I think it right to say that in my judgment the words 'whereon may depend, etc.' do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, viz., of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us." Markby, J., at page 482 observes: "The restriction, which is the foundation of the second objection to the validity of the Act, is certainly couched in language to the last degree vague and obscure...I wholly repudiate the doctrine contended for, that the allegiance of a subject to his Sovereign can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege, or immunity whatsoever. I think the notion of reciprocity expressed in the maxim *protectio trahit subjectionem, et subjectio protectionem*, upon which this argument depends, is one which is wholly inadmissible in any legal consideration. It appears to me that if we are to admit such a doctrine as this we must admit it, not only with regard to Acts of the Indian Legislature, but to Acts of the English Parliament."

As to this last observation I may point out with great respect that there is a fundamental difference between the Legislative powers of the Imperial Parliament which, according to the theory of the English constitution, can enact any laws it chooses and

the authority of the Indian Legislature which is purely derivative and subordinate. Any enactment of the latter in excess of its delegated powers or in violation of the limitations imposed by the Imperial Parliament is null and void. This doctrine was recently expressed in very clear terms by the Judicial Committee in the famous *Moment* case [*Secretary of State v. Moment* (15)] the judgment in which was delivered by Lord Haldane. In that case it was held that section 41 (b) of the Act of 1891, by which it was sought to debar a Civil Court from entertaining a claim against the Government to any right over land, was *ultra vires* of the powers of the Indian Legislature as contravening the provisions of section 65 of the Government of India Act of 1858 (corresponding to section 32 of the Government of India Act of 1915). Lord Haldane observed (page 401*): "It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure but whether the Government of India can by legislation take away the right of the subject to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of section 65 of the Act of 1858 renders such legislation *ultra vires*."

The whole question, therefore, here is, what is the meaning of the words in section 65 (2) of the Government of India Act, which has been cited above. Is it as understood by Norman, J., or as suggested by Phear and Markby, JJ.? The question is

*See *In the matter of Ameer Khan*. 6 B. L. R. 459—*Ed.*

*Page of 40 C.—*Ed.*

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one of great importance and not free from difficulty and I do not wish to express any positive opinion on it. It is neither necessary to do so to decide the question involved in this application, nor am I satisfied that it has been fully discussed. But as at present advised, it seems to me that the construction put upon the enactment by Norman, J., is what is really required by the plain meaning of the words used. And I find no difficulty in conceiving that the Imperial Parliament, with all its great traditions in upholding the cause of liberty, should have been unwilling to grant to the Indian Legislature, constituted as it is, any legislative powers which would enable the Government of India to encroach upon those fundamental rights of the people the violation of which, especially by a foreign Government, is so calculated to lead to a disturbance of that peace in the realm which it is the highest concern of the Crown always to assure. That the provision of section 43 of 3 and 4 William IV, Chapter 85, is not to be regarded as of no practical value and importance or as something quite obsolete is made clear by its repetition in identical language in section 65 of the Government of India Act of 1915.

The next question in this connection is whether the enactment in section 4 of the Press Act is such as can be said to be in violation of section 65 (2). It is argued by the applicant that the forfeiture of security by the Government under the provisions of section 4 without trial in the ordinary Courts of Law is repugnant to a subject's right to hold and enjoy property, unless it is forfeited to the Crown after due trial for any offence or charge proved in due course of law. The Government acting under section 4 need not hear the person whose property it seizes, need not take any evidence nor is it bound to follow any kind of procedure which would ensure that the forfeiture was made after proper deliberation with due regard to the rights of the parties concerned and in the true interests of the State. The right of appeal to the High Court under the provisions of sections 17 and 19 does not make any substantial difference, as the onus is cast upon the owner of the confiscated property to prove that the order of forfeiture was wrong and that right must,

in the circumstances, be treated as more or less illusory.

The contention of the Advocate-General in answer to this reasoning is that there are numerous instances in which personal freedom of the subject is interfered with because of the exigencies of good government. For instance, persons suspected of crimes are daily arrested by the Police before they are placed on trial and the laws of every country place restrictions on the user of certain forms of property in the interests of public welfare. This enactment he says stands practically on the same footing.

But it is unnecessary to determine any of these questions for the very simple reason that this Court is constituted and this application has been made under the special provisions of the Press Act itself and section 22 of that Act prevents all interference on our part except on one ground mentioned in sections 17 and 19. When this was pointed out to Mrs. Besant, she further contended that section 22 itself was *ultra vires*. Even if that contention were valid, whatever other remedy she may have she has none on this application.

Now I shall examine the provisions of section 4 in some detail. It is contended that the phrase "which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" means that if any of the words used may, by any possible construction, however ingenious and far-fetched, be supposed to have an objectionable tendency of the nature described therein, that is enough to bring a newspaper within the purview of the section. This indeed is said to be the interpretation which found favour with Chief Justice Jenkins. He says that "the provisions of section 4 are very comprehensive, and its language is as wide as human ingenuity could make it. Indeed, it appears to me to embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other."

"It is difficult to see to what lengths the operation of this section might not plausibly be extended by an ingenious mind. They would certainly extend to writings that may even command approval."

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"An attack on that degraded section of the public which lives on the misery and shame of others would come within this widespread net: the praise of a class might not be free from risk. Much that is regarded as standard literature might undoubtedly be caught."

Anything which fell from that distinguished Judge has my greatest respect. But though undoubtedly the language of the enactment is, as I have said, extremely, nay dangerously wide, I venture to doubt if the cases which are mentioned above could reasonably be said to come within the scope of the section. In the first place, the words "whether by inference, suggestion, allusion, metaphor, implication or otherwise" are merely by way of explanation, and do not in any way enlarge the meaning of the words "which are likely or may have a tendency directly or indirectly." By "tendency," I take it, is meant the *natural* effect of the words used on the readers of the newspaper in question. I do not think that we ought to have any regard in this connection to the effect which they may possibly produce on the minds of abnormally constituted persons, or persons whose acquaintance with the language is inadequate, or on those who might content themselves with reading certain passages or expressions apart from the context.

I do not think that our decision upon the tendency of publications in a newspaper should be affected by a consideration of the interpretation which men of ingenious minds may put upon them. All that we are to take into account is the effect which the words are, by their nature, likely to produce on a normal average reader understanding them in their plain, natural meaning.

But the onus is laid (see sections 17 and 19) upon the person whose security has been forfeited to prove that the publications selected by the Government at their own discretion may not have the tendency described in the various clauses. That is not only reversing the ordinary procedure in trials, but the difficulty of proving such a negative as this must in many cases be insurmountable.

Then apart from explanation 2, we have not, in applying section 4 (1), to consider the

intentions of the Editor or the writer, if it is not shown that the words in their plain, ordinary meaning may not tend to produce the objectionable effects mentioned in clauses (a) to (f).

The extracts under consideration are said to come within clause (a), (c), (d) or (e). Briefly speaking, clause (a) relates to words having a tendency to incite to acts of violence; clause (d) to words tending to put any person to fear and thereby induce him to do an act which he is not legally bound to do; and (e) relates to words which encourage persons to interfere with the maintenance of law and order.

That portion of clause (c) with reference to which the extracts require careful examination is this: "to bring into hatred or contempt His Majesty or the Government established by law in British India...or any class or section of His Majesty's subjects in British India or to excite disaffection towards His Majesty or the said Government..." It will be seen that this lumps together the offences defined by sections 124A and 153A of the Indian Penal Code, with this difference that we are not concerned here with any question of intention of the Editor or writer of the articles, leaving aside for a moment the effect of explanation 2 which will be considered presently.

The words of section 124A, which has been the subject of interpretation in a number of cases, have been substantially reproduced in clause (c). "Hatred" and "contempt" which are ordinary English words, I take it, mean something more than mere disapproval or dislike. The word "disaffection" has been explained in the section itself as including disloyalty and all feelings of enmity and I do not think any practical purpose would be served by attempting to suggest any further explanation.

But a question has been raised as to the meaning of the phrase "the Government established by law in British India." It is contended by the applicant that what is meant by that phrase is the supremacy of the British Crown and the British connection as opposed to independence. This cannot be a definition of "Government" as used in the section; it would only indicate the

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essential elements in the political relation between India and Great Britain. Government denotes an established authority entitled and able to administer the public affairs of the country. On the other hand, Government is not identical with any particular individuals who may be administering the Government. Mr. Justice Strachey of the Bombay High Court defined it as "British Rule and its representatives as such, the existing political system as distinguished from any particular set of administrators." See *Queen-Empress v. Bal Gangadhar Tilak* (17). Justice Batty in *Emperor v. Bhaskar Balwant Bhopatkar* (11) explained the conception of Government in somewhat greater detail. "What is contemplated under the section is the collective body of men—the Government, defined under the Indian Penal Code It means the person or persons collectively, in succession, who are authorised to administer the Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government, because they are only individuals and not representatives of that abstract conception which is called Government... The individual is transitory and may be separately criticised but that which is essentially and inseparably connected with the idea of the Government established by law cannot be attacked without coming within this section." The same idea underlay Sir Comer Petheram's explanation of the phrase in the "*Bangobasi*" case (*Queen-Empress v. Jogendra Chunder Bose*) (21), where he says that "British India is part of the British Empire and is governed like other parts of the Empire by persons to whom the power is delegated for that purpose. There is a great difference between dealing with Government in that sense and dealing with any particular administration." In the above sense "Government" includes not only the Government of India but also the local Governments.

I think the last passage from Justice Batty's judgment cited above requires some explanation. I do not think he meant that the law prohibits criticisms of the Government as constituted in a particular

form, provided such criticisms do not bring it into hatred or contempt or excite disaffection against it. In fact all criticisms of the measures of a Government must in some degree involve reflections on the Government itself. But section 4 allows less scope to criticisms directed against the Government itself than to criticisms of measures of the Government.

Explanation 2, which is transcribed almost word by word from section 124A, says that "comments expressing disapproval of the measures of the Government with a view to obtain their alteration by lawful means or of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (c)." The draftsman who borrowed these words from section 124A apparently overlooked the fact that the essence of an offence under section 124A being the guilty intention, explanation 2 necessarily imported the question of intention, while clause (c) to section 4 to which the explanation was attached is not concerned with the intention of the writer of the words charged. However that may be, we must read explanation 2 as we find it. So reading, it means that comments on the measures and actions of the Government are exempted from the operation of section 4, provided the person making the comment does not excite or attempt to excite thereby hatred or contempt against the Government. But the protection afforded by this explanation is extended only to comments on Government's measures and actions, and not to attacks on the Government itself which have to be judged by light of the section 4 alone without reference to the explanation II.

It is evident from some of the extracts, the subject of the charge, from the statements of the applicant herself and certain copies of "*New India*" tendered in evidence under section 8 that it is the declared policy of this paper to advocate and agitate for Home Rule in India. The method adopted is to draw attention to those measures and actions of the Government that are in the opinion of the editor injurious to the interests of the people

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and thereby to enforce the teaching that Home Rule is the only efficient remedy for most of the political evils in the country. The learned Advocate-General very rightly told us under instructions from the Government that they did not object to advocacy of any Home Rule propaganda; what they objected to was the nature of the matters published in the paper, connected though they might be with a scheme for Home Rule.

And in fact it is difficult to see how any such movement can be regarded as illegal *per se*. It lies entirely with the Sovereign, that is in the compendious phrase of Dr. Dicey, the King in Parliament, to establish any Government he chooses for India or any other part of the British Empire. There can be nothing wrong, therefore, in a subject of the Crown urging the desirability of a change in the machinery of Government in India. Changes in the constitution of Government do take place from time to time with the consent or sanction of the Sovereign and the most recent, in the case of India, were the reforms introduced by Lord Morley. In certain stages of society, reforms in the constitution of the Government are a biological and political necessity. To say that such questions are not open to public discussion, supposing that the law is not violated by the manner and the methods adopted in such discussion, would be opposed to all sound maxims of constitutional law. The principle which bears on the subject has been expressed in the following terms, which have met with the approval of some of the most distinguished text-writers:—"An intention is not seditious if the object is to show that the King has been misled or mistaken in his measures or to point out errors and defects in the Government or constitution with a view to their reformation or to excite the subjects to attempt by lawful means the alteration of any matter in Church or State or to point out with a view to their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of the subjects" (see Stephen's Commentaries, Volume IV, page 150, 16th Edition; Dicey's Law of Constitution, page 240, 8th Edition; 9 Halsbury's Laws of England, page 460, paragraph 902).

The applicant has complained to us that the Madras Government never made any pronouncement on the subject of Home Rule and she thought that they objected to the movement suggesting thereby that if she had known their real attitude, the tone of some of the articles might have been modified. But then she was not justified in supposing that the Government would act contrary to the law, and any such supposition could not be a valid excuse if it led her to publish matters obnoxious to the law.

After the best consideration I have been able to give to these articles, which I shall now proceed to deal with in detail, I fully accept the assurance of the applicant that her newspaper "New India" has been persistently preaching against acts of violence. Nor have I found anything in these articles which can reasonably be taken to suggest that India should sever her connection with the British Crown or the British Empire. In fact, it is expressly stated in some of these extracts, for instance Extract No. 3, that what "New India" has been struggling for, to use its own language, is "Home Rule", by which is meant Self-Government within and as a part of the British Empire. The applicant indignantly repudiated charges of disloyalty to His Majesty, and I find nothing in the language of these articles which would lead me to doubt in any degree the sincerity of her protestation. Nor has the learned Advocate-General suggested otherwise. The real question, however, is whether the words of any of these extracts are likely to have a tendency to bring into hatred or contempt the Government or to excite disaffection towards the Government or to bring into hatred or contempt any class of His Majesty's subjects in British India, or do they or any of them come within the scope of explanation 2 to section 4. I will say at once that none of the articles cited in the charge can fairly be said to have any tendency of the description mentioned in clauses (a), (d) and (e).

I will take serial Nos. 4 (a) to 4 (f) together. These are letters of correspondents and paragraphs dealing with the practice which obtains on certain railways of reserving compartments for the use of Europeans

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and Eurasians alone and of excluding from them Indian passengers holding tickets issued to them in due course. They are written on the assumption that the legality of such practice was open to challenge. It is possible that the decision of the Sindh Court referred to was misunderstood, but there can be no doubt that the writers *bona fide* believed that it had declared against the validity of the practice. It is stated that it was a matter of frequent occurrence that, while the compartments reserved for Europeans and Eurasians were empty, Indian passengers were not allowed to use them, even though the other compartments were overcrowded and many Indian passengers holding tickets were unable to find seats. The action of the Railway authorities is condemned not only as illegal but objectionable as tending to emphasise racial distinctions. The suggestion is made in several of the extracts that the passengers should test the legality of this practice. It is urged that the editorial note to Serial No. 4 (d) "why did you get out. It is this submission to illegality that causes half the troubles from which Indians suffer" amounts to a suggestion to use violence: but I have no doubt that the note is not reasonably capable of being so understood, if read in the light of the letter to which it is attached and in connection with the other writings on the same subject. It has also to be borne in mind that some of these extracts had already appeared in other newspapers.

Extract No. 5 which is headed "The price of Liberty" is an article quoted from "the Herald" of London. It is an apology put forward by one John Scurr for the action of persons known as conscientious objectors to conscription. It extols the virtues of those who, for the sake of the cause which they believe in, cheerfully and boldly suffer all kinds of inflictions. Mrs. Besant has told us that as a matter of fact she has been doing everything possible in her power to support the British cause in this War through the medium of "New India" and that is not denied on the other side. There is no question of conscription in this country and the objection of the Advocate-

General to this extract is that it may have a tendency to incite the readers of the "New India" to acts of violence against the Government. But I can find no such suggestion in the extract. Mrs. Besant herself explained to us that the reason why she inserted it in the Home Rule section (that is to say, that part of the paper which is especially devoted to the question of Home Rule for India) was simply to supply an object-lesson to the people of this country in self-sacrifice. I am unable to say that it suggests in any way that people should take the law into their own hands.

Extract No. 7: "The latest political crime in Calcutta and its moral, by Bipin Chandra Pal." This, it is contended, comes under clauses (a), (c) and (e). I have read the article with considerable care and I cannot find in it any palliation of the anarchical crimes committed by the young anarchists or revolutionaries of Bengal, as suggested on behalf of the Crown. What the writer tries to prove is that repression alone is not an adequate remedy for the present situation in that province. He expresses the opinion that if the Government would publicly accept Swaraj or Home Rule "as the ideal objective of the immediate historical evolution of the Indians" and "if they would start some of those necessary reforms in the administration which would give a practical assurance to the future national autonomy inside the coming federation of the whole British Empire", the problem might be more easily solved. Mr. Pal asks the Government not to regard these misguided young students as mere ordinary criminals but rather as political offenders. He does not, however, suggest that their offences should not be punished according to law. In one place he says that these men are possessed of a kind of courage which should not be overlooked, but in the same sentence he condemns 'the suicidal folly and criminal inhumanity of their actions.' I do not think that any reader of "New India," who is not predisposed to read in meanings in the article which are not there, would carry away the impression that it attempts in any way to excuse the conduct of the political assassins in Bengal. Nor is there

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a single word in the whole of that article which can be said to have a tendency to bring the Government into hatred or contempt or to excite disaffection against it.

Extract No. 3 is "Latest sin of the Arms Act." It notices a dacoity of a very serious nature which was committed in the house of a rich merchant in a village in this Presidency. Large sums of money and jewels were carried away and the victim, it is said, bitterly complained of the helplessness of the unarmed villagers to offer any resistance to the armed bandits. The moral is pointed that such helplessness is the result of the Arms Act and the writer pleads for its repeal or modification. It is difficult to see how this paragraph can be said to go beyond the limits of fair comment on a measure of the Government which has formed the subject of frequent discussion in newspapers and on public platforms.

Extract No. 1. "Bureaucracy in *Ex-celsis*", is a letter written by one Krishnama Chariar denouncing the action of the Magistrate requiring security from the applicant. It accuses the Madras Government of blind hostility against "New India," dwells on the "unwisdom of relying too much upon the sympathy of the Bureaucracy towards any of her (i. e., India's) truly higher aspirations" and says when "New India" "mercilessly exposes any and every vagary of the Englishman in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interest." This is undoubtedly a violent piece of writing and goes beyond the limits of fair comment.

Extract No. 2 is also a letter from a correspondent. It not only describes the enforcement of the Press Act against "New India" as "inhuman action and barbarous atrocity," but it leaves the readers under the impression that "the much-hated and ever-mischievous bureaucracy" is identical with the Government. It alleges that the Government have a spite against the Editor of "New India", for "she is the head of an institution which works against the missionaries and the missionaries are the parasites of the Government." It is impossible to say that a publication of this character may not have a tendency to excite hatred against the Government.

Extract No. 6 is an editorial article, where it is stated "Repressive measures such as the Press Act, the Seditious Meetings Act, the Official Secrets Act and the Defence of India Act in the hands of people with vested interests of their own naturally assume a shape and a form all too ghastly for the children of the soil, and day and night exert a baneful influence over them, engendering at once fear and hatred." Supposing these measures are all of a repressive character and are objectionable, still to describe them in language quoted is certainly not fair comment, and naturally tends to create a feeling of dislike and hatred against the Government.

Extract No. 8, "Ave Cæsar", is written by Mrs. Besant herself criticising the order passed by the Government of Bombay under the Defence of India Act prohibiting her from entering that province. She told us that she wrote in that strain because she was indignant that the Defence of India Act, which is directed against the enemies of England and of His Majesty the King-Emperor, should have been used against her." I am not inclined to attach much importance to this paragraph, it is an outburst of an enraged woman who felt that she had been very unjustly dealt with.

In similar strain is Extract No. 9. It contrasts the attitude of Anglo-Indians towards constitutional struggles in India with that of Englishmen in England. In Extract No. 10 there is a suggestion that sometimes action under the Defence of India Act is resorted to by the Government from a feeling of personal enmity. Extract No. 11 deals with the case of one Shyam Sunder Chakravathy, Assistant Editor of the *Bengalee*, who was arrested in Calcutta and in connection with whose arrest the safe of Babu Surendra Nath Bannerji, the editor of that paper, was searched by the Police. Without stating whether the arrest was under the ordinary law or under the Defence of India Act or what was the nature of the evidence upon which action was taken by the Police, it is asserted "the arrest is legal doubtless, but is truly unlawful". "When injustice is perpetrated, when crimes are committed legally, when innocence is no protection and harmless men are treated as criminals, then we live

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in a condition of anarchy, no matter what legal sanction may cover the wrongdoer. Civilization does not protect us. We should be better off in a state of savagery, for then we should be on our guard, we should carry arms and protect ourselves. We are helpless. We pay taxes to be wronged", words like these exceed the limits of all fair comment and are likely to excite hatred against the Government.

Extract No. 12 is a plea for Home Rule. It is taken from a contribution in the "Commonweal." The Advocate-General has especially drawn our attention to the passage where the writer speaks of this age as "an age for heroes who dare to enter the arena of righteous warfare loved by the true Kshatriyas of old, to whom according to the Gita nothing is more welcome", and to the allusion to Paine, the American writer's saying "that we are living in times that try men's souls." I think the allusion to the true Kshatriyas of old is by way of exhortation not to wage actual warfare against the Government but to fight the constitutional battle for Home Rule. There are also allusions to certain social customs in the East and in the West which are certainly not in good taste and are calculated to arouse class hatred between Englishmen and Indians. There are words which might also be liable to be understood as suggesting that Government has encouraged dissensions among people of different religions and castes in the country.

Extract No. 13 contains the suggestion that the reason why Bal Gangadhar Tilak of Bombay who had instituted an action in the English Courts against Sir Valentine Chirol was refused a passport by the Bombay Government was that he might not go to England to prosecute his case. I find nothing to warrant such a supposition which, if well-founded, would be greatly to the discredit of the Government of Bombay.

The last article, Extract No. 14, contains a statement that the "Education of Indian boys is in the grip of foreigners who impose upon them a crushing curriculum; that some of the professors and teachers often treat them with the greatest rudeness and address them in the most insulting terms and that they have no regard to their

miserable poverty nor try to improve their indecent and insanitary surroundings." It is written by way of protest against a suggestion that the actions of educational authorities should not be criticised in the public press. The language used is very strong and it is not right to cast any blame on the English professors and teachers for the "indecent and insanitary surroundings of the students." But I do not think that the passage read in the light of the context can be said to have a tendency to bring the Government into hatred or to excite feelings of class hatred, within the meaning of clause (c).

The difficulties of a foreign Government, constituted as it is in this country, are necessarily very great. It is not to be expected that it should be in complete touch with the genuine sentiments, feelings and aspirations of the people; the information that it can command must at best be second-hand and is often likely to proceed from interested sources. With the best of intentions, it is liable to make many mistakes, sometimes serious blunders. These and other inherent difficulties of the Government as at present constituted may or may not justify the demand for Home Rule, and it may be that Self-Government is necessary for the full growth of the people. But the law does not permit a publicist, discussing the Government's actions and failures, to impute base and dishonourable motives.

Mrs. Annie Besant has assumed full responsibility for everything that appeared in her paper. I am prepared to acquit her of any wilful attempt to disseminate disaffection or hatred against the Government of the country or to create feelings of hatred against any class of His Majesty's subjects. But I have been unable to hold that some of the extracts from the publications in the "New India" cited before us may not have such a tendency.

The application must be dismissed.

AYLING, J.—This is the petition presented under section 17 of the Press Act (I of 1910) by Mrs. Annie Besant, Editor of the newspaper, "New India," and keeper and printer of the "New India Printing Works." In it she applies to this Court to set aside

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an order of forfeiture passed by the Madras Government on 25th August 1916 in respect of a sum of Rs. 2,000 deposited by her as security under section 3 of the Act for the said Press, and of all copies of the "New India" newspaper. It may be mentioned that the forfeiture of the copies of the newspaper appears not to have been enforced by actual seizure and that the publication of the paper has been continued on deposit of further security under section 5 of the Act.

The order of forfeiture was passed under section 4 of the Act, which empowers the Local Government to take such action when it appears to the Local Government that the Press has been used for printing or publishing any newspaper containing any words... "which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise, (a) to incite...to any act of violence...(c) to bring into hatred or contempt...the Government established by law in British India...or any class or section of His Majesty's subjects in British India or to excite disaffection... towards the said Government ..." or "(e) to encourage or incite any person to interfere with the administration of the law or the maintenance of law or order."

There are two explanations to the section, one of which is of considerable importance and will be dealt with in due course.

Section 17 of the Act allows any person interested in the property thus forfeited to apply to the High Court to set aside such order (of forfeiture), "on the ground that the newspaper...in respect of which the order was made did not contain any words...of the nature described in section 4 (1)."

Section 18 provides for the constitution of a Special Bench of the High Court composed of three Judges to hear and determine such application.

Section 19 empowers the Special Bench so constituted to set aside the order of forfeiture, if it appears that the words contained in the newspaper in respect of which the order was made were not of the nature described in section 4 (1); and further provides that where there is no majority of the Special Bench which concurs in setting aside the order of forfeiture, the order shall stand.

It will thus be seen that we are a Special Tribunal constituted under a special enactment for a single specific purpose—namely, to determine whether certain words contained in the newspaper (and specified in the order of forfeiture), are or are not of the nature described in section 4 (1). This was the conclusion arrived at by a Full Bench of the Calcutta High Court similarly constituted in *Mahomed Ali v. Emperor* (2) with which I respectfully agree.

Much of the argument before us has been devoted to the question of whether and to what extent we should concur in the conclusions to which those learned Judges have arrived, or the further question of the proper construction of section 4 (1). The Advocate General has contended that we should adopt them in their entirety; while the petitioner argues that the language of the section defining the nature of the words which would justify forfeiture has been misunderstood and given far too wide an effect.

I do not propose to follow this argument in detail. As at present advised, I am by no means satisfied that the interpretation of the learned Judges is not too wide. I can find nothing in the Act which seems to me to throw on the applicant the onus of proving that the words, which are made the ground of forfeiture, do not fall within the scope of the section. I certainly do not think this is to be deduced (as has been suggested) from the words of section 19, which empowers the Bench to set aside the forfeiture if it appears that they do not. Whether the words are likely or may have a tendency to produce certain results must be determined primarily by inference from their own nature. The words themselves form the main evidence in the case; and I do not think the Act throws any onus on either side. I am not satisfied that the words of section 4 ("are likely or may have a tendency") "embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other", or that the wording of the section is so all-embracing that even a person "acting in the highest interests of humanity and civilisation" is confronted with an almost hopeless task in showing that the words he has used do not

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fall within it. Whether "an attack on that degraded section of public which lives on the misery and shame of others would come within this widespread net" is a question, the decision of which we may, in my opinion, well postpone until we are asked to decide it. At present we are only concerned with the question of whether the words of the articles before us do or do not come within the mischief of the section; and if, as I think, they do without placing any startlingly wide construction on the section, it is unnecessary for us in this case to decide to what lengths the section might be ingeniously stretched. That the wording of the section is very wide is, however, undeniable; and in some respects it clearly goes beyond the provisions of the Penal Code. The governing words "are likely or may have a tendency" undoubtedly leave the question of intention quite immaterial: and confine our attention to the natural effect of the words without reference to what the writer meant, or wished to be understood.

To this, however, there would seem to be a very important exception in explanation II of the section which runs:—"Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (c)." The learned Advocate-General has argued that even here the element of intention is absent, and that 'attempting to incite' is equivalent to "tending to excite." The wording of the explanation, which is apparently taken from section 124A, Indian Penal Code, is not altogether happy. Comments may excite hatred, etc., but it is difficult to see how comments (*i.e.*, the words used) can attempt to excite. The word 'attempt' seems to presuppose a sentient being and one animated by a particular intention. I am not disposed to accept the Advocate-General's argument in this respect; and shall consider the extracts placed before us from the point of view that in the case of comments on the

measures of Government an intention to excite hatred, contempt or disaffection is necessary to bring them within the scope of clause (c) of section 4 (1). The intention is, of course, deducible from the words of the extracts themselves.

Much argument has also been devoted to the meaning to be attached to the words "Government" or "Government established by law in British India" as used in the Act: and to the words "contempt or hatred." The term "disaffection" is defined in section 4 (1), explanation I, which says "In clause (c) the expression 'disaffection' includes disloyalty and all feelings of enmity."

As regards the first point, petitioner asks us to interpret the words "Government established by law in British India" as indicating nothing more than the supremacy of the Crown and the British connection. That is to say, as long as the writer or publisher of an article proclaims his loyalty to the King-Emperor, and his desire that India should still remain a part of the British Empire, he may attack to his heart's content the Government of India or the Government of Madras and hold them up to hatred and contempt, without coming within the scope of the section; and the same interpretation would presumably apply to section 124A, Indian Penal Code, the wording of which is practically identical. To give effect to such an interpretation would go far to render the task of governing India impossible; and I have no hesitation whatever in deciding that it is not the one intended by the authors of this Act, or one which we should adopt. If anything of the kind were intended, the words used would have been chosen to indicate, not the Government, but the form of Government in so far as it embodies the British connection. We must assume that the term "Government", in explanation II to sub-section (1), is used in the same sense as in clause (c) of the sub-section and if petitioner's interpretation is correct, to speak of the "measures of the Government" is absolutely meaningless.

The true interpretation is to be found in section 3 of the General Clauses Act (X of 1897) which governs the Press Act as regards definitions of terms. It is sufficient to quote the following sub-sections:

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(21) "Government" or "the Government" shall include the Local Government as well as the Government of India.

(22) "Government of India" shall mean the Governor-General-in-Council or, during the absence of the Governor-General-in-Council from his Council, the President in Council or the Governor-General alone as regards the powers which may be lawfully exercised by them or him respectively.

(29) "Local Government" shall mean the person authorised by law to administer Executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner.

These definitions (which it may be remarked are substantially identical with those given in sections 16 and 17, Indian Penal Code) govern the Press Act, "unless there is something repugnant in the subject or context" (*vide* section 3, General Clauses Act). I can find nothing repugnant in the section or Act. The addition of the words "established by law in British India" seems to be intended to emphasise the fact that it is the Government existing at the time that is sought to be protected from attacks of the kind forbidden and to exclude the very plea now raised by petitioner.

As regards the words "hatred" and "contempt" we are asked by petitioner to hold that only such hatred and contempt are contemplated in clause (c) as would lead to the commission of the crimes referred to in the other clauses of the sub-section, *e. g.*, murder, violence, resistance to the law, intimidation of public servants and others.

I cannot find a shadow of justification for such an argument. Hatred and contempt are perfectly intelligible words, but it is impossible to say what degree of hatred and contempt would be sufficient to lead different people to commit different crimes, and there is no ground for giving them such a limited meaning. No case has been quoted to us in which any Court has applied such a limitation even in construing the old section 124A, Indian Penal Code, before the amendment of 1898. The word therein used was "disaffection" and I need only refer to the exhaustive discussion of the matter by Strachey, J., in *Queen-Empress v. Bal Ganga-dhar Tilak* (17). "Disaffection" (which word

is also found in the section we are construing, in addition to "hatred" and "contempt") was held to mean hatred, enmity, dislike, hostility, contempt and every form of ill-will towards the Government. The amount or intensity of the "disaffection" was held to be absolutely immaterial except as regards the question of punishment. The learned Judge says: "I am aware that some distinguished persons have held that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance; the test of guilt."

The learned Judge's charge to the Jury in that case contains an exhaustive discussion of the law of sedition: and I select it for quotation and rely on it with the more confidence because it was substantially approved by their Lordships of the Privy Council in dismissing an appeal specially allowed against the conviction in that case and based very largely on the ground that there had been misdirection on this very point of the meaning of the term "disaffection."

It is not suggested that the subsequent alteration of the law was in the direction of relaxation or less stringency. Section 124A, Indian Penal Code, was practically re-cast so as to make it clear that Strachey, J.'s interpretation of the law was correct (*vide* Mayne's Criminal Law of India, 4th Edition, page 298). Nor is it suggested that a more lenient construction should be put on the section with which we are concerned than would be applied if petitioner were on her trial for a criminal offence.

The learned Judge's remarks are also of the greatest value in dealing with explanation II to section 4 (1). The explanation to the old section 124A, Indian Penal Code, with which he was dealing was admittedly susceptible of interpretation much more favourable to an accused person than the explanations to section 4 (1) of the Press Act, or those to the present section 124A,

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Indian Penal Code. Strachey, J., however, says:

"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely; and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section, and the explanation will not save him."

The words "dwelling adversely on its foreign origin and character," "imputing to it base motives" or "accusing it of hostility or indifference to the welfare of the people" all have great importance in relation to certain of the articles, which we have to consider. I need hardly say that the first phrase (dwelling adversely on its foreign origin or character) must not be understood in too comprehensive a sense, or divorced from the context.

All unfavourable criticism of a Government's constitution, policy or measures must necessarily tend to arouse dissatisfaction. So far, there is nothing illegitimate. No enactment of the Government of India with which I am acquainted seems to be intended or, reasonably interpreted, could be used to stifle such criticism. But between dissatisfaction on the one hand and hatred, contempt and disaffection on the other, there is a vast gulf.

It is open to any one to draw attention to the non-Indian elements in the Government of India, and to argue that these impair the efficiency of that Government, and that it would be to the public advantage, if they were replaced by Indian

elements. That is legitimate criticism. But it is not legitimate to go further and to use the existence of the non-Indian elements of Government as a means of exciting hatred, contempt and disaffection against Government—as Strachey, J., puts it, to hold up the Government to hatred and contempt by dwelling adversely on its foreign character and origin. It all depends on the manner in which and the object with which the circumstance is used in argument.

With those preliminary remarks, I shall now proceed to a consideration of the various articles in "New India" which have been made the basis of the order of forfeiture. They are in all twenty in number, though seven of them have been grouped together under the heading of Extract No. 4 (a-g) in the list appended to the order of forfeiture.

In addition to these articles, a number of others culled from various issues of "New India" between August 1st 1914 and the date of the order of security have been filed on both sides. They are relied on partly under section 20 of the Press Act in "aid of the proof of the nature or tendency of the articles specified as the basis of forfeiture," and partly as illustrating the policy of the newspaper and, in that way, the probable intention of the petitioner where such intention is relevant.

I have considered these articles but find myself unable to derive material assistance from them, one way or the other. In no single case has any attempt been made to show such a connection between one of them and any of the specified articles as would enable a Court to say that a perusal of the one threw appreciable light on the nature and tendency of the other. As regards intention, it seems to me most unsafe to judge of the intention of petitioner in publishing the specified articles, by reference to other articles previously published at long intervals of time, and mostly in other connections. The additional articles filed on petitioner's behalf are, as she explains, intended to show that she has upheld the British connection and the authority of the Crown (as distinguished from the Government of India); and that in certain instances she

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has approved of the action of Government. I have already dealt with the distinction she seeks to draw between the Crown and the Government: and an occasional instance of praise of Government has no bearing on the tendency and extremely little on the intention (where such is relevant) of the specified articles. The articles filed by the Advocate-General stand in much the same position. It is sought to prove, by reference to other articles in the paper, that the specified articles were published with the intention of exciting hatred, contempt, or disaffection. I prefer to base my conclusions on the actual articles which have to be construed. I do not say these other articles are irrelevant: I have considered them to the best of my ability, but have found them of so little assistance that I do not propose to lengthen my judgment by further reference to them, and shall confine my remarks to the articles specified in the forfeiture order.

Extracts Nos. 1 and 2 have some similarity and may conveniently be dealt with together. They purport to be letters from correspondents published on the 7th and 8th June 1916 respectively, with reference to the order of the Chief Presidency Magistrate, dated 22nd May, demanding security from petitioner under section 3 (1) of the Press Act. It is not suggested that the fact that they are letters of correspondents makes any difference and *Apurba Krishna Bose v. Emperor* (12) would be clear authority against such a proposition even in a criminal prosecution. But it is contended that they are comments on the measures of Government and fall within explanation II. If one were inclined to take a narrow view of the explanation it might be difficult to bring the first extract within it. Extract No. 1 is only a comment on the security order in the sense that it has apparently been evoked by the latter. The nature of the order is not even referred to, except incidentally in a single passage towards the end. I shall, however, treat both letters as comments on Government measures, and merely consider whether they satisfy the requirement indicated in the words "without exciting or attempting to excite hatred, contempt or disaffection." Extract No. 1

begins by remarking that "out of evil comes good": and after referring to the benefits indirectly arising from the tyranny of the Stuarts, Aurangzeb and Lord Curzon, says that "out of the blind hostility evinced by the Madras Government towards 'New India,' our *ultra* moderate begging politicians are bound to learn the unwisdom of relying too much on the sympathy of the Bureaucracy towards any of our truly higher aspirations." The writer then goes off at a tangent and proceeds to speculate on the motives which have prompted Government's action. He finds no difficulty in discovering them. "We can well guess how the journal, 'New India,' has offended the Bureaucracy." "The strong plain speaking of 'New India' has grown intolerable for the over-delicate, self-adulent, flattery-loving ears of Anglo-India." "When 'New India' mercilessly exposes any and every vagary of the Englishman in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interest." This is clearly indicated as the cause for the Government's action. "The real issue may indeed be expressed in one small phrase 'Anglo-India versus New India'"—or as it is put further on, "the attempt, bound to be futile, is made by Might to overawe and put down Right."

The characteristic feature of the article is that it treats the "Bureaucracy," "Anglo-India" and the "Madras Government" as synonymous. Certainly no attempt is made to distinguish Government from the Bureaucracy and Anglo-India, and blind hostility is specifically attributed to the former. The motive suggested as animating all three is of the basest—the protection of selfish vested interests, and the resentment at plain speaking of flattery-loving ears.

Extract No. 2 follows much the same lines. The first three paragraphs and the first part of the fourth are unobjectionable—at any rate not beyond the limits of fair comment. The writer refers to the fact that "New India" has condemned anarchy and has not advocated the severance of the British connection, and observes that the drastic legislation was very drastically applied, the maximum security being demanded without warning or reasons assigned. The term "inhuman action" is, of course, very

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inappropriate to a measure of the kind referred to: but had the writer stopped here, I should certainly hold that the letter did not come within the mischief of the section.

The letter, however, proceeds: "What private cause has made the Government stoop to such barbarous atrocity we know not. But this we know full well: the much-hated and ever-mischievous Bureaucracy discountenances outspoken criticism and no good Government should be afraid of criticism. We also know that the Government have a spite against the Editor of 'New India', for she is the head of an institution which works against the Missionaries and the Missionaries are the parasites of the Government." Further down it proceeds: "News of Prussian aggression and German atrocity are communicated to India to bewilder the Indian imagination. They are committed, under pressure, during the War, under passion. They are common. But what does this mean? This perpetration of atrocity in civic life, in peaceful times, in a peaceful province? This thunder during this sunny day sets the world a-wondering."

Apart from the grossly exaggerated language applied to the measure, which is the subject of comment, and which it is obviously impossible to justify, what I attach particular importance to is the discussion of motive. "Private cause" is hinted at: and Government is said to have a spite against petitioner for working against the Missionary parasites of Government.

No one could write these passages without the intention of exposing Government to the hatred and contempt of its subjects, and it is not questioned that in all cases the intention of the writer must be ascribed to the publisher.

Neither of these letters can claim the protection of explanation II: and each falls to my mind beyond question within the scope of section 4 (1).

I shall next take Extract No. 6, an article entitled "Prussianism in India." The writer begins by referring to the well-known fact that in India we live hemmed in on all sides by repressive measures. The Press Act, the Seditious Meetings Act, the Official Secrets Act, the Defence of India

Act, not to mention several despotic measures of early days—potential of mischief and capable of retarding democratic progress—are all there in the hands of a powerful Bureaucracy to be used as it thinks fit." He says they have been used, and tend to terrify people. So far, it may be treated as legitimate though perhaps hardly reasonable comment: but the article then proceeds:

"These iniquitous measures, in the hands of people with vested interests of their own, naturally assume a shape and form all too ghastly for the children of the soil, and day and night exert a baneful influence over them engendering at once fear and hatred."

Here we have the same characteristic. Not only are the measures of Government described in language too exaggerated to be explained merely by an honest desire to criticise: but the motives of Government are impugned and its actions ascribed to a desire to protect "vested interests."

There is a great deal more in the article but while it certainly contains nothing to qualify or soften the passage above quoted, there is nothing to add materially to it and I pass it over.

With this may be taken Extract No. 10 which is short enough to be given *in extenso*. "What does..... Great Britain." (See Extract No. 10, page 541)

The salient feature again is the imputations of motive. The 'four men' referred to can only be the Governor of a Presidency and his members in Council, "His Excellency the Governor-in-Council", and they are described as a group who may be the personal enemies of the individual interned and who are his enemies in thought and belief.

What is this but an attempt to excite hatred against Government?

I pass on to Extract No. 13. This is an article commenting on the action of the Bombay Government in calling on Mr. B. G. Tilak to furnish security for Rs. 40,000 to be of good behaviour under section 108, Criminal Procedure Code. The action was, of course, taken by a Magistrate; but the article treats it, and, I do not say unreasonably, as taken under the orders of Government. Here again there is no attempt at legitimate comment or criticism: the writer goes at once to the motive, which he ascribes as

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dictating the measure. Mr. Tilak is described as "again in the toils of his enemies" which can only mean Government, and the object of the demand of security is suggested as a desire to save Sir Valentine Chirol (against whom Mr. Tilak had brought a civil suit in England) from being brought to account. Petitioner admitted in answer to a question by me in open Court that this was the suggestion and added that it was a warranted inference. This is a specific imputation of the basest motive against the Bombay Government and could only be dictated by a desire to arouse hatred, contempt, and disaffection against it.

Extract No. 11 is of a slightly different nature. It is called "An outrage in Calcutta" and is a comment on the arrest of the Assistant Editor of the "Bengalee" and the search of the Editor's safe. There is nothing to indicate whether this was under any special enactment or was under the ordinary criminal law. Petitioner admitted in Court that it might be under the latter. No special motive is assigned (unlike the cases previously dealt with), but the writer after expatiating on the blameless and respectable life of the Assistant Editor says:

"The arrest . . . wronged". (See Extract No. 11, page 542.)

It seems to me impossible for any one to use language such as this without attempting to arouse hatred, contempt, or disaffection against the Government. It was used absolutely without excuse, so far as appears. In every country in the world innocent people are liable on occasion to be arrested or to have their safes and houses searched on suspicion. Can any writer not actuated by a desire to arouse hatred and disaffection describe such a state of affairs as anarchy, worse than savagery or say "we pay taxes to be wronged?"

Extract No. 9 is an article called "By what it feeds on." It has nothing to do with Government and is not covered by explanation II. It was apparently elicited by a suggestion of an Anglo-Indian paper, that petitioner's publications may not be allowed to use the mails. It is simply an attack on Anglo-Indians as a class. (The term Anglo-Indian is used here and I think in most, if not all, the articles in the old fashioned

sense of an Englishman living in India.) The comparison is between the Englishman and the Anglo-Indian. The writer says—

"The Englishman...tyranny." (See Extract No 9, page 541.)

I do not regard this article as anything like as bad as those with which I have already dealt; but think it is likely to bring Anglo-Indians as a class of His Majesty's subjects into hatred and that it must be held to fall within the scope of clause (c) of section 4 (1). It is difficult indeed to justify such a general attack on a class by a single article in a journal, however representative of that class.

Extract No. 12 is entitled "Three ways to Home Rule;" and is taken from the "Commonweal." It is a very long article, and much of it is not open to serious attack. I do not agree with the Advocate-General that reasonably construed as a whole, it is an encouragement or incitement to violence, or falls under either clause (a) or (e). But it seems to me to display again the desire to arouse hatred against both the Government and the Anglo-Indian class. The writer says: "All efforts that Indians make to assert their own rights to gain liberty for the Motherland, to win Home Rule for themselves are resented, and our opponents have recourse to repression and Prussianism."

Anglo-India and the Government are again treated as synonymous. The usual motive is assigned: "the vested interests of her (Great Britain's) sons in this land drive out of them their love of liberty and push them on to mean and undesirable means of action."

Further on the foreign character of the Government is emphasised: "If we are to be tyrannised and lorded over, better that Indians do it—be they Brahmanas or Muslims—than that foreigners do it."

"Indians.....labour." (See Extract No. 12, page 544.)

The article is not protected by explanation II and seems to me to fall under clause (c).

Extract No. 14 again is a comment, not on any measures of Government, but on a speech of the Hon'ble Mr. V. S. Srinivasa Sastriar objecting to the intervention of newspapers in educational disputes. In

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combating Mr. Srinivasa Sastri's views the following argument is used: "Even if the education.....despair." (See Extract No. 14, page 545).

Petitioner explains that this is simply a criticism of the educational policy of Government. So much might be said of the crushing curriculum and the early specialisation. But the reference to the neglect of the miserable poverty of the boys and their indecent and insanitary surroundings seems to me to go further and to attack Government itself; while the phrase "in the grip of foreigners" is one only calculated to arouse hatred. In this as in the last-mentioned articles the foreign character of Government is utilised in what I have tried to distinguish as the illegitimate manner.

Extract No. 7 is of a very different nature to all the rest, and its construction with reference to section 4 appears to me to present peculiar difficulty. It is headed "The latest political crime in Calcutta and its moral" and is dated 8th July 1916. The crime in question appears to have been the assassination of a Bengali Police Officer by anarchists and the writer discusses the character of the assassins, the light in which they are regarded by the public, and the best way to deal with them so as to prevent the recurrence of such crimes. The Advocate General seeks to bring the article under each of the clauses (a), (c) and (e). I can find nothing in it coming under clause (c), and clause (a) seems to me less applicable than clause (e): I shall, therefore, consider whether the words of the article "are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication, or otherwise, to encourage, or incite any person to interfere with the administration of the law or the maintenance of law and order."

In this case, intention is entirely immaterial: we have only to consider the natural tendency of the article as it would present itself to an average reader.

The writer begins by emphasising the failure which has hitherto attended all attempts to suppress, detect, or punish these political assassinations. He pays a well merited tribute to the courage of Bengali Police Officers. He repudiates all

sympathy with the crime on the part of himself or other reasonable Indian politicians. He then proceeds to consider the psychology of the criminal and the best means of dealing with him. This is the important part of the article. The writer passes to and fro from censure of the crime to what I think I may not unfairly call admiration of the criminal. He emphasises the "quiet and even courageous determination of the assassins." He says: "Heroism may, according to some people, be too noble a word to apply to men guilty of such ignoble assassinations; but that there was a kind of courage in any case—an utter disregard of personal consequences even in these criminals, cannot be denied." Whence comes this determination? He ascribes it to the fact that they are not ordinary or hardened criminals but idealists of a type. He says that for this reason people pity them as "youthful and misguided enthusiasts" just as they pity a man who kills a faithless wife or a treacherous friend. The ideal they hold is that of seeing their people occupy a legitimate place in modern history and politics. He concludes that punishment and repression are not the right remedy for this evil; but a recognition by Government and the general public of their ideal (above referred to) as containing nothing wrong or criminal. "We shall then be able to convince these young men of the folly and futility of their ways."

Now I am very anxious to do no injustice to the writer but I can only understand his article as amounting to this. The political assassins are courageous young men animated by an ideal with which every Indian must sympathise, and with which no reasonable man of any other race could quarrel. The Government and public should recognise them as such and in place of punishing them, endeavour to convince them of the "folly and futility" of their ways (*i.e.*, the assassination of their heroic fellow countrymen in the C. I. D.). This seems to me most pernicious writing; and writing which must tend to encourage political assassination by removing public detestation of such crimes. "New India" is presumably read by numbers of excitable young men animated (and not unnaturally)

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by the same ideal which the writer ascribes to the assassins, but which it is impossible for any right-minded person to connect with their crimes. Such young men are practically told that the assassins are pursuing the same ideal as themselves with singular courage and disregard of self: and that such criminals should not be punished but convinced of the folly of their ways. The article presents the assassins to such young men (and to the public generally) in a far more favourable light than any ordinary person would have viewed them in: and although it may not amount to incitement, it certainly seems to me to give encouragement to the commission of crimes which undoubtedly falls within clause (e) of section 4 (1).

As I have already said, we have nothing to do with the intentions of the writer. He may be perfectly sincere in reprobating the crime, while sympathising (as he undoubtedly does) with the criminal. We have merely to consider the effect of his writings.

I can only conclude that this article falls within clause (e) of section 4 (1).

I have now dealt with 10 of the 14 extracts, all of which seem to me to fall in one way or another within the mischief of section 4 (1) of the Act. I propose to briefly dismiss the others. It is not necessary to find that all the articles specified are of the same nature: and the remaining articles are such as, by themselves, to form at best a very doubtful basis for an order of forfeiture.

Extract No. 8 (*Are Cæsar*) is a protest against the order of the Bombay Government excluding petitioner from that Presidency: and I do not feel satisfied that we should be right in inferring a desire to arouse hatred simply from the single use of the term tyranny and the reference to the Royal Arms.

Extract No. 5 is taken from the Herald, a London newspaper: and is an impassioned defence of the conscientious objectors to military service. I fail to see how it has any tendency of the nature specified in clauses (a), (c) or (e) under all of which the learned Advocate-General would bring it.

Extract No. 3 is a comment on a serious dacoity in a village in Bhadrachalem Taluq, of the Godavary Agency. It is argued that the helplessness of the villagers to protect themselves is due to the operation of the Arms Act. As a matter of fact, it is now admitted that the Arms Act does not apply to the Agency tracts: and so had nothing whatever to do with the case under discussion. Nevertheless, the article is a comment on the operation of an Act and seems to me to fall under explanation II. It is a foolish article but I am not prepared to say that it was written with the intention of exciting hatred or disaffection.

Extract No. 4 series consists of 7 letters and articles dealing with trouble that has recently arisen in Madras owing to a popular idea that the reservation of Railway compartments for Eurasians and Europeans had been declared illegal. There is very little in the series except an Editorial note appended to a letter No. 4 (c). The correspondent had stated that he entered a reserved compartment but left it when ordered to do so by the Station Master and threatened with prosecution. The Editor says: "But why did you get out? It is this submission to illegality that causes half the troubles from which the Indians suffer."

Now the sole question is, what is the natural result and tendency of these words and how are they likely to be understood by the readers of the paper.

Petitioner explains that all she meant was that the correspondent should not have got out until the Railway Officials had used such show of force, as would justify him in bringing a test case to question the legality of the reservation. If that were the meaning of the words, I do not think that could fairly be brought within any of the clauses of section 4 (1). But is that the sense in which they would be understood by the ordinary reader? I cannot find anything in the series of articles remotely suggesting the testing of the legality of the Railway Company's action in this way. On the contrary, the three preceding articles all speak of the illegality of the reservation as if it were beyond question.

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It is clear from the series that there was a great deal of popular excitement at the time which culminated in a riot [*vide* Extract No. 4 (g)]. It seems to me that it was the duty of any newspaper in counselling such modified resistance to the Railway Officials as would afford basis for a test case to make its meaning clear. Otherwise there was every danger of the words being construed as advice to resist by all possible means any attempt at eviction and if such were the tendency of the words they would fall within clause (c).

I am inclined to hold that the Editorial note to this article Extract No. 4 (d) does fall within the scope of section 4 (1): but that the rest of the series do not.

On the findings I have set forth above, I am of opinion that the petition should be dismissed and the order of forfeiture should stand.

SESHAGIRI AIYAR, J.—The Press from which "New India" is printed has been in existence for over half a century. In it the "Madras Standard" was printed till July 1914. Mrs. Besant purchased the printing press as well as the good-will of the "Madras Standard" on the 14th of that month. From the 1st of August 1914, the name of the paper was changed into "New India." Mrs. Besant made the usual declaration under section 4 of Act XXV of 1867 on the 2nd of December 1914. It is admitted that no security was demanded from the petitioner at that time. On the 22nd of May 1916, the Chief Presidency Magistrate, Madras, informed her: "I hereby cancel my order, dated 2nd December 1914, dispensing with security in respect of the 'New India Printing Works' and require you under section 3 (1) of Act I of 1910, to deposit security for Rs. 2,000." It may be taken from this notice that the Chief Presidency Magistrate dispensed with the deposit of security at the time of the declaration and that he recorded his reasons under the proviso to section 3 of the Press Act when doing so. The security was furnished, and the paper continued to be published as before until the 2nd of August 1916, when the Local Government acting under section 4, clause (1), of the Press Act declared that "the security deposited in respect of 'The New India Print-

ing Works, Madras,' and all copies of 'New India' wherever found to be forfeited to His Majesty."

The present petition was filed under section 17 of the Act to revise the said order. The first point taken by Mrs. Besant was that the order of the 22nd of May demanding security was illegal. Although there is a separate petition complaining against the levy of the security, the question has been raised in this case, presumably on the ground that if the Magistrate was wrong in his demand, there was nothing to forfeit and that consequently the order of the Government was void and of no effect. I have discussed the legality of the demand at some length in my judgment in Criminal Revision Case No. 661 of 1916;* I adopt the conclusion therein come to. The further point is, that even if the demand of security was illegal, whether that question is open in an application presented under section 22 of the Press Act. The answer to this question depends upon the construction to be placed on the section. That section lays down in general terms that a declaration shall be conclusive evidence as against all persons that the forfeiture has been incurred. I cannot accept the learned Advocate-General's suggestion that this clause must be read as declaring that the forfeiture has been legally made. It only enacts that the declaration is notice to all persons that the Government have declared the forfeiture. But the matter does not end here. The succeeding clause of section 22, which empowers the High Court "to call in question any proceedings purporting to be taken under the Act," leaves little room for doubt that our powers are restricted. The section refers back by the expression "such application as aforesaid" to section 17. Under that earlier section, the grounds of interference are confined to holding that the newspaper did not transgress section 4, sub-section (1). A party is not entitled to complain under that section that section 3, sub-section (1), has been violated. Mrs. Besant suggested that our rights of interference are not controlled by the grounds that are open to the party. But the foundation of our jurisdiction under the Act is section 17. It is a statutory right that we are

*See 37 Ind. Cas. 607 *Infra*.—*Ed.*

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asked to exercise; and we can grant relief only in respect of the grounds on which the party can seek our intervention. That is what section 19 distinctly lays down. That is also the view taken by the learned Chief Justice of Calcutta and by Mr. Justice Stephen. It is true that the language of section 22 reads as if all proceedings under the Act were liable to be revised by us. The apparent intention of the Legislature was that only such proceedings under the Act as lend themselves to attack on the grounds mentioned in section 17 should be revised by the High Court. It may be said that the Legislature must have known that proceedings under section 3 cannot be questioned on such grounds. I do not say that the language employed is apt. On the other hand the other construction would result in not attaching any meaning to the words "on such application as aforesaid" in section 22. The use of the expression "no proceeding purporting to be taken under the Act" may have been inserted *ex majori cautela*. We have to choose between not giving any meaning to a very important clause, and regarding another clause as somewhat inadvertently expressed. It was pointed out, by Coleridge, J., in *R. v. East Ardsley* (22) that a Court of Law should reject words as surplusage if it appears that, by "attempting to give a meaning to every word, we should have to make the Act of Parliament insensible." Lord Selborne used similar language. [See *Hough v. Windus* (23).] The true aim to be kept in view is to construe the Statute in such a way as to carry out its main intention. In doing that, inaccurate and loosely worded phrases have to be subjected to some pruning and adjustment. Bearing these propositions in mind, I am of opinion that proceedings under section 3 are not subject to our revisional jurisdiction under sections 17 and 22 of the Press Act.

The next point relates to the construction of section 4. Before dealing with the arguments on behalf of the Crown, I shall

consider a preliminary objection raised by the petitioner. It was broadly contended at the outset that the whole Press Act was *ultra vires* of the Indian Legislature. But when it was pointed out that the petitioner herself invoked our interference under section 17 of that Act, she contended that section 4 of the Act at least was *ultra vires*. It was not Mrs. Besant's case that the Press Act offends any Act of Parliament. Her point was that the provisions of section 4 affected "the unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." She argued that to declare property to be forfeited without first obtaining the decision of the Civil Courts in that behalf was an act of confiscation which interfered with the allegiance of the subject to the Crown. Mr. Justice Norman's observations in the Wahabi case [*In the matter of Ameer Khan* (24)] were relied on. The learned Judge, after referring to the Great Charter and the Bill of Rights, said: "Now if it be true, as laid down in *Calvin's* case (24), that *protectio tribuit subjectionem et subiectio protectionem*, that allegiance and protection are reciprocally due from the subject and the Sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects.....No man can study the history of England, or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that on the faithful observance by the Sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subjects. It would be a startling thing to find that rights of so sacred a character could be taken away by an act of the subordinate Legislature. It would be strange indeed if a great popular assembly like the Parliament of England had put

(22) (1850) 14 Q. B. 794 at p. 801; 17 E. R. 306.

(23) (1888) 12 Q. B. D. 224 at p. 229; 53 L. J. Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 Morrell L.

(24) 7 Rep. 1a; 77 E. R. 377.

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into the power of a Legislature which has not, and in the nature of things could not have, any representative character the power of abrogating or tampering with such fundamental laws." The question in that case related to the right of the High Court to issue a writ of *Habeas Corpus* to produce a person detained in custody. It was held that the right of the subject to move the High Court was not taken away by any Act of the Indian Legislature. I do not think the observations above quoted can affect the present case. As Lord Justice Buckley pointed out in *West v Gwynne* (25), there is no presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, according to the learned Lord Justice, interfere with existing rights. An Act of the Legislature in this behalf cannot be regarded as interfering with the allegiance of the subject. Markby, J., said in the appeal from the decision of Mr. Justice Norman in the same case [*In the matter of Ameer Khan* (26)] that an Act of the Legislature does not affect the prerogative of the Crown and conversely the allegiance of the subject, merely because it affects the liberty of the subject. The foundation of all criminal laws in India would be shaken to its root, if it is held that the Legislature has no power to enact laws depriving the subject of his liberty. So also with reference to property. It is possible to argue—I do not wish to commit myself definitely to an opinion on this matter—that any Act of the Legislature which permanently deprives the subject of his property without vesting in a judicial tribunal the power to pronounce on the legality or justice of the step taken may be said to strike at the root of the allegiance due from the subject. This question requires a great deal more argument than has been addressed to us; but under the Press Act, section 4, the subject is not deprived of the right of showing that the forfeiture has not been incurred. Instead of taking the decision of the Court first and then declaring the forfeiture, the process has been reversed; such a procedure cannot be said to affect the allegiance of

the subject. The Indian Legislature has enacted other provisions of a similar nature, *e. g.*, sections 88 and 89 of the Code of Criminal Procedure. I am of opinion that section 4 is not *ultra vires* of the powers of the Imperial Legislature. Mrs. Besant seemed to suggest that she carried with her to India her inherent rights under the Bill of Rights and the Great Charter; but she did not press the point.

I now turn to the construction which the learned Advocate-General sought to put on the various sub clauses of section 4 (1). I thought, at first, that he was asking us to put a very illiberal construction upon them; because, if accepted, it would make the publication of any respectable newspaper impossible; but on thinking over the matter, I am not sure that I have been fair to the learned Advocate-General. I do not think that the seriousness of the consequences is the right test. We have to administer the law as we find it. In my opinion, there is great force in the arguments for the Crown, although I do not accept them in their entirety. The language of the section is this: "containing any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise." The word *likely* refers to the probable inference that may be drawn; when that word is followed by the words "*may have a tendency*", the contention that the barest possibility of the words, etc., conveying a particular impression was contemplated seems not unreasonable. I asked, in the course of the argument, whether the probability or possibility should not be reasonable. The learned Advocate-General replied that a possibility is not generally reasonable. I do not think the word *reasonable* would be misapplied even to a possibility. I am not prepared to hold that what the Legislature had in mind was an unthinking, perverse and blind possibility and not a consequence, however far-fetched and remote it might be, which can be deduced by a reasonable human being. The process by which the inference is to be drawn is very tightly worded. When the probability or possibility is to be reached "directly or indirectly, whether by inference, suggestion, allusion,

(25) (1911) 2 Ch. 1 at p. 12; 80 L. J. Ch. 573; 104 L. T. 759; 55 S. J. 519; 27 T. L. R. 444.

(26) 6 B. L. R. 439.

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metaphor or ~~impersonation~~ or otherwise," it looks as if all egress is barred. The word *otherwise* is the finishing stroke. It is no wonder that the learned Chief Justice of the Calcutta High Court pronounced the right vested in the High Court as illusory.

If the language had stopped here, I would have considered it a waste of time to examine the articles complained of, because by no stretch of ingenuity can they be said not to contravene one or the other subsections of section 4 (1). But there is explanation II, and it is mainly with reference to its language that the keeper of the press can expect to get some redress. The learned Advocate-General drew our attention to the difference in language between the explanations to sections 124A and 153A of the Indian Penal Code and the explanation to section 4 of the Press Act. The latter is impersonal, whereas the former apparently refers to the motives and intentions of the offender. There is much force in this observation. At the same time, I am not prepared to hold that the intention of the writer is of no consequence in applying the provisions of the Press Act. I adhere to the opinion which I expressed during the course of the argument that while the operative portion deals purely with the language employed, divorced from considerations of motive or intention, explanation II furnishes a ground of exemption, if it can be shown that there was no intention to excite or to attempt to excite hatred, contempt or disaffection. It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed. The difference is very thin no doubt; but I think that the Legislature was contemplating in explanation II the possibility of proof by the person proceeded against that the intention to create disaffection was not in the mind of the writer. The other alternative would compel us to hold that whatever the motive, if the words employed have the remotest tendency to make a single unreasoning individual disaffected, the press should be forfeited. In other words,

it is the forbearance of the Crown from taking steps under the Act that gives life to a respectable newspaper and not any protection which has been introduced into the Act by the explanation. I am unwilling to proceed on this basis.

The meaning to be attributed to the words "without exciting or attempting to excite hatred, contempt or disaffection" is not free from difficulty. The learned Advocate-General relied upon the summing up of Strachey, J., in *Queen-Empress v. Bal Gangadhar Tilak* (17) in explanation of the various terms. I may say at once that I agree with the conclusion that the word *disaffection* is used in the sense of *disloyalty*. That was how Sir Comar Petheram understood it in *Queen-Empress v. Jogendra Chunder Bose* (21) and that was also the view taken by Mr. Justice Strachey. The learned Judge's interpretation of the words "hatred and contempt" requires more examination. This is what he says: "But if he goes beyond that, and whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him." With a good portion of the sentiments expressed in this sentence, I agree. Some qualifications are, however, necessary. The times have changed a great deal since the learned Judge delivered his charge. If I may use a very hackneyed expression, the angle of vision has changed largely. In a solemn document issued under the signature of a Viceroy, the legitimacy of the claim to have political autonomy in India under certain conditions was discussed. This implies that the time may come when Indians can be trusted to largely administer the affairs of their own country. The process may have to be gradual. But when the possibility is recognised, one cannot get away from the fact that it is the administration of non-Indians that would be replaced in the endeavour to reach autonomy. Consequently,

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when the learned Judge says, "dwelling adversely on its foreign origin and character" would make a man guilty of exciting hatred and contempt, I am not prepared to accept it, without qualification. In my opinion, suggestions to the effect that an indigenous agency would be more suitable in certain departments of the administration and should be more largely employed in others should not be regarded as exciting hatred or disaffection. Of course, language may be employed which may render this advocacy dangerous. But *prima facie* I would be unable to discern in criticisms of this kind an intention to excite hatred or contempt. I would also qualify the phrase which says that attributing indifference to the welfare of the people would amount to sedition. In *Reg. v. Alexander Martin Sullivan* (21) Fitzgerald, J., told the Jury "that a journalist may canvass and censure the acts of Government and their polity" [*Piggott's case* (26)]. The learned Judge also said: "A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives. The law does not seek to put any narrow construction on the expressions used and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion." In *Sullivan's case* (27), the same learned Judge cautioned the Jury thus: "It is not mere strong language, such as 'desecrated Court of Justice,' or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal spirit. You should recollect that to public political articles great latitude is given. Dealing as they do with the public affairs of the day such articles, if written in a fair spirit, and *bona fide*, often result in the production of great public good. Therefore, I advise and recommend you to deal with these publications in a spirit of freedom and not to view them with an eye of narrow criticism." I do not see why these salutary tests should not be applied in considering whether the articles in question are protected by the explanation. If

criticism attributing indifference to the welfare of the people is couched in language which imports corrupt or malicious motives, the writers cannot escape. But if it aims only to draw attention to a weak point in the administration in the hope that the criticism may lead to the redress of grievances or the removal of a disability, I do not think the writing can be condemned. Subject to these reservations, I accept the summing up of Mr. Justice Strachey as fairly accurately explaining the words I have referred to.

The next argument dealt with the meaning to be attached to the various clauses of sub-section (1) of section 4. Before Mrs. Besant addressed the Court, in answer to a suggestion from the learned Officiating Chief Justice, the Advocate-General pointed out under what clauses the offending articles included in the declaration of forfeiture fell. I shall discuss the articles separately later on. At present, it is enough to say that almost all the articles were regarded as coming under section 4 (1) (c), while (a) and (e) were added to a few. The important question which might have necessitated a great deal of discussion was fairly solved by the admission of the learned Advocate-General that he had instructions to say that the discussion as to "Home Rule" was not *per se* objectionable. A reservation was made that the discussion might amount to bringing into hatred or contempt the Government established by law in British India, if the methods advocated to gain "Home Rule" and the language employed in pushing it forward were calculated to disseminate hatred or contempt. There can be no doubt that two essentials should be kept in mind in asking for changes in the machinery of Government. The allegiance to the throne and person of the Sovereign should be held as inviolate; and there should be no suggestion that the connection which makes India an integral part of the British Empire should be severed. Within these limits, it is permissible to ask that the details of the administrative machinery should be re-adjusted to meet the exigencies of the times. A demand for change there will be in the most perfect form of popular Governments. That demand *ex-necessitate* would show that the existing machinery is out of gear in some particular

(27) 11 Cox Cr. L. C. 51.

(28) 11 Cox Cr. L. C. 60,

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or other. In one sense such a criticism may excite disaffection towards the Government established by law. It is conceivable that there may be even dislike; but if the object is to re-arrange the *personnel* and even in a measure substitute new classes of men in the places occupied by the old, provided the advocacy is attributable to a genuine desire to strengthen the feeling of loyalty and the link that binds the Empire, there can be no room for saying that hatred, contempt or disaffection was preached. Mr. Justice Batty has given clear expression to this idea in *Emperor v. Bhaskar Balvant Bhoputkar* (11). This is what he says: "One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and are not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain," and again at page 441*, the learned Judge says: "Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country. The British nation has always specially boasted that it had a free press but the freedom of that press is conditional upon one thing; every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including, among injuries to others, injury to the State. It is only on that condition that it is possible to have a free press." I entirely agree. Stephen in his Digest of the Criminal Law says: "An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the Government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matters in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention." The demand that there should be *alterations in the State* is one of those claims

which every law-abiding subject interested in the well-doing of the Government might legitimately advance. I am not to be understood as suggesting that the expression "Government established by law in British India" applies only to British Sovereignty and the British connection. I adopt Mr. Justice Strachey's definition of these words. He says: "It means, in my opinion, British rule and its representatives as such, the existing political system as distinguished from any particular set of administrators." It is the system of Government that section 4 (1) (c) contemplates, and not the persons who for the time being carry on the details of the administration. Clause (a) does not require much comment. A great deal will depend upon the language used. Clause (e) is not easy to define. The objects aimed at must be those which would render friendly co-operation between the different races living in India impossible. The language must be such as to lead to the breaking of the peace. Otherwise, any argument tending to suggest that particular persons are not carrying on the machinery of Government efficiently may be said to incite the people to interfere with the maintenance of law and order. Dissatisfaction with men and measures is believed in many quarters as a healthy sign of progress. It is not necessarily incompatible with a desire not to interfere with the administration of the law or with the maintenance of law and order. I propose to keep before me these principles in judging of the character of the articles complained of.

On one other section of the Act, I shall say a word, before discussing the articles. When Mrs. Besant wanted to put in copies of other articles which appeared in the "New India" newspaper, the learned Advocate-General contended that it is only the Crown that is entitled to this right under section 20 and not the petitioner. I do not think such a contention can be upheld. The more serious question under the section is whether articles evidencing the general policy of the paper can be received in evidence. In my opinion, there must be some connection between the subject-matter of the articles tendered and of the articles which are objected to. The articles are to be received "in aid of the proof of the nature or tendency of the words, signs of visible representations contained in such newspaper". Speaking

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for myself, I would have rejected some of the articles tendered on either side as being unconnected with the views taken exception to. But, however, we have let in only such of them as either bear on the general policy of the paper or are connected with the subject-matter of the impeached articles. I am content to accept the decision come to by the learned Chief Justice on this question.

Now, I proceed to deal with the articles.

Extract No. 1—I gave expression; during the course of the argument, to my ideas regarding the inappropriateness of the language employed in this letter. It is ill-balanced and foolish. I am not, at the same time, able to attach to the language the sense which the learned Advocate-General imputed to it. To one reference in this letter, he attributed a meaning which I cannot but regard as far-fetched. This reference is to the "grim contest between Hiranya and Prahlada." I am afraid I must adopt the role of the Puranic storyteller for the nonce. The story is very familiar to the readers to whom, in the main, the paper is addressed. Hiranya was not a bad king. At least, I am not aware that it is with reference to his misrule the story has been told. Hiranya, in the Purana, symbolises the egotistic self. He is his own God. He says to himself and to others that there is none greater than himself. There is no God to whom Hiranya is accountable. His son personifies the abnegation of self—the subjection of the man to the dictates of the Supreme. From his cradle he lisps the name of God. In school, he invokes God's name. He infuses this spirit into his fellow students. The teacher is much upset and complains to Hiranya. At first, the father is contemptuously tolerant, then he coaxes his son into accepting his dogmas, then there is threat; violence afterwards, followed by every attempt to be rid of the stripling who defies all his cherished ideals. Even here, the father, by instinct of nature, resists the temptation to kill the boy himself. He employs other agencies. Even the fond mother is pressed into service; but all the machinations prove of no avail. The patient trust in God and the uncomplaining tenacity of purpose so exasperate Hiranya that he resolves to lay his own hand on his

son. Before he takes the fatal step, he asks his son to point to the place where the God he worships can be found. The boy boldly replies, "He is everywhere." The irate father asks, "Is He in this pillar?" "Yes, He is everywhere" is the quiet answer. Then the father kicks the pillar violently saying, "let Him come out, if He is there". God does come out of the stone pillar and destroys Hiranya. This is the story recounted everywhere to prove the omnipresence of God and the immanence of righteousness and virtue. In the Hindu theology, Prahalada is the foremost of religious devotees.

Now in this story, Prahlada does not wage war against Hiranya. He does not kill his father. Prahlada is in the letter intended to represent the Indian, and Hiranya, the Anglo-Indian. It is clear, therefore, that the people are not incited to violence against the Anglo-Indians. If they behave like Prahlada, they must lead uncomplaining lives, leaving the justice of their cause to be vindicated in the fulness of time. I do not say that a certain amount of dislike will not be engendered by the comparison; but I do not think that hatred or contempt will be inculcated by the reference, if that story is understood rightly. Nor do I think that the Anglo-Indian will be incited to hate the people by his being depicted as Hiranya. The cultured few who represent that class are not likely to be led into a feeling of hatred or contempt by hysterical writing of this kind. At the same time, I cannot but condemn, in strong terms, the latitude which the writer has allowed himself in describing men and measures. Mrs. Besant, like most others, might exclaim, "Save me from my friends." She has rightly taken the responsibility for this effusion on herself, and while I am unable to see that the article is covered by any of the clauses of section 4 (1), I cannot help saying that it is a mischievous and an ill-balanced production.

Extract No. 2.—This letter lacks the adjectival exuberances which characterised the previous one; but portions of it are more culpable than the former. The paragraph in page 15 beginning with line 29 and ending with line 35 is unjustifiable. I

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think it is calculated "to bring into hatred or contempt" the Government of Madras. "Prussian aggression" and "atrocities in civic life in peaceful times" are expressions which cannot be condoned. Further, the sentence "that the missionaries are the parasites of the Government" is unwarranted. I hold that portions of this letter come under section 4 (1) (c). I do not think sub-clause (e) applies.

Extract No. 3.—I can see nothing wrong in this article. It is true, as pointed out by the learned Advocate-General, the article ignores the fact that the Arms Act does not apply to the Agency Tracts. But the subject-matter of the grievance is not what affects these tracts. The general sentiment is in no way incompatible with perfect submission to everything that the most fastidious can insist upon as being due from the subject to the Government.

Extract No. 4.—Here again, there has been a misunderstanding of the law as declared by the Punjab Chief Court. It is extraordinary that an overruled judgment should have been allowed to be the basis of comment so long. The learned Advocate-General has informed us that the decision in *Mathradas Ramchand v. Secretary of State* (1) on which these articles were based was reversed on appeal in April 1913 [*Mathradas Ramchand v. Secretary of State* (29)]. The articles were all written since the date of the appeal decision. There is no doubt that there has been a great want of judgment in the writer not having taken care to ascertain whether *Mathradas Ramchand v. Secretary of State* (1) was modified or set aside. I say nothing about the correctness of the law as expounded on appeal; but granting that the critic ought to have exercised more care and caution, I fail to see how hatred, contempt or encouragement to interfere with the administration of the law can fairly be attributed to these articles. I think they are covered by the explanation. The editorial note finding fault with the persons who walked out is only an exhortation to submit themselves to some personal inconvenience in order that the legality of the procedure adopted by Railway Companies may be tested in a

Court of Law. I hold that these articles do not offend any of the provisions of section (1).

Extract No. 5.—This is a quotation from "Herald," London. At first, I was inclined to think that its place under the "Home Rule Section" was objectionable; but on carefully reading it through, I find that nobody is held up to hatred or contempt and none is encouraged to break the law. The burden of the article is "the price of liberty is death." It is a call to make heavy sacrifices; not an exhortation to use violence, but a call to stand at the post of duty even to the point of death, if the person is in earnest in securing rights. The theme is in the main religious. The martyrdom of Catholics, Protestants, and Atheists is extolled. They suffered death to testify to the strength of their conviction. It is the spirit of self-sacrifice that the "Herald" preached to the pacifist who refused to join the army corps. In inserting the article under the heading "Home Rule," the person responsible for the selection wanted those that advocated "Home Rule" to act in this spirit. I am unable to see in this article anything which brings it within the mischief of section 4 (1).

Extract No. 6.—This is strong writing. But I am unable to detect anything in it which is calculated to bring the Government into hatred or contempt. The word *Prussianism* has been objected to. In this article, it is applied to a particular journal and not to any class. I hold this article is not obnoxious to section 4 (1).

Extract No. 7.—As was suggested by the learned Officiating Chief Justice during the course of the argument, I read this article once again, forgetting, for the time being, that it was written by Bepin Chandra Pal. I am not able to detect its sinister import. If one reads a great deal between the lines and then begins to argue that the article is dangerous, he must be prepared for the answer: "You are not condemning my words, but words which you are interpolating." On the face of it, the writer points out how the political anarchists have not been brought under the grip of law, notwithstanding the severe measures taken to put them down. He suggests a new mode of dealing with their crimes. I am not

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able to spell out of this article an intention to extol anarchism and to invite unwary youths to commit acts of violence with impunity. I do not think that sub-clauses (a), (c) and (e) of section 4 (1) apply to this contribution.

Extract No. 8.—I hold this article comes under section 4 (1) (c). Mrs. Besant said that she wrote it under great provocation. That is apparent. To say that the "escutcheon" of the Bombay Government should have the words "Justice gagged, sable and gules," and the legend: "My strong arm and your wrong," is calculated to bring that Government into hatred and contempt.

Extract No. 9.—This article extols the Englishmen at home at the expense of those that have come out to India. I do not think this article contravenes section 4 (1) (c).

Extract No. 10.—This refers to the probable result of an internment order. The reference to four men "who are his personal enemies and who are his enemies in thought and belief" is undoubtedly misconceived. I am not prepared to say that the characterisation of the *personnel* of the Government as the personal enemies of the writer is calculated to excite contempt or hatred. I do not consider this article comes under section 4 (1) (c).

Extract No. 11.—I am satisfied that this article comes within the purview of section 4 (1). The statement that the arrest which was conceded to be legal is "truly unlawful" and breaks "the sacred Law of Justice which holds society together," is meaningless. But the sting of the article is in its tail: "Civilisation does not protect us; we should be better off in a state of savagery for then we should be on our guard, we should carry arms, and protect ourselves. We are helpless; we pay taxes to be wronged." The appeal to barbarism may incite violence, and the sentence "that we pay taxes to be wronged" is calculated to bring the Government into contempt, by suggesting that the taxes are utilised for oppression. I think this article is within section 4 (1) (c) and (e).

Extract No. 12.—This long extract from the "Commonweal" is not really objection-

able. The reference to the Gita and the appeal to evince the true Kshatriya spirit are not intended to create disaffection. It is intended to whip up laggards. The gate of heaven, in this case, being the gate to "Home Rule", the exhortation is to the people to come forward at once, and not to lose the opportunity of gaining their rights. The suggestion is not to fight, but to take time by the forelock. The word "Prussianism" seems to have a fascination to writers of this school, but I am inclined to think that these men do not use the word with a knowledge of what it imports. Such catchwords are the stock-in-trade of writers aspiring to write to newspapers and other periodicals. The statement that "political petitioning and prayer should be abandoned" is not an appeal to give up constitutional methods, but an advice to proclaim rights without following it up by deputations for their enforcement. I do not think this article is impeachable under section 4 (1) (c) or (e). I certainly see nothing in it to bring it under section 4 (1) (a).

Extract No. 13.—Portions of this article are clearly objectionable. The suggestion that the Bombay Government is in league with Sir Valentine Chirol is certainly calculated to bring that Government into contempt. I hold this is covered by section 4 (1) (c).

Extract No. 14.—This article was written after the extraordinary meeting of the Senate of the Madras University. I am not able to see in it anything which brings it within section 4 (1) (c). The statement about insanitary surroundings refers to the agitation to provide hostels.

Apart from the legal tests, it is not easy to lay down any absolute rule by which the culpability or otherwise of these articles can be judged. Personal inclinations would necessarily play a great part in passing judgment upon a question of this description. Experience of life, and a knowledge of the modes of thought and of the activities which actuate men who, though engaged in politics, are honestly devoted to their Sovereign and are unquestionably endeavouring to promote good-will and a closer understanding between the rulers and the ruled, may also serve

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as guides. Even here temperament would play no mean part. Considerations like those I have mentioned have weighed with me in the main.

To summarise my conclusions I hold that Extracts Nos. 2, 8, 11 and 13 contain statements and sentiments which are calculated to bring the Government established by law into hatred or contempt and to interfere with the maintenance of law and order. It is not for me to say whether the punishment inflicted is necessary to expiate the offence. We have no right to apportion the quantum of punishment. I, therefore, hold that Mrs. Besant has not shown that the extracts I have mentioned "did not contain any words, signs or visible representations" of the nature described in section 4, sub-section 1. At the same time, I am clear that none of the articles to which our attention has been drawn has been written in a spirit of disloyalty to the Sovereign. If I may say so, they all aim at making India better understood and better appreciated. They undoubtedly very freely express disapprobation with the existing machinery of the Government. These comments, according to Mrs. Besant, were intended to make British rule in India more firmly established and to remove causes of discontent which may have a tendency to undermine the British connection. I have little doubt that this has been the policy of the paper; but what we have to see is, not whether the intentions of the Editor are praiseworthy and the articles themselves may ultimately help good Government and law and order, but whether the articles taken exception to are not obnoxious to section 4 of the Press Act. Viewing the four articles I have referred to from this point of view, I am of opinion that they do offend the Press Act. The petition must, therefore, be dismissed.

Petition dismissed.

V.R.P.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 661 of 1916.

CRIMINAL REVISION PETITION No. 542 of 1916.

October 18, 1916.

Present:—Mr. Abdur Rahim, Offg.

Chief Justice, Justice Sir William Ayling, KT.,

and Mr. Justice Seshagiri Aiyar.

MRS. ANNIE BESANT—RESPONDENT—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Press Act (I of 1910), ss. 3, 22—Government of India Act, 1915 (5 and 6 Geo. V, C. 61), ss. 106, 107—Criminal Procedure Code (Act V of 1898), s. 435—Security, imposition of, after being dispensed with, legality of—Order of Magistrate, whether judicial or administrative—Interference by High Court, powers of—Certiorari, issue of—Nature of writ—Jurisdiction of High Court—Letters Patent—Revision.

Per Curiam.—It is not competent to a High Court to interfere with the order of a Magistrate under section 3 of the Press Act, requiring security from the owner of a Printing Press either in the first instance or in variance of an order dispensing with security, either under sections 106 and 107 of the Government of India Act or under section 435 of the Code of Criminal Procedure. [p. 628, col. 2; p. 631, col. 2; p. 636, col. 1.]

Per Abdur Rahim, Offg. C. J., and Seshagiri Aiyar, J.—The words 'proceedings under the Act' in section 22 of the Press Act do not include orders passed by the Magistrate under section 3. Under the powers vested in it by the special provisions of the Press Act (sections 17 to 22) the High Court can call in question only orders of forfeiture though the general jurisdiction to issue writs of *certiorari* even in respect of orders passed under section 3 is not taken away by section 22. [p. 626, col. 2; p. 634, col. 2.]

A Magistrate has no jurisdiction to demand security from the keeper of a Printing Press under section 3 (1) after having dispensed with it in the first instance. The words 'may vary or alter any order', in the proviso to the sub-section, refer only to orders demanding security and not to orders dispensing with security. [p. 626, col. 1; p. 637, col. 2.]

The High Court, however, has no jurisdiction to issue a writ of *certiorari* to the Magistrate or to revise his proceedings under the Charter or under its powers under the Code of Criminal Procedure, as the orders under section 3 (1) of the Press Act are administrative and executive and not judicial. [p. 628, col. 2; p. 637, col. 2.]

The power to issue writs of *certiorari* to inferior Tribunals is not taken away from the High Court by the Press Act. [p. 626, col. 1; p. 636, col. 1.]

Per Abdur Rahim, Offg. C. J.—A High Court has jurisdiction to issue writs of *certiorari* in order to remove the proceedings of Courts or of persons entrusted with judicial functions out of the ordinary course of legal procedure for the purpose of quashing them. [p. 626, col. 2.]

The powers of revision and control are available only over the proceedings of ordinary Courts: while

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a writ of *certiorari* is issued not only to Courts but to Tribunals specially constituted and entrusted with duties of a judicial character. [p. 626, col. 2; p. 627, col. 1.]

Proceedings will not be removed into the superior Court by a writ unless they are capable of being determined there. [p. 628, col. 1.]

None of the provisions of the Press Act either singly or collectively have necessarily the effect of taking away the revisional jurisdiction of the High Court over the proceedings of the Magistrate if he is acting judicially. But having regard to the scheme of the Press Act and to the functions of the Magistrate under section 3 (1) and the large discretion vested in him, it follows that the proceedings under section 3 (1) are not of a judicial character, but of an Executive Officer entrusted with the performance of administrative functions. If an Executive or Administrative Officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court, whether by means of a writ of *certiorari* or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action. [p. 628, col. 2.]

Per *Ayling J* The provision in section 3, requiring the record of special reasons, does not apply to an order cancelling or varying an order. [p. 629, col. 2.]

It is open to a Magistrate, on the right construction of the section, to alter or vary an order dispensing with security. [p. 629, col. 2.]

The term 'proviso' as applied to the second part of section 3 is a misnomer. The sub-section must be treated as a whole and the words 'any order' cover an order dispensing with security. The sub-section is intended to give the Magistrate fullest discretion both as regards requiring security and determining the amount, and this discretion is to be exercised not once for all, but may be revised from time to time. [p. 629, col. 2; p. 630, col. 1.]

The words 'no proceedings purporting to be taken under this Act' in section 22 of the Press Act include proceedings under section 3 (1). [p. 630, col. 2.]

The jurisdiction of a High Court to issue *certiorari* is taken away by the Press Act both in respect of proceedings taken with jurisdiction as well as in respect of proceedings purporting to be taken under the Act. The Press Act is self-contained and complete and, though it is open to any one to argue that it is unnecessary or impolitic, effect must be given to what seems to be its plain meaning, and, by reason of section 2 of the Act, it is not open to the High Court to interfere with the Magistrate's order by virtue of any power which it possesses outside the Act. [p. 631, cols. 1 & 2.]

It is within the competence of the Legislature to take away from the High Court the power to issue a writ of *certiorari*. Whether the power is taken away absolutely or only in respect of proceedings with jurisdiction, must depend in each case on the wording of the Statute which takes the power away. [p. 631, col. 1.]

Bradlaugh, Ex parte, (1878) 3 Q. B. D. 509; 47 L. J. M. C. 105; 38 L. T. 60; 26 W. R. 758, distinguished.

Dubitante.—If it were necessary to decide the question, the proceedings of the Magistrate under section 3 (1) may be viewed as an executive act, and on that ground, even if the power of *certiorari* is not taken away by section 22 of the Press Act, the High Court will not interfere under sections 106 and 107 of the Government of India Act, the more so where the application is presented after long delay, relief under the said sections being discretionary with the Court. [p. 631, col. 1; p. 632, col. 1.]

Per *Seshagiri Aiyar, J.*—A High Court has the same powers over persons resident within the local limits of its ordinary original jurisdiction as are exercised by the Court of King's Bench in England. [p. 632, col. 2.]

The freedom of the Press is not a 'licensed calling' but a common law right inherent in the subject, subject to certain limitations, and this right is not affected by the Press Act. [p. 634, col. 1.]

Re v Dean of St. Asaph, 3 T. R. 429n.; 100 E. R. 637; *Re v Cobbet*, 29 Stato Trials 41; *Re v Reeves*, (1796) Peake's Add. C. 84; 4 R. R. 871; *Re v Gray*, (1900) 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305, referred to.

It is not a condition precedent to the issue of a writ of *certiorari* that the Court issuing should be able to place itself in the position of the Court whose order is complained against. The writ may assume various forms. It is enough that in the exercise of its jurisdiction, it directs the lower Court to re-consider its order or judgment. The fact, therefore, that the High Court cannot place itself in the position of the Magistrate and itself fix the amount of the security is no bar to entertaining the application. [p. 634, cols. 1 & 2.]

The fact that the power to issue the writ is recognized in legislative provisions is not an argument for holding that the power does not exist *ab initio*. [p. 634, col. 2.]

Unless the power to issue a writ of *certiorari* is expressly taken away, it inheres in the Court. There is nothing in the Press Act which can be said, expressly or even by implication, to take away this power from the High Court. All that can be said is that the Act does not provide for the order under section 3 being revised. [p. 634, col. 2.]

R. v. Reeve, (1760) 2 Burr. 1040; 97 E. R. 696; *R. v. Jukes*, (1700) 8 T. R. 542; 5 R. R. 445; 101 E. R. 1536; *R. v. Plowright*, 3 Mod. R. 94; 87 E. R. 60, referred to.

Even if the right is taken away, the High Court can interfere, if there has been a want of jurisdiction in the inferior court. The reason of the rule is that the power *prima facie* exists in the High Court in all matters which are not within the cognizance of the inferior Court; and when this latter Court acts beyond its powers, it usurps jurisdiction which the High Court can control. [p. 634, col. 2; p. 635, col. 1.]

Ex parte Bradlaugh, (1878) 3 Q. B. D. 509; 47 L. J. M. C. 105; 38 L. T. 680; 26 W. R. 758; *King v. Justices of Somersetshire*, (1826) 5 B. & C. 816; 108 E. R. 303; *Queen v. Wood*, (1855) 5 El. & Bl. 49; 119 E. R. 400; 3 C. L. R. 1134; 5 W. R. 419; 103 R. R. 358;

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Queen v. South Wales Railway Co., (1849) 13 Q. B. 98; 6 Rai w. Cas. 197; 8 L. J. Q. B. 30; 13 Jur. 1095; 116 M. W. 1544; 78 R. R. 56, referred to.

Even where jurisdiction to issue the writ has been expressly taken away, if fraud was practised, the writ can issue. [p. 635, col. 1.]

R. v. Gillyard, (1848) 12 Q. B. 527; 17 L. J. M. C. 153; 12 Jur. 655; 116 E. R. 965, referred to.

Prima facie an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. The officer need not be sitting as a Court to attach to himself judicial functions, nor is the fact that he may have to take evidence a test of his acting judicially. But the nature of the functions that a Magistrate has to perform under section 3 of the Press Act, which gives him an unfettered discretion in fixing the amount of the security without stating any reasons or taking evidence, shows that his proceedings thereunder are only ministerial. [p. 635, col. 2.]

The power to dispense with the security only qualifies the rule which imposes the security. The first part of the proviso to section 3 of the Press Act is a conditional avoidance of the antecedent clause to demand the security. It should be regarded as defence clause to the first part of the section. The second proviso naturally would govern the power to vary given in the second portion of the section. It is not reasonable to hold that an order which necessitated the record of reasons in its inception could be capriciously set at naught the next moment. A Magistrate has, therefore, no power to demand security after having dispensed with it at the time of the declaration. [p. 636, col. 2.]

A proviso may at times serve to introduce an exception. It is often in the nature of a condition precedent to the enforcement of the operative clause. It is doubtful whether it can ever add to the clause itself. The preponderance of authority is in favour of the view that a proviso annexed to a section should not be read as enlarging the scope of that section. [p. 637, cols. 1 & 2.]

Rhonda Urban Council v. Taff Vale Railway, (1909) A. C. 253; 78 L. J. K. B. 647; 100 L. T. 713; 73 J. C. 257; 7 L. G. R. 616; 25 T. L. R. 483; *Mohammed Buhadoor Khan v. Collector of Bareilly*, 13 B. L. R. 29; 21 W. R. 318; 3 Sar. P. C. J. 363; I. A. 167; *West Derby Union v. Metropolitan Life Assurance Society*, (1897) App. Cas. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820; *Ex parte Partington*, (1844) 6 Q. B. 69; 115 E. R. 244; *In re Brockelbank*, (1889) 23 Q. B. D. 461; 53 L. J. Q. B. 75; 61 L. T. 543; 37 W. R. 57; 6 Morrell 138; *Hill v. East and West India Dock Co.*, (1884) 9 App. Cas. 418; 53 L. J. Ch. 842; 51 L. T. 163; 32 W. R. 925; 48 J. P. 7-8; *Ret. v. Dibdin, Thompson*, *Ex parte*, (1910) P. 57; 79 L. J. K. B. 517; 10 L. T. 722; 26 T. L. R. 150, referred to.

Petition under sections 66 and 117 of the Government of India Act, 5 and 6 George V, Chap. 61, and section 435 of the Code of Criminal Procedure, 1893, praying the High Court to revise the order of the Chief Presidency Magistrate, Egmore, Madras, dated the 22nd May 1916, calling on the petitioner to deposit security for Rs. 2,000 under section 3 (1) of Act I of 1910.

FACTS.—This case is connected with the previous case.* The facts are fully stated therein. The Government Solicitor wrote the following confidential letter to the Chief Presidency Magistrate before he called upon Mrs. Besant to furnish security on 9th May 1916:—"I have been instructed by the Government of Madras to move before you for the cancellation of your order made on the 2nd December 1914, dispensing with deposit of security in respect of the New India Printing Press, and I have the honour to request that you will allow me to attend before you in Chambers on Monday morning, the 22nd instant at 10 o'clock, if convenient, to lay before you the papers in support of my application. Mr. Williams of the C. I. D. will accompany me." The interview took place on 22nd May 1916 and notice was thereafter issued to Mrs. Besant calling on her to furnish security for Rs. 2,000 in fourteen days.

The petitioner applied to the Magistrate for inspection of the papers, but the same was refused.

Mr. C. P. Ramaswami Iyer, for the Petitioner.—The petition is presented under section 435, Criminal Procedure Code.—Your Lordships will permit me to move under section 106 also. I have given notice of this to the other side.

In regard to the Presidency Magistrate's Court, the High Court has got a right to issue a writ of *certiorari*. It is well known and exercised whenever inferior tribunals act *ultra vires*. By 39 and 40 George III, Chap. 79, the first Supreme Court was established at Madras with full powers to exercise all criminal and original jurisdiction. It is stated: "It is our further will and pleasure that the said Chief Justice and the Puisne Judges shall severally and respectively and they all or every one of them thereby appointed shall have such jurisdiction and authority as our Justices in the King's Bench have",...Under the Letters Patent issued under the Act of 1800, this High Court inherited as far as the Courts and Functionaries within the Presidency Town are concerned all the powers of the King's Bench. In the Act of 1861 the

*See 37 Ind. Cas. 525—Ed.

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temporary Charter of 1862, the Act of 1865 and the Charter issued in 1866 in pursuance of that Act, these powers of the High Court have been preserved. Under Chap. 12 of the Charter Act, the High Court has jurisdiction over all proceedings pending in the Subordinate Courts. The Government of India Act of 1915 says that the High Courts shall exercise all such jurisdiction as are vested in the High Courts at the commencement of this Act.

In the first place the order of the Presidency Magistrate was passed in violation of the jurisdiction conferred on him by the section; there is an utter absence of jurisdiction.

Secondly, if the Magistrate acted in this matter in any capacity at all, he acted as a Court.

Thirdly, if he is not technically a Court, the proceedings before him are judicial proceedings. The Magistrate puts the heading "Under the Press Act" but does not appear to act under it.

[ABDUR RAHIM, OFFG. C. J.—Even that I would not concede.]

[AYLING, J.—Surely he purports to act under the Press Act.]

Mr. Ramaswami Iyer.—He is purporting to act under the Press Act. At any rate that is the point for your Lordships to determine. Supposing under section 3 (1) he imposes a security on a person who has no Press at all, it is a question whether in so doing he purports to act under the Press Act or he is merely acting beyond any powers conferred on him. If he passes an order that is entirely out of his jurisdiction, this Court in spite of section 22 has power to revise it by *certiorari* even if he acts or purports to act under a special provision and even though all powers of revision are taken away. Further the Magistrate did not act under section 3. Therefore I have a right to have his proceedings revised.

[The Advocate-General.—*Certiorari* means removing a case from a Subordinate Court: it may be a pending proceeding.]

Mr. Ramaswami Iyer.—It need not be pending proceedings. There are various powers given to the King's Bench. In the

Patna case the High Court revised under section 107 an order passed under section 3 (1) of the Press Act. They held that it is the Government that must move under section 3, clause 2, because it was an old press and that the continuity of the press was not affected by the change of proprietorship after 1910. They further said that the proceedings were irregular because the Magistrate acted instead of the Local Government.

Section 2, clause (a), of the Press Act says: 'Magistrate' means 'the District Magistrate or the Chief Presidency Magistrate.' The Criminal Procedure Code, section 6, says a Presidency Magistrate is a Court, that is the Magistrate referred to in section 3 of the Press Act.

[ABDUR RAHIM, OFFG. C. J.—He is a Court. There is no doubt as to that.]

[The Advocate-General.—My contention is that the order in question is an executive order of the Magistrate.]

[ABDUR RAHIM, OFFG. C. J.—Not, that he is not a Court.]

Mr. Ramaswami Iyer.—Then he is a Court. If in a Statute a public body or functionary is allowed to pass orders, his action in such a proceeding is a judicial and not an executive one.

[ABDUR RAHIM, OFFG. C. J.—Supposing the Government passes orders?]

Mr. Ramaswami Iyer.—If the Government has to pass orders on hearing both sides or on giving reasons, the order is judicial in character. It is clear from section 17 that the whole procedure ought to be judicial and not executive or administrative.

[ABDUR RAHIM, OFFG. C. J.—Do you mean the Magistrate or the Government?]

Mr. Ramaswami Iyer.—I deal with both. It is a *fortiori* case in the case of the Magistrate. Even if revision is specially taken away, a revision lies if the functionary acted without jurisdiction.

[SESHAGIRI Aiyar, J.—That will be apart from the Press Act.]

Mr. Ramaswami Iyer.—Section 17 indicates that the orders even of the Local Government are judicial in character. The section indicates that in demanding security or in the demanding of fresh security, the Magistrate

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or the Local Government is acting judicially and not executively.

[ABDUR RAHIM, OFFG. C. J.—Have you got any case in which Government has passed orders?]

Mr. Ramaswami Iyer.—The Government of the country is constituted as a Court in regard to Agency Tracts. See *Maharaja of Jeypore v. Gunupuram Deenabandhu Patnaick* (1). There are many instances in which either the Local Government or certain departments of Government act as Courts and their proceedings are judicial proceedings capable of being revised. The power under section 36 of the Legal Practitioners Act is of a judicial character. See *In re Siddeshwar Borul* (2).

Even if the machinery is on the face of it administrative or executive, still if there are elements of a judicial enquiry, then the powers of the High Court can be invoked. Even in the case of an *ex parte* order it is possible that it may be a judicial order. It has been so held in the case of licenses to be issued by Municipalities. Notice to show cause must be issued on the general principle, *audi alteram partem*. That principle applies to proceedings under the Press Act. In the language of the Patna Judges, there must be a notice to show cause. There are a certain class of cases under the Criminal Procedure Code where all orders passed under section 145 coming within Chapter 12 of the Code are expressly exempted from the jurisdiction of the High Court by way of revision under section 435: see *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh* (3) and *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (4), but nevertheless if a person acts in entire absence of jurisdiction, the revisional powers come in.

There is a very instructive case of *Natigal Telephone Company v. Post Master General* (5). It decides that if to an

existing Court certain functions are given by Statute, it must be taken that that Court gets those functions, unless there is something inherent taking away all powers under the Statute itself. See the judgment of Lord Parker at page 562. The judgment is not based on the fact that it is a Court of Record. The reasoning of the Lords would apply equally cogently whether it was a Court of Record or otherwise.

It is the duty of a person keeping a printing press to deposit a security between Rs. 500 and Rs. 2,000. But if the Magistrate has to cancel or vary, he must ask the petitioner to show cause why the order demanding security should not be passed. He has to fix it on some enquiry, and on certain materials which he has to call for.

Whenever a Magistrate is asked to exercise discretion so as to affect the right of property or status, he is thereby performing a judicial function. Even in fixing the amount my contention is that he must act judicially. Whatever that be, in regard to the dispensing with security before cancelling or varying the order under the sub-section, he has to give notice. For dispensing with security he has to give reasons. He is then acting judicially. It may be the Legislature might say that special reasons may or may not be recorded in a special class of cases but if the kind of act which he is required to do is one which involves the exercise of judicial discretion, it is a judicial proceeding.

[SESHAGIRI AIYAR, J.—*Prima facie*, a Magistrate to whom jurisdiction is given to pass certain orders will be a Court. If he is not to take evidence and if he does not give a judicial determination, we have to see in order to come to a decision whether the Magistrate is acting as a Court, what his functions are.]

Mr. Ramaswami Iyer.—All orders under section 3 are judicial. The proviso is an exception to section 3 (1). It gives powers of a somewhat wider and comprehensive nature. In *Partridge v. General Council of Medical Education and Registration of the United Kingdom* (6), a Medical Council

(1) 28 M. 42; 9 C. W. N. 257; 7 Bom. L. R. 97; 2 A. L. J. 135; 32 I. A. 45; 8 Sar. P. C. J. 763.

(2) 4 C. W. N. 36.

(3) 26 C. 188; 3 C. W. N. 49; 13 Ind. Dec. (N. S.) 725

(4) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; (1912) M. W. N. 1154; 23 M. L. J. 499; 13 C. L. J. 753.

(5) (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637.

(6) (1890) 25 Q. B. D. 90; 59 L. J. Q. B. 475; 62 L. T. 787; 38 W. R. 729; 55 J. P. 4.

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had to act under certain powers in exercise of a discretion vested in them. When a public body is entrusted by an Act of Parliament with a duty which consists in the exercise of discretion, it cannot be said that it is merely a ministerial act. There is in *Sharpe v. Wakefield* (7) a case very near to the present. It was on the application for renewal of license for intoxicating liquors.

To hold otherwise would mean that under the Press Act the Magistrate is not entitled to give reasons for cancelling the order of exemption. If there is no appeal revision lies. In *Hodson v. Pare* (8) the argument was that none of the conditions attendant upon a judicial proceeding were present. *Rex v. Wood House, Hyderabad Ex parte* (9) is a case of licensing Magistrates. The case arose on an application for *certiorari*.

In *Erudlaugh, Ex parte* (10) there was a special Act which said that it shall not be removed by *certiorari*. In spite of that they were removed by *certiorari*. In *King v. Justices of Somersetshire* (11) it was not a pending proceeding. It was a quashing of the proceeding which had taken place before another body. *Queen v. Wool* (12) was a case under the Public Health Act of 1848 where conviction was quashed by *certiorari* because the Court had acted without jurisdiction. It was not a judicial body but it was a Local Board of Health acting in pursuance of certain Statutes.

In *Queen v. South Wales Railway Company* (13) a Railway Company for the purpose of giving compensation for land acquired had acted beyond a Statute; and a *certiorari* was issued to remove the whole proceedings.

Of the Indian cases, the latest case on the point is *Vasudera Aiyar v. Devasthanam Committee of Negapatam* (14), which was an order made under the Religious Endowments Act in regard to the nomination of one of the committee members. This judgment refers to a Privy Council decision, *Minakshi Naidu v. Subramanya Sastri* (15). Whether a Magistrate is acting entirely as a Court or not, if he is acting under a Statute and violates the Statute there is power in this Court to interfere.

In the case of *In re Nataraja Iyer* (16), a writ of this Court was applied for. It was an income tax case. In that case Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar came to different conclusions as to the right of the High Court to issue writs beyond the original jurisdiction. As to the writ of *certiorari* within the limits of this Court there was a concurrence. They refused the writ on the ground that there was another remedy open to the applicant in that case. In this case I have no other remedy.

There are several cases where writs of *certiorari* have been issued within the local limits. *Pirbhai Khimji v. Bombay, Baroda and Central India Railway Company* (17), *Reg. v. Nathalal Pitambar* (18), *Reg. v. Ramdas Samaldas* (19). In *Reg. v. Ramdas Samaldas* (19) it was decided that the passing of the Criminal Procedure Code has not taken away the right to issue *certiorari*. It was held that there should be a special enactment to remove the right of issuing *certiorari*. In *Colonial Bank of Australasia v. Willan* (20) they refer to particular instances in which a writ could be granted. It is only where the Court is satisfied that there was

(7) (1891) A. C. 173; 60 L. J. M. C. 73; 64 L. T. 180; 39 W. R. 551; 55 J. P. 197.

(8) (1899) 1 Q. B. D. 475; 68 L. J. Q. B. 309; 47 W. R. 241; 80 L. T. 13; 15 T. L. R. 171.

(9) (1906) 2 K. B. 501 at pp. 534, 535; 75 L. J. K. B. 745; 70 J. P. 495; 95 L. T. 399; 22 T. L. R. 603.

(10) (1878) 3 Q. B. D. 509; 47 L. J. M. C. 105; 38 L. T. 680; 26 W. R. 756.

(11) 1826) 108 E. R. 303; 5 B. & C. 816.

(12) 119 E. R. 400; 5 E. L. & Bl. 49; 3 C. L. R. 1134; 5 W. R. 419; 103 R. R. 358.

(13) (1849) 116 E. R. 1540; 13 Q. B. 998; 6 Railw. Cas. 197; 18 L. J. Q. B. 610; 13 Jur. 1095; 78 R. R. 565.

(14) 21 Ind. Cas. 451; 33 M. 594; 14 M. L. T. 354; 25 M. L. J. 536; (1913) M. W. N. 812.

(15) 11 M. 26 (P. C.); 5 Sar. P. C. J. 54; 14 I. A. 160; 11 Ind. Jur. 493; 4 Ind. Dec. (N. S.) 18.

(16) 16 Ind. Cas. 755; 36 M. 72; 23 M. L. J. 323; (1912) M. W. N. 1012; 13 Cr. L. J. 723; 11 M. L. T. 367.

(17) 8 B. H. C. R. 59.

(18) 10 B. H. C. R. 102.

(19) 12 B. H. C. R. 217.

(20) 1874) 5 P. C. 417 at p. 412; 43 L. J. P. C. 33; 30 L. T. 237; 22 W. R. 516.

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want of jurisdiction that it can interfere by a writ of *certiorari*.

Going to section 3 of the Press Act and the provisos, 'an order under this sub-section' can only refer to the words in the sub-section and does not include the provisos.

There are two provisos. The normal state is to give security. The provisos relate to the sub-section and the second proviso does not relate to the first proviso. A proviso has to be construed with reference to a previous clause. There are two or three cases on the point. The first case is *Duncan v. Dixon* (21). That was a case under the Infants Relief Act. It might be said that the power to impose security between Rs. 500 and Rs. 2,000 carried with it the power to change it. Under the Act as it stood some security between the two amounts should be given.

[ABDUR RAHIM, OFFG. C. J.—Where is the power to dispense with security? You cannot call it an exception.]

Mr. Ramaswami Iyer.—A proviso need not necessarily be an exception. A proviso is something which has reference to the preceding portion and speaks as a kind of commentary to it.

In *Stourbridge Navigation Co v. Dulleys, Earl of* (22) the proviso was sought to be construed to enlarge the powers.

Where there is an enacting part, a proviso and another proviso, each of these provisos must be read as part of the enacting clause: *West Derby Union v. Metropolitan Life Assurance Society* (23). There is also *West Derby Union v. Metropolitan Life Assurance Society* (24), where there are two judgments of Lord Halsbury and Lord Watson. The Press Act is a penal enactment.

[AYLING, J.—What will be the effect of your argument? Is it that the Magistrate cannot alter or cancel his previous order as regards security?]

Mr. Ramaswami Iyer.—Yes. Section 12 gives the right to the Local Government to forfeit.

(21) (1890) 44 Ch. D. 211; 59 L. J. Ch. 437; 62 L. T. 319; 38 W. R. 700.

(22) (1867) 3 El. & Bl. 403 at p. 427; 121 E. R. 496; 30 C. J. Q. B. 10; 3 L. R. 14; 7 Jur. (N.S.) 329; 9 W. R. 158; 122 R. R. 752.

(23) (1897) 1 Ch. D. 335; 63 L. J. Ch. 58.

(24) (1897) A. C. 647; 66 L. J. Ch. 756; 77 L. T. 284; 61 J. P. 820.

[AYLING, J.—Even if the press remains in the hands of the same person, if the Magistrate dispenses with security under section 3 (1), that dispensation cannot be altered and would be irrevocable?]

Mr. Ramaswami Iyer.—That would be my contention. It is impossible to speculate what reasons there could be for varying the order.

[ABDUR RAHIM, OFFG. C. J.—You are assuming that he is acting as a Court. There is no evidence to be taken and no reasons to be given. The Act does not require it. I do not think that any Magistrate can give reasons.]

Mr. Ramaswami Iyer.—Supposing the Act itself says that for special reasons to be recorded he might dispense with security. Can he not be taken to be acting as a Court?

[ABDUR RAHIM, OFFG. C. J.—I do not know how he can be in regard to the other case.]

Mr. Ramaswami Iyer.—Once the security is dispensed with he has no power to cancel or vary the order. I am concerned with the case where an order has been made dispensing with security. That is a judicial order.

My contention in the petition has been that the Press Act is *ultra vires*, at all events section 4. I do not think I can contend that section 3 is *ultra vires*.

[ABDUR RAHIM, OFFG. C. J.—We are not concerned here with section 4. If the Government seizes property unlawfully what is your remedy? You will have to sue for recovery of the property.]

Mr. Ramaswami Iyer.—If a person purports to act under a Statute but in violation of it, I can come to the High Court.

[ABDUR RAHIM, OFFG. C. J.—That is another matter. Even under sections 17 and 22 of the Press Act you could come in. You cannot come in either under section 435, Criminal Procedure Code, or sections 106 and 107 of the Government of India Act.]

Mr. Ramaswami Iyer.—Whether it is *ultra vires* or not I can come in under sections 106 and 107 of the Government of India Act.

The whole question is whether a body is acting under statutory authority.

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Section 17 does not affect this matter at all. If the Act is not *ultra vires*, the fact that section 22 takes away the jurisdiction does not preclude the Court from revising the order or issuing a writ of *certiorari*.

[ABDUR RAHIM, OFFG. C. J.—I want to know whether section 22, if an order of forfeiture has been made, has reference to an order under section 3.]

Mr. Ramaswami Iyer.—It begins by stating that no proceedings purporting to be taken under that section can be called in question except by the High Court. The whole section is with reference to proceedings consequent upon forfeiture and not proceedings by way of demanding of security or variation of security.

[ABDUR RAHIM, OFFG. C. J.—Section 22 includes anything purporting to be done under this Act.]

Mr. Ramaswami Iyer.—I would venture to dispute that, but it is unnecessary to go to that extent. It may be that, read as a separate sentence, it may protect the Magistrate against an action. But it is unnecessary to consider that, because I have not chosen to take any action against the Magistrate. Even if it be construed that the words "purporting to do an act" include proceedings under section 3, I contend that even that taking away of the power or the restriction upon the calling in question, does not take away the inherent right of the High Court to revise the proceedings if there is an absolute want of jurisdiction.

In *Nundo Lal Bose v. Corporation of Calcutta* (25) there is a decision on the *certiorari* power of the High Court to quash proceedings. That is a case where there was no Court. It is a case of an appeal against the rental fixed by the Calcutta Corporation. See also *Proudfoot v. Montefiore* (26). Jurisdiction was exercised where there was not necessarily a Court. *Vijayaraghavalu Pillai v. Emperor* (27) related

to an order of a Presidency Magistrate in which the High Court had no jurisdiction to revise the order. The Magistrate was in the position of a referee between the President of the Corporation and the candidate for Municipal election.

The Advocate-General, for the Government.—The petition is under sections 106 and 107 of the Government of India Act and section 435, Criminal Procedure Code. My learned friend gave notice only this morning about asking for a writ of *certiorari*. The notice must be to the Magistrate.

[ABDUR RAHIM, OFFG. C. J.—You appear for the Magistrate here and you might take notice of it.]

The Advocate-General.—Section 107 of the Government of India Act is really *certiorari* business and nothing but that. The powers of *certiorari* mean that. Instead of using that word, if it is interpreted that the English procedure of *certiorari* is kept alive apart from the Government of India Act and apart from section 435, Criminal Procedure Code, the practice is well established that the notice must be to the Magistrate. It is a mixing up of two different things. It is the records of the Court that should be removed here. There is no such thing as *certiorari* in the air.

[ABDUR RAHIM, OFFG. C. J.—I want to know as regards the records of the Magistrate why they are sent here in a "confidential" cover.]

The Advocate-General.—I do not know.

[ABDUR RAHIM, OFFG. C. J. opened the cover and showed the records to the parties.]

[Mr. Ramaswami Iyer.—This is a notice calling for security and this is the only order we have received. We now learn that the Government Solicitor made an application, but we did not know of it.]

The Advocate-General.—My submission is whether it is an application to your Lordships under section 435, Criminal Procedure Code, or under sections 106 and 107 of the Government of India Act, a writ of *certiorari* must be issued to a Court in respect of a judicial act.

[ABDUR RAHIM, OFFG. C. J.—It need not be a Court.]

(25) 11 C. 275; 5 Ind. Dec. (N. S.) 943.

(26) (1867) 2 Q. B. 511 at p. 513; 8 B. & S. 510; 36 L. J. Q. B. 225; 16 L. T. 585; 15 W. R. 920.

(27) 25 Ind. Cas. 345; 38 M. 581; 16 M. L. T. 128; 27 M. L. J. 227; 15 Cr. L. J. 593.

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The *Advocate-General*.—I do not say that section 107 limits it. Assuming it does not, it must be either to a Court or in respect of a judicial act. 10 Halsbury's Laws of England, page 171 and *Rez v. Wood House, Ryder Ex parte* (9) lay down that *certiorari* lies only in respect of judicial as distinguished from ministerial acts.

In every one of the cases cited there was a difference between two parties. That difference was referred to some party for determination and adjudication between the parties. In such a case as that there is undoubtedly a judicial function to be performed. My learned friend's contention is that the word Magistrate is used and, therefore, it is a Court. It is not that the Magistrate has to perform anything of a judicial function, but the Legislature has itself imposed certain rights and duties upon any person who wants to keep a press.

The Magistrate's act under the Press Act does not constitute a judicial proceeding. No Court is set in motion for the purposes of trying some offence, or convicting some person, or investigating some matter at issue between him and another person.

[ABDUR RAHIM, OFFG. C. J.—Nobody can prevent a person from opening a press.]

The *Advocate-General*.—This Act was borrowed from the Irish Prevention of Crimes Act. In France also such an Act was in force before the Third Republic. *Certiorari* necessarily means that a matter pending before a lower Court is brought up before your Lordships for the purpose of re-investigating the question and substituting the right judgment and in fact it is really transfer of cases generally. In cases of quashing it is for the purpose of remitting, for proceeding further with it by a certain judgment or certain convictions being suffered or even an indictment being removed. It includes the right of transfer under the Charter Act which was repeated in the Letters Patent of 1865. The Press Act confers on the Magistrate absolute discretion. How is this Court to say that the discretion was wrong?

What are the conditions and what are the grounds of jurisdiction in which the

Magistrate is to exercise his discretion? Is he to find out anything in respect of the nature of the press, the estimated circulation of the paper or whether it is a weekly, daily or monthly? There is absolutely no clue even in the Statute. The scheme of the two Acts, XXV of 1867 and I of 1910, is that no person shall keep a press without a declaration. There are various offences which are laid down in the old Act which are triable in an ordinary way. The Act of 1867 says that there is a condition precedent before keeping a printing press lawfully. This Act imposes additional conditions. At the time of making a declaration the keeper has to deposit a security. The amount and other things are left entirely in each case to the Magistrate.

[SESHAGIRI Aiyar, J.—Does it not deprive a man of his liberty?]

The *Advocate-General*.—We simply ask a man to deposit security. In civil cases we ask for revenue. To ask a man to pay down a deposit is not depriving him of anything.

There has been no inclination of opinion on the part of any Court that even in the case of administrative and ministerial orders the Court of the King's Bench in England would have the power to remove a matter before it in order to quash it.

[ABDUR RAHIM, OFFG. C. J.—In the Calcutta case it was in respect of Municipal assessment. Sir Richard Garth was in the Bench and that decision was not likely to go wrong.]

The *Advocate-General*.—It depends upon the particular terms of a Statute. In that case the valuation of certain properties had to be taken and it was contended that it was a judicial act. It depends upon how the assessment is fixed and upon evidence.

[AYLING, J.—Or upon certain fixed principles.]

The *Advocate-General*.—A writ of *certiorari* issues from a Superior Court and is directed to a Judge or other officer of an inferior Court to transmit the record to be there dealt with in order that the applicant may have more speedy justice. It means really a revision.

[ABDUR RAHIM, OFFG. C. J.—If an order is bad for want of jurisdiction, you cannot proceed with it further.]

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The Advocate-General.—There must be an existing proceeding to be quashed. There must be some case, it may be an interlocutory order.

[ABDUR RAHIM, OFFG. C. J.—The order is the order requiring security.]

The Advocate-General.—It is not in connection with any proceeding pending before the Magistrate. The moment a declaration is made, there is no proceeding pending before the Magistrate.

[SUSHRIGRI AIYAR, J.—Supposing it is a judicial proceeding and the Magistrate has passed an order demanding security and the matter is taken up to us and we say that the Magistrate is wrong, is it not a case in which *certiorari* will lie?]

The Advocate-General.—That will be a case of *mandamus* and not *certiorari*. If a man does something which under the law he is not entitled to do, there would be a different principle.

[ABDUR RAHIM, OFFG. C. J.—*Mandamus* is only to an inferior authority to perform a thing. There is no question of quashing an order in *mandamus*.]

The Advocate-General.—Nor is there in this, because there is no cause or matter pending before the Magistrate.

[ABDUR RAHIM, OFFG. C. J.—Suppose the Magistrate heard evidence and then passed an order, would not *certiorari* lie?]

The Advocate-General.—Yes. Certainly.

In order that there should be a judicial proceeding there must be a cause or matter or pending proceeding.

No reasons are required at all when he is to make an order. Reasons are given when he contravenes a normal statutory provision.

[ABDUR RAHIM, OFFG. C. J.—Or if he cancels or varies an order.]

The Advocate-General.—No. It depends upon what the sub-section and the proviso show. With respect to each of the species of *certiorari* there are limitations imposed, but there can be no *certiorari* when there is no cause or matter pending in a Court.

[ABDUR RAHIM, OFFG. C. J.—Is a Magistrate's Court a Court of Record?]

The Advocate-General.—It has power of inflicting fine for contempt. I do not want to deal with the question whether it is a Court of Record or not. Most of these inferior Courts are by Statutes made Courts of

Record. *Certiorari* does not lie in cases of this description. A deposit has been made. It is suggested that the deposit was made under protest. That does not make any difference. There is no evidence to show that there was a protest. This is not a case of an order requiring a person to make a deposit and the person resisting and asking for relief. The appellant made the deposit and if the deposit is a bad deposit which she was not bound to make and the Magistrate was not entitled to make under law, she is entitled to sue to recover that deposit. There is nothing to be quashed here. A writ can only be issued in respect of matters which are within the jurisdiction of the High Court, for proceedings will not be removed to a superior Court unless sure of being determined there.

There is a decision in *Blamires v. Lancashire and Yorkshire* (28). If a new offence is created a peculiar jurisdiction is prescribed. Outside the jurisdiction of the High Court *certiorari* will not lie. *Certiorari* is a common law right but if common law is transferred to new tribunals, the fact that new tribunals are created will not oust jurisdiction. But what is not a right or an offence is for the first time created and new authority and power is given; there is no such thing as *certiorari* in respect of that.

[ABDUR RAHIM, OFFG. C. J.—There is no offence created?]

The Advocate-General.—Deposit of security is not an ordinary matter. It is a special matter prescribed by Statute and it is left to a special authority to deal with.

[ABDUR RAHIM, OFFG. C. J.—*Certiorari* will not lie except in matters cognizable in Common Law?]

The Advocate-General.—Yes.

[ABDUR RAHIM, OFFG. C. J.—If there had been deprivation of jurisdiction by special legislation, then *certiorari* will not lie?]

The Advocate-General.—Yes.

[ABDUR RAHIM, OFFG. C. J.—There are certain sections in the Press Act which refer to fines].

The Advocate-General.—Yes.—The Act creates an offence, but it is not made triable under the Act. The ordinary Courts have to deal with it in the ordinary way. Section 23 merely creates an offence.

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[ABDUR RAHIM, OFFG. C. J.—Is not the Press Act a self-contained Act?]

The Advocate-General.—So far as procedure is concerned it is self-contained; so far as declaring that failure to deposit the security is an offence under the old Act, it only declares a new offence. There being no common law in connection with the way in which security has to be deposited, it cannot be regarded as a matter pending before the Magistrate and any act in connection with that cannot be regarded as a judicial act. There are two cases on the point, *Rudolf Stullman v. Emperor* (29) and *Gulli Sahu v. Emperor* (30), which are in my favour. Section 3 (2) may stand on a different footing, where any opinion has got to be expressed or reason to be stated or where the Statute gives any indication as to what it is that should be done by the Magistrate. See *Gulli Sahu v. Emperor* (30).

The High Court has power to revise the orders of Magistrates on the ground that they are inferior Courts.

[AYLING, J.—Is there any reported case of this Court issuing *certiorari*?]

The Advocate-General.—Not that I know of. I may refer to *Sivugami Achi v. Subrahmaniam Ayyar* (31).

The writ of *certiorari*, as far as civil cases are concerned, is governed by section 145 of the present Code (section 622 of the old Code). In regard to criminal cases the writ of *certiorari* is regulated by section 435 of the Criminal Procedure Code and section 107 of the present Government of India Act or section 15 of the Charter Act of 1861. They have exhausted all the jurisdiction of the High Court which can only call for the records but no revision lies.

The writ of *certiorari* is governed entirely by statutory provisions. It is no longer a common law remedy or anything of the kind.

[ABDUR RAHIM, OFFG. C. J.—Why should we regard that the right to issue a writ

is taken away unless it is expressly repealed?]

The Advocate-General.—This is not a case where this Court can by itself issue a writ. The question is whether the Supreme Court had the right and exercised it by any statutory provisions. In cases of revenue, for instance, the Court of Exchequer in England always had jurisdiction and Justices of the Peace had civil jurisdiction in respect of assessment, rates and so forth. They were subsequently regulated by various enactments. My submission is that the Supreme Court had no jurisdiction in matters of revenue.

[SANKHARIBAI AYER, J.—Section 44 of the Letters Patent says it is open to the Governor-General-in-Council to legislate, not that the right is taken away from the High Court.

The Advocate-General.—I do not say that the right existed and that it was taken away, but what I am stating is that in construing the various Statutes by which the High Courts were constituted, your Lordships will have to look at the constitution of the High Courts as a whole and if there was an exhaustive provision made for that purpose, in that case you could not require any deprivation of inherent jurisdiction which a Court of Common Law in England would require.

In judging whether your Lordships have power under section 107, your Lordships must see whether it is an inferior Court. See *Nundo Lal Bose v. Corporation of Calcutta* (25).

Suppose inferior Courts deal with certain matters which were originally within the scope of the jurisdiction of the High Court but which are now summarily dealt with by the new Courts constituted. The jurisdiction of this Court to superintend inferior Courts will not be taken away. There is no doubt that the Presidency Magistrate is a Court and if he acts judicially he comes under section 107. See the leading case of *Hartley v. Hooley* (32).

The right of issuing *certiorari* was exercised by the superior Court unless it was taken away, because its power was sought to be set aside by barring the

(29) 0 Ind. Cas. 612; 33 C. 547; 15 C. W. N. 717; 12 Cr. L. J. 322.

(30) 25 Ind. Cas. 335; 42 C. 711; 9 C. W. N. 22; 21 C. L. J. 11; 15 Cr. L. J. 3.

(31) 27 M. 259; 14 M. L. J. 57.

(32) (1777) 2 Cowp. 524; 98 E. R. 1221.

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right of appeal and a new Court was constituted to dispose of such cases in a summary manner:

[ABDUR RAHIM, OFFG. C. J.—But what remedy has the man over whom jurisdiction is wrongly exercised?]

The Advocate-General.—A suit.

[ABDUR RAHIM, OFFG. C. J.—Unless the power of the High Court is taken away, the High Court can exercise the right.]

The Advocate-General.—Demanding of security does not touch any question of the right of a man. This right not known before, is transferred by the Act from the Common Law Courts to a new authority created by the Act.]

[ABDUR RAHIM, OFFG. C. J.—Don't you come back to the same position whether it is a judicial act or not?]

The Advocate-General.—I am not speaking of offences. If a Magistrate is clothed with powers which are not recognised in the Common Law, can it be said that the Court of King's Bench or the Supreme Court had power to issue a writ?]

[ABDUR RAHIM, OFFG. C. J.—Power to demand security is a penal provision.]

The Advocate-General.—When a Magistrate imposes fine or sends a man to prison it will be technically a penal Statute. I submit it is not a penal Statute so far as section 3 is concerned. As regards section 23 it is a penal provision when it says that if he fails to deposit security, he will be liable to a conviction. Nobody is compelled to keep a press and if you want one you must pay, if required.

[ABDUR RAHIM, OFFG. C. J.—Is it not the ordinary right of a citizen to keep any property he likes?]

The Advocate-General.—Supposing for the purpose of acquiring land you have to make certain declarations. You will have to register or you may have to take out Probate or heirship certificate and pay stamp-duty. All these are conditions precedent to the enjoyment of property. So the provision relating to security is not a penal one. It is no more penal than the various taxing enactments, which are to be met with before a man could acquire property. See 10 Halsbury's Laws of England, page 161, under this very head of *certiorari* and 6 American Cyclopaedia 739. It is not

to be assumed that this extraordinary power could easily be invoked unless it is shown that such a jurisdiction has been previously exercised.

[ABDUR RAHIM, OFFG. C. J.—If that proposition of yours is pressed, then I should say section 15 of the Charter Act gives us wider powers, because the Presidency Magistrate is an inferior Court.]

The Advocate-General.—The writ lies in cases in which Courts have jurisdiction. But the existing Magistrate is used for a new purpose unknown to the Common Law. My submission is (1) that the action of the Magistrate is not judicial and (2) even if it be a judicial act, it would depend on special legislation whether it created a new thing unknown to Common Law. See *Gulli Sahu v. Emperor* (30), *In the matter of the Petition of Damma* (33), *In re Dalsukhram Hargovindas* (34) and *Chinnasawmy Iyer v. Emperor* (35).

In *Rex v. Lediard* (36) it was held that no writ of *certiorari* lay against a ministerial Act. If the Chief Presidency Magistrate issues a warrant there can be no right to issue a writ.

[ABDUR RAHIM, OFFG. C. J.—We have wider powers. We can quash his warrants. It was frequently done in Calcutta.]

[SESHAGIRI Aiyar J.—A warrant issued under the Gambling Act can be quashed.]

The Advocate-General.—Under section 435 of the Criminal Procedure Code, your Lordships can do it. It is a question whether it is more than *certiorari*. What I would submit is that when this new provision was created, it must be taken to displace the old provisions.

[ABDUR RAHIM, OFFG. C. J.—We can do that which we cannot do by *certiorari*.]

The Advocate-General.—This demand of security cannot be said to be charging a man with an offence. He cannot be in a better position than a man against whom a Magistrate issues a warrant.

The fact that a person may be a Court

(33) 29 A. 563; A. W. N. (1907) 168; 5 Cr. L. J. 476.

(34) 9 Bom. L. R. 1347; 6 Cr. L. J. 425.

(35) 4 Ind. Cas. 876; 19 M. L. J. 566; 11 Cr. L. J. 69.

(36) (1790) 96 E. R. 784; Sayer 6.

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for some purpose does not make him a Court for all purposes. It will depend upon the particular kind of function he has to discharge. See *Reg. v. Lucey, Ex parte Gosling* (37).

A review of the English cases shows that it is only when a right or duty has to be investigated and the Court has to come to a decision on that investigation that there can be a judicial act.

[ABDUR RAHIM, OFFG. C. J.—Suppose the Magistrate dispenses with security and gives no reasons for doing so. Could we set aside that order on that ground?]

The Advocate-General.—I submit, not.

[ABDUR RAHIM, OFFG. C. J.—He has to perform a certain duty and he fails to do it?]

The Advocate-General.—It is pure discretion. The reasons need not be examined.

[ABDUR RAHIM, OFFG. C. J.—The Magistrate is given certain power under certain conditions. He does not perform his duties.]

The Advocate-General.—That he dispenses with security may be for the information of the public.

[ABDUR RAHIM, OFFG. C. J.—What is the remedy if the Magistrate does not perform his duty?]

The Advocate-General.—*Mandamus*.

[ABDUR RAHIM, OFFG. C. J.—The Magistrate has passed his order already and we are asked to quash it. It is a serious thing if a Magistrate who is empowered to do a duty fails to do it. There must be a remedy.]

The Advocate-General.—There may be many conditions precedent to the exercise of an administrative or judicial act. The conditions precedent do not necessarily make an act a judicial act instead of an administrative act.

[ABDUR RAHIM, OFFG. C. J.—If he dispenses with security and gives no reasons, as a matter of fact the object of the Act is frustrated.]

The Advocate-General.—It is not; from time to time he may cancel or vary the order dispensing with security.

(37) (1897) 1 Q. B. D. 659; 66 L. J. Q. B. 308; 61 J. P. 388.

[ABDUR RAHIM, OFFG. C. J.—Suppose that does not apply to dispensation of security. So far as dispensation of security is concerned, he has got to give reasons.]

The Advocate-General.—Can it be shown that the keeper of a press, when he gives a declaration before the Magistrate, has any claim or particular grounds to ask the Magistrate to excuse him from security? He has no such right, he does not rely upon particular grounds, and the Statute merely leaves it to the Magistrate as a matter of discretion, and the security is required for the safety of the public or of Government.

[ABDUR RAHIM, OFFG. C. J.—Where is the necessity for recording reasons, unless it is subject to revision?]

The Advocate-General.—It is for the information of Government.

[SESHAGIRI AIYAR, J.—Can Government ask us to interfere when the Magistrate has not given reasons?]

[ABDUR RAHIM, OFFG. C. J.—Is a Magistrate precluded from taking evidence by the Act? Supposing for the purpose of dispensing with security he wants to take evidence?]

The Advocate-General.—The Act does not contemplate taking evidence.

[ABDUR RAHIM, OFFG. C. J.—Why?]

The Advocate-General.—If he takes evidence it must be for his own information. The Act does not provide for his taking evidence. The declarant may say that he will pay security. If a person refuses to give evidence, can the Magistrate punish him?

[ABDUR RAHIM, OFFG. C. J.—Certainly.]

The Advocate-General.—If he has an issue to decide and determine some right or duty he may have ample power to take evidence. Suppose documents are refused to be produced.

[ABDUR RAHIM, OFFG. C. J.—Why is he precluded from taking evidence? He has power to take evidence as a Magistrate.]

The Advocate-General.—If he exercises his duty as a judicial officer, undoubtedly he has power to take evidence. It is open to persons to refuse to give evidence.

[ABDUR RAHIM, OFFG. C. J.—Under the

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Criminal Procedure Code, he has full power to take evidence.]

The Advocate-General.—This is not under that Code.

[ABDUR RAHIM, OFFG. C. J.—As regards calling for explanation, is there any provision?]

The Advocate-General.—There is provision for notice under the Act.

[ABDUR RAHIM, OFFG. C. J.—How is the notice to be served?]

The Advocate-General.—In the manner provided for the service of summons.

[ABDUR RAHIM, OFFG. C. J.—Under the Criminal Procedure Code?]

The Advocate-General.—Yes, section 25 of the Act provides for that. I rely upon section to show that they are not judicial acts. See *Sivagami Achi v. Subrahmanya Aiyar* (31). The very fact that necessity is felt to protect Magistrates being proceeded against under section 22 shows that they are not judicial officers, because they would otherwise be protected by the Criminal Procedure Code.

[ABDUR RAHIM, OFFG. C. J.—There has recently been a case in which a Magistrate has been sued for acting under the Criminal Procedure Code.]

The Advocate-General.—If they are judicial officers, they do not require protection.

[ABDUR RAHIM, OFFG. C. J.—It is not only the Magistrate but the Government also requires protection.]

The Advocate-General.—The Government as such do not require to be protected, because the Government of India Act protects them and they are protected by Statutes of Parliament.

[ABDUR RAHIM, OFFG. C. J.—Cannot Government be sued for damages?]

The Advocate-General.—Not as such.

[ABDUR RAHIM, OFFG. C. J.—The Secretary of State?]

The Advocate-General.—He would not be responsible for the torts of these persons. The members of Government cannot be sued. The Government as such does not need this protection.

[ABDUR RAHIM, OFFG. C. J.—The State could be sued?]

The Advocate-General.—That was considered

recently in this Court. That is a very different question. There are more than sufficient indications to show that it is merely a ministerial and administrative act and not judicial.

[SESHAGIRI AYYAR, J.—Although evidence is to be taken, it is an administrative act?]

The Advocate-General. Section 22 is wholly unnecessary if the Magistrate is acting as a judicial officer. The only question I have to deal with is whether *certiorari* would lie. *Vinayaghavalu Pillai v. Emperor* (27) is under the Madras City Corporation Act. It was held that there was no jurisdiction to revise the Magistrate's order as regards competency or otherwise of a candidate for election. It is not necessary that a Magistrate's order should be made in open Court and before the public.

[ABDUR RAHIM, OFFG. C. J.—Why do you say that?]

The Advocate-General.—A Magistrate has not to hear parties, and when an applicant comes to make a declaration, there is no evidence to be taken and nobody can say that the applicant should furnish security at the time of making the declaration. There are no words in the Statute to show that it is otherwise than pure discretion. There is nothing to show that these proceedings take place in public Court.

If this deposit of security is *ultra vires*, it could not be tested by means of proceedings against the Magistrate or Government. It could be tested by an action. See also *Vasudeva Aiyar v. Devasthanam Committee of N. g. patam* (4).

The reason for holding that no right of appeal lay was that they viewed it as a purely administrative act. *Minakshi Naidu v. Subramanya Sastri* (15). I shall now refer to the deposit made in this case and the stage at which objection was made to it.

[ABDUR RAHIM, OFFG. C. J.—It is late in the day. You should have raised it earlier before it was opened.]

The Advocate-General.—The rule is that if a person does not object to jurisdiction and acquiesces in it and does a thing, there is an end of it.

It has been held that if a person acquiesces in a jurisdiction, then there is no question of

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certiorari. Rex v. Williams, Phillips Ex parte (38) and 6 American Encyclopedia 764.

[ABDUR RAHIM, OFFG. C. J.—The only question is as regards delay.]

The Advocate-General.—This application was never thought of till the forfeiture was made. There was no objection to the jurisdiction. All that is said in the petition is that the deposit was made under protest. You may deposit under protest for various reasons. The petition does not state any objection to the jurisdiction. I submit that after depositing the security and after allowing it to go on, coming to this Court now and saying that there is no jurisdiction is not a permissible procedure.

[ABDUR RAHIM, OFFG. C. J.—You ought to have taken this objection earlier. There is no limitation. It is left to our discretion.]

The Advocate-General.—There is no limitation to my taking it at any stage. It is a case of estoppel.

[ABDUR RAHIM, OFFG. C. J.—What could the petitioner have done?]

The Advocate-General.—She could have refused to pay the money.

[ABDUR RAHIM, OFFG. C. J.—And have gone to jail?]

The Advocate-General.—After the matter has reached another stage, it is no longer open to this Court to issue a writ of *certiorari*. I shall now deal with the merits. I have only to argue about the proviso and not on the question of *ultra vires*.

A proviso may be of various kinds. An ordinary proviso is of the nature of qualification of an enacting part. 'Section' is defined in the General Clauses Act. When it says 'under this sub-section', the whole of it is in that section. A proviso is always a part of a section.

In the words "Provided sub-section,"...the word *may* is twice repeated and it is divided by the word *or*. It is plain that it does not qualify the second part. The reason of it is plain. The Statute requires that security should be deposited. For dispensing with security some reasons are required; for not dispensing with it, no reasons are required.

(38) (1914) 1 K. B. 608; 83 L. J. K. B. 528; 110 L. T. 372; 78 J. P. 142.

It is the only construction that is possible. The only question is whether the word *or* should be read as *and*. The Magistrate has to do one of two things. If so they are not simultaneous. It is clear that no option is given to him that it may be repeated. The words "Cancel or vary" assume a prior stage—a point of time—and the words "from time to time" show that the cancellation and variation could be repeated. It cannot be read as merely an alternative power conferred upon the Magistrate. He has not got to make up his mind to do this or that.

[ABDUR RAHIM, OFFG. C. J.—In one case you say he must record reasons and that in the other case he need not.]

The Advocate-General.—In the first case the keeper of a press shall, at the time of making the declaration deposit so much amount as the Magistrate may in each case think fit to require. Fixing the amount is done under the first part of the section itself. He is required by the Statute itself to deposit security and the Magistrate is required to fix the amount.

[ABDUR RAHIM, OFFG. C. J.—If he cancels the order fixing the amount, is he not departing from the Statute? There will be no security after he has cancelled it.]

The Advocate-General. A mere cancellation or variation will not be a dispensing with security.

[ABDUR RAHIM, OFFG. C. J.—What is the substantial difference? You are put in the position of being without security.]

I am inclined to doubt if it is admissible at all to read 'for special reasons to be recorded by him' as applicable only to the first part.]

The Advocate-General.—The intention of the Legislature can be gathered only from the words. The expressed intention of the Legislature requires reasons in one case. It may be said that there is no symmetry or uniformity.

[ABDUR RAHIM, OFFG. C. J.—Why don't you read that comma after 'him'? You either dispense with security or from time to time cancel or vary it.]

The Advocate-General.—The word is *may*.

[SESHAGIRI AYYAR, J.—If there is no comma?]

The Advocate-General.—I do not want to deal too much with commas. The question is

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what is the meaning of the words 'any order'. It is not 'any other order'. The word 'or' is used loosely. I cannot be certain if 'and' would be better. The words 'from time to time cancel or vary' indicate that an order can be made after an order is made under the first part of the section and then the process can be repeated. The second order made is made under the proviso. 'Any order under this sub-section' includes an order under the second part of the proviso.

Any order means 'every order'. One of the orders is dispensing with security. It is not one power that is given. It is two powers. The first part of it must be at the time when the declaration is made. The second part of it is subsequent. To say that he must choose between one or two alternatives when the point of time is different will reduce the proviso to absurdity.

The word *or* may be read as *and* when the thing is required to be so read. The latest case is *Walker v. York Corporation* (39), [*Ditcher v. Denison* (40)]. It is a question of context.

The reason why *and* is not put in is that there is the word 'provided.' That is very loosely done. If it is read as *and* that would also mean the same thing. It is a simple illustration of the laxity of the English language. Though there is no previous relative clause the words 'and which' are used very loosely by the best English writers. There cannot be dispensing with security when there is no deposit. Security is to be deposited at the time declaration is made. If at that time *or* means one of two things which the Magistrate can do, then I submit the second thing will be impossible.

What is the exact position of the proviso is important. It is plain that it cannot be an exception to what goes before. It is not a qualification but an addition. A recent case relied upon was *Rhondda Urban Council v. Toff Vale Railway* (41).

(59) (1906) 1 K. B. 724; 75 L. J. K. B. 413; 94 L. T. 744; 54 W. R. 493; 4 L. G. R. 524; 70 J. P. 270; 22 T. L. R. 456.

(40) (1857) 14 E. R. 718; 11 Moore P. C. 324; 6 W. R. 342; 1 Deane & Sw. 334; 117 R. R. 32.

(41) (1909) A. C. 253; 78 L. J. K. B. 647; 100 L. T. 713; 73 J. P. 257; 7 L. G. R. 616; 25 T. L. R. 483

It was stated there that a proviso meant, whether it started with the word 'provided' or not, that all parts of the enactment must be read together. What was laid down in *Reg. v. Bishop of Oxford* (42) is that an ordinary proviso may be a qualification.

Lord Herschell does not mean that a proviso would help the construction of a section if the section itself is clear. There is one class of cases in which provisos may be explanations. In *Natesan Chetty v. Vengu Nachiar* (43) this view is taken. Really there is nothing to prevent a proviso being regarded as a fresh enactment. If this is to be read as a substantive enactment itself, it is perfectly obvious that the word *or* would cause no difficulty whatever. It gives two powers to the Magistrate, *viz.*, power to dispense with security and power to cancel or vary.

Assuming that I am wrong even on the merits, section 22 of the Press Act is a bar to this petition. That section will apply to any proceeding or order. It will apply to all cases under the Press Act. It has been construed in *Mahomed Ali v. Emperor* (44) to preclude the Court from going into the legality of a forfeiture.

[ABDUR RAHIM, OFFG. C. J.—Section 17 deals with cases of forfeiture.]

The Advocate-General.—Section 22 is not confined to mere forfeiture. The words 'no proceedings purporting to be taken under this Act' cover a variety of proceedings. 'No proceedings' may include also forfeiture. The section does not say 'no proceeding subsequent to forfeiture.'

[ABDUR RAHIM, OFFG. C. J.—Can proceeding under section 4 be called in question by section 17?]

The Advocate-General.—The proceeding must be of the same nature as this.

[ABDUR RAHIM, OFFG. C. J.—Read it as 'no proceeding requiring security or forfeiture'—what will it mean? It has no meaning at all. There is no sense in saying that

(42) (1879) 4 Q. B. D. 245; 48 L. J. Q. B. 609; 41 L. T. 122.

(43) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(44) 20 Ind. Cas. 977; 41 C. 466; 14 Cr. L. J. 497; 18 C. W. N. 1.

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under section 17 you call in question a proceeding under section 3.]

The Advocate-General.—Any proceeding shall not be called in question by any Court, etc.—that is a general proposition.

Every section has to be read with the previous sections. Except as provided in sections 17 to 19 no proceeding shall be called in question. Forfeiture orders are allowed to be questioned, and the High Court can question them.

[AYLING, J.—You say it blocks jurisdiction under sections 106 and 107 of the Government of India Act?]

The Advocate-General.—Certainly. The whole point is the construction of section 22.

[AYLING, J.—The argument was that it does not block the revisional jurisdiction.]

The Advocate-General.—The argument was that "proceeding" did not mean "subsequent proceeding." [Maxwell's Interpretation of Statutes, page 213.] Where there is a new duty created by Statute, there is no ouster of the jurisdiction where the Court had any. Section 22 is quite plain and it ought to be given full effect to and cannot be whittled away by reading it in any other way. In *R. v. Burah* (45) the legislative power of the Governor-General was recognised by the High Court for the purpose of taking away jurisdiction or adding to jurisdiction. It cannot be regarded as if it must be treated as a subordinate legislation in a different sense, so as to say that the Government of India Act preserved this and that it cannot be affected by Indian legislation. Section 21 gives new powers to the High Court, prescribes new procedure and except to the extent of offences created, the Press Act is an exhaustive Code in itself and provides for service of notices, for bar of action, for immunity of officials and exhaustively deals with everything, and the whole scheme of the legislation is to oust jurisdiction except to the extent shown in section 17, and even the High Court has to constitute a Special Bench.

Mr. C. P. Ramaswami Iyer, in reply.—When lower tribunals overstepped their limits of jurisdiction it was held that the High Court could issue the writ. Section 22 does not apply if the Magistrate has acted entirely without jurisdiction or acted in a manner not consonant with natural justice.

[AYLING, J.—Even if he acted in good faith, there may be a remedy.]

Mr. Ramaswami Iyer.—A private party having a remedy does not help us. To say that I have a right of action to recover the security would not meet my case. The earlier part of section 22 has no application.

[AYLING, J.—Only if a person goes to the Magistrate to make a declaration, he is called upon to give security.]

Mr. Ramaswami Iyer.—Supposing that in respect of a certain press which does not come under section 8, a person who is registered as printer is also registered as the keeper of the press and he is asked to give security in flagrant violation of section 8, there is no remedy. To reject that untenable and illogical contention, your Lordships will have to take the scheme of the Act into account and read section 22 in the light which I place it. "No proceeding" must have reference to forfeiture. To import any other construction will be to make a party remedyless in a large class of cases. "On such application" means application under section 17, which is only to revise an order under section 4. *Bradlaugh, Ex parte* (10) is a case where under the Statute a right of applying to the High Court by a writ of *certiorari* was expressly taken away. In spite of that, they said that it applied where a normal course is taken by a Magistrate. *Certiorari* is one method of invoking the revisional jurisdiction of this Court. I use section 106 of the Government of India Act as retaining, or keeping alive the old jurisdiction that this Court might have. To say that the jurisdiction of the High Court is taken away by implication, one must show that it is a necessary implication.

Section 106 of the Government of India Act enacts that the power of superintendence is to be given to the High Court. If section 107 is exhaustive, section 106 is

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unnecessary. My learned friend somewhat laboured the question as to judicial acts. 10 Halsbury's Law of England 161 says that *certiorari* also lies to remove the determination of persons or bodies entrusted with judicial functions out of the ordinary course of legal procedure but within the scope of the Common Law.

In *Rex v. Wood House, Ryder, Ex parte* (9) "judicial act" is defined: "Writ of *certiorari* is an ancient remedy...In a large number of cases it rests on Common Law. The phrase 'judicial act' must be taken in a wide sense including many acts not judicial" The term "judicial act" is used only in contrast with purely administrative acts. The use of the word *Court* and the words *judicial act* must be taken in the widest sense. If they exceed those statutory powers then *certiorari* has application. My learned friend in one portion of his speech referred to new Acts constituting new offences and new remedies. The new Licensing Act came into force in 1904 and yet *certiorari* lay. In *Queen v. Wood* (2) it was simply held that a person who put forward an account would be amenable to the Court's jurisdiction, *Reg v. Denton* (41). In *Rex v. Sunderland Justices* (47) it was held that whether it was a Court or not, if it is a statutory body its act is a judicial act. That decision was followed in *Rex v. Johasim* (48). The origin of *certiorari* is defined by Lord Halsbury, and the limit of its operation is defined in that case.

[ABDUR RAHIM, OFFG. C. J.—Do you contend that it gives us larger powers than we have under the Charter?]

Mr. Ramaswami Iyer.—I would say that section 107 may give powers equally large with *certiorari*.

Section 107 says that the High Court has powers of superintendence. Magistrates are normally under your Lordships' supervision under section 105. If it is held that under a special Statute a Magistrate is not subject to the jurisdiction of the High Court, there

might be a residuary jurisdiction under section 107. If for the purpose of the Press Act, the Magistrate is not subject to the appellate jurisdiction of the High Court, it is open to me to contend that an officer or Court is subject to the appellate jurisdiction as he is a person whom the High Court may call upon to explain certain acts. I guard myself against a narrow construction of section 107.

[ABDUR RAHIM, OFFG. C. J.—A writ has to be issued to show cause.]

Mr. Ramaswami Iyer.—The order is quashed first and he is called upon to show cause why that order of quashing should not be made absolute. In English cases, both the procedures are adopted. I come back to the real question in the case, *viz.*, whether it ought to be construed to be a judicial act. On that point, I desire to say that if that portion of the section or provision points to a judicial act, it cannot be said that the varying or cancelling order is not a judicial act. An act may be ministerial if it only made an appointment. Cancellation or variation of an order involves the bringing into play of judicial qualities.

A curious fact came to light when the confidential papers were seen in Court here. Mr. Brightwell moved for an order. I did not know of it when the petition was put in. The papers are not found now, because they are not material papers according to the learned Chief Presidency Magistrate. What happened shows that it was a judicial act done by the Presidency Magistrate. Mr. Brightwell moved judicially and the learned Magistrate seems to have regarded it as a private interview. Where it is an act of Court, it is a judicial act when materials are brought before him and he makes an order. That appears to be the irresistible conclusion to be drawn from the section itself, where it is laid down that for special reasons to be recorded the Magistrate may dispense with the deposit of security. Surely, any construction that makes the section a creature of caprice will not commend itself: it must be based on some kind of reason or common sense. This Act does not give despotic powers to the Magistrate.

There is no provision made for payment of interest on the security deposited, if

(46) (1852) 118 E. R. 287; 18 Q. B. 761; Dears. C. 3; 21 L. J. M. C. 107; 17 Jur. 453.

(47) (1901) 2 K. B. 357; 70 L. J. K. B. 946; 65 J. P. 598; 85 L. T. 183; 7 T. L. R. 531.

(48) (1905) 1 K. B. 59; 74 J. K. B. 585; 69 J. P. 236; 53 W. R. 655; 92 L. T. 653; 21 T. L. R. 423.

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a man's property is dealt with, is it open to my learned friend to say that we have to give all our property and that there is no determination between two parties? Suppose the Magistrate acts on hearsay, his order can be set aside by *certiorari*. See *Emperor v. Gulli Sahu* (49). In spite of special enactments ousting jurisdiction of the High Court, the High Court exercised jurisdiction when Courts acted without jurisdiction. My submission is that *Emperor v. Gulli Sahu* (49) and *Gulli Sahu v. Emperor* (30) taken together lay down the true principles on which I ask your Lordships to decide this case. *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (14), a Municipal case, decided two well-defined grounds. Under the Act the Magistrate was constituted merely as referee between the President and the candidate for election. The second ground is that, under the Act, no penalty is given if there should be disobedience of that order. My submission is that there is a penalty in this order allowing of an inference that it is a judicial act. The next argument adduced on the other side was that all these things were regulated by section 435 of the Criminal Procedure Code and that it was no longer a common law remedy. I say that orders of appointment or dismissal are a class of discretionary matters in which the judicial element may or may not enter. There is no use saying that if an unfettered discretion is given you must consider the nature of the act itself. If a Statute went to the extent of saying that a certain officer shall appoint men of such and such qualifications and he does not appoint such men, it would make a difference. *Dalsukhram Hurgovindas, In re* (34) was decided on the ground that it was a civil liability. *Minakshi Naidu v. Subramanya Sastri* (15) was a case in which the appellate jurisdiction was invoked. Searching the judgment through and through no other jurisdiction could be invoked. If there was a right of *certiorari*, it was not likely they would have omitted to say so. The decision is no authority for the two propositions put forward, *firstly*, that there was no right of revision and *secondly*, that it was not a judicial act.

(49) 21 Ind. Cas. 993; 41 C. 400; 14 Cr. L. J. 678; 18 C. W. N. 869.

If they had said that it was merely an administrative matter it is hardly likely that the Judges in *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (14) would have revised the order. In *Shankar Sarup v. Mejo Mal* (50) with reference to rateable distribution being administrative, a suit alone lay for redress. Taking section 3 and section 23 together, taking the use of the word *order*, taking the use of the words *special reasons to be recorded*, what is contemplated is the exercise of discretion and not exercise of mere whim and caprice, and if it is so whether it is strictly a Court or not, the Judge has to exercise a judicial act.

I am content with an adjudication that the imposing of security is wrong. It may be that I might sue for return of Rs. 2,000, or might not. But it is open to your Lordships—I do not say that there is an obligation on your Lordships—if in a matter of this kind your Lordships are satisfied that there has been a substantial error in the exercise of jurisdiction, or there has been an excess of jurisdiction, your Lordships will interfere.

I come finally to the proviso. A proviso is not an enactment of substantial law. There are two exceptions, the two ways in which the operation of the section is sought to be modified. The normal feature is security. But security may be dispensed with or security may be varied or cancelled. My argument may be put thus; supposing the Statute stood without the first proviso or the 2nd proviso stood first. The words 'or may' are important. The use of those words indicates that one or the other may be read with the preceding clause; if the word 'or' can be meant as 'and', why should we whittle down the terms of the section?

The last argument is with reference to the reasons to be recorded. I ask your Lordships to suppose that the words 'if he thinks fit' 'for special reasons to be recorded by him' are in brackets; then, would your Lordships find it difficult to read it? It does not make bad grammar. "Provided the Magistrate may dispense with the deposit of any security, or may, from time to time,

(50) 23 A. 813 (P. C.); 28 I. A. 203; 5 C. W. N. 649; 3 Bom. L. R. 713; 8 Sar. P. C. J. 72.

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cancel or vary any order under this subsection"—this is not such bad grammar as the Advocate-General would make it. In section 8 there are two provisos, and there also the exact language is used. The draftsman has a partiality for the words "or may."

ORDER.

ABDUR RAHIM, OFFG. C. J.—This petition is under sections 106 and 107 of the Government of India Act, 5 and 6 George V, Chapter 61, and section 435 of the Code of Criminal Procedure, asking us to revise the order of the Chief Presidency Magistrate requiring deposit of security from the petitioner. I have already dealt with the contention of Mrs. Annie Besant in the petition under section 17 of the Press Act and held that the order was made in excess of the power conferred on the Magistrate but that there was no provision in the Press Act itself which would enable us to revise the order.

Under section 106 of the Government of India Act which continues in this High Court all the powers and authority already vested in it, we are asked to quash the proceedings of the Magistrate by means of a writ of *certiorari*. The old Supreme Court of Madras which is now absorbed in the High Court had all the jurisdiction and authority of the Court of King's Bench in England, which included the power to issue writs of *certiorari*. (See 39 and 40 George III, Chapter 79, and the Letters Patent of 1800.) That power has been preserved to the Madras High Court by the High Courts (Charter) Act, 1861, the Charter Act of 1865, Letters Patent, Madras, 1865, and lastly the Government of India Act, 1915. It is not shown that this jurisdiction has been taken away by any Act of the Legislature, which could only be done by express words or by necessary implication.

I find nothing in section 22 of the Press Act which can be said to have deprived the High Court of this power. Section 22 says: "Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding

purporting to be taken under this Act shall be called in question by any Court except the High Court on such application as aforesaid..." The first part, I have no doubt, does not refer to the validity of an order of forfeiture but to the fact that it has been made. And I do not see how it is possible to read the words "and no proceeding purporting to be taken under this Act" as including any order of the Magistrate under section 3 (1), otherwise the passage would run thus: "and no proceeding purporting to be taken under this Act including an order of the Magistrate under section 3 (1) shall be called in question by any Court except the High Court on such application as aforesaid." This would make no meaning. The application referred to therein is an application under section 17, that is, to set aside an order of forfeiture, and that clearly shows that the proceeding in contemplation of the Legislature is a proceeding under section 4 and under similar sections of the Act and not a proceeding under section 3, which has nothing to do with forfeitures at all. This may be an omission on the part of the Legislature but we have to give effect to the Act as we find it.

There can be no doubt whatever that this High Court has jurisdiction to issue writs of *certiorari* in order to remove the proceedings of Courts or of persons entrusted with judicial functions out of the ordinary course of legal procedure for the purpose of quashing them. It was stated at the Bar that no instance of the issue of such writs by this Court is to be found on record. But that would not extinguish the jurisdiction. It is true, as pointed out by the Advocate-General, that many of the powers which the King's Bench exercises in England by means of writs of *certiorari* have been expressly conferred upon the High Courts in India by different legislative enactments, such as section 15 of the Letters Patent, section 115 of the Civil Procedure Code, section 25 of the Provincial Small Cause Courts Act and section 435 of the Criminal Procedure Code, etc.

But these powers of revision and control are available only over the proceedings of ordinary Courts: while a writ of *certiorari* is issued not only to Courts but to Tribunal

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specially constituted and entrusted with duties of a judicial character. For instance in England the proceedings of Censors of the Royal College of Physicians, of the Commissioners of Sewers, of Canal Commissioners, of Sheriffs and of Licensing Justices have been held to be subject to the writ. Writs of *certiorari* have also been issued by the Calcutta and Bombay High Courts. In *Nundo Lal Bose v. Corporation of Calcutta* (25) an assessment made by the Commissioners of the Town of Calcutta was removed to the High Court by a writ of *certiorari* and quashed by Chief Justice Garth and Justice Wilson. The learned Judges in that case do not appear to have entertained any doubt whatever that they had jurisdiction to issue the writ. The first and essential question on this application is whether the taking of security by the Magistrate under section 3 (1) of the Press Act was a ministerial or judicial Act. If the former, it is conceded that we cannot interfere even by a writ of *certiorari* much less under section 435, Criminal Procedure Code, or under the power of superintendence which we possess over the inferior Courts under section 107 of the Government of India Act.

That the writ lies only with respect to judicial acts is well established (see Halsbury's Laws of England, Volume 10, paragraph 338). Whether an act is judicial or not depends on the nature of the powers conferred by the Legislature, the character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations. Our attention has been drawn to many English cases in which writs of *certiorari* have been issued by the King's Bench in England. In some of them it looks as if the line of differentiation between a judicial and administrative act was very faint. But whether any particular function was of a judicial character or not in those cases depended on the provisions of the particular Statutes concerned and no good purpose would be served by reviewing them.

Now what are the functions of the Magistrate under section 3 (1) of the Press Act? Every keeper of a printing

press is required to deposit security and all that the Magistrate has to do is to say what should be the amount of security, provided it is not less than Rs. 500 or more than Rs. 2,000. The matter is left entirely to his discretion and so is the question whether he should or should not cancel or vary any order that he may make in this connection. He is not required to hear the owner of the printing press or to take any evidence. He is not to conform to any conditions or formality before passing any such order. In fact it cannot be said that there is any "case" or "cause" before him which he has to adjudicate upon. The discretion which is vested in him, such as it is, is absolute; it has all the attributes of an executive and not a judicial discretion. I do not see how it would be possible for any one, asked to revise such an order as the Magistrate is empowered to pass, to say whether it is proper or not. No doubt when a Magistrate dispenses with the deposit of security, he can do so only for special reasons to be recorded by him. Having regard, however, to the whole scheme of the Act, I do not think that those reasons are required in order to enable the High Court to make any pronouncement upon them. They are apparently required for the information of Government. What is also of importance in judging of the intention of the Legislature as to whether the proceedings of the Magistrate under section 3 (1) are to be regarded as judicial in character or not is the provision of section 22, by which Magistrates purporting to act under the Act are especially exempted from all civil or criminal liability. That would not have been necessary if the Magistrate in exercising his powers under section 3 (1) were acting as a judicial Tribunal.

The Indian decisions which approach at all near this case are *Sivagami Achi v. Subrahmaniam Ayyar* (31), where it was held by a Full Bench of this Court that the proceeding of a Court under section 257 of the Code of Civil Procedure settling a proclamation of a sale of property in execution is of an administrative and not of a judicial character, *Shankar Sarup v.*

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'*Mejo Mal* (50), where an order of distribution under section 295 of the Code of Civil Procedure was held by the Privy Council to be in the nature of an administrative act, *Minakshi Naidu v. Subramanya Sastri* (15), which decides that no appeal lies from an order of a District Judge appointing a member of a committee of a temple, and *Vijayaraghavalu Pillai v. Emperor* (27), in which it was held that the High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an enquiry held by virtue of the rules framed by Government under the Madras City Municipal Act, III of 1924, as to the competency or otherwise of a candidate for a Municipal election.

Mr. C. P. Ramaswami Aiyar, who argued the case of the petitioner with great ability, referred us to a number of decisions of the Calcutta High Court in which they set aside orders of District Judges declaring certain persons to be touts within the meaning of the Legal Practitioners Act. It is perfectly clear from section 36 of that Act that the function to be exercised by the Courts mentioned therein is judicial in nature. They have to hear the persons sought to be proceeded against and to take evidence and their order must conform to certain conditions.

The other contention of the Advocate-General that proceedings will not be removed into the superior Court by a writ unless they are capable of being determined there, is also well established (see Halsbury's Laws of England, Volume 10, paragraph 335, page 170, and the cases cited there). None of the matters which are left to the determination of the Chief Presidency Magistrate by section 3 (1) of the Press Act are such that this Court would be in a position to deal with at all satisfactorily. A writ is granted only in respect of matters which but for some especial legislation creating especial Tribunals would have been within the ordinary jurisdiction of the superior Court. The Press Act has conferred upon the Presidency Magistrate novel powers which were never known to be exercised by this Court or by any Subordinate Court in the land. He is to take security from every person keeping a printing press and it

is left entirely to his discretion whether to dispense with the security or not. There need be no question of the likelihood of the owner of the press committing any offence or doing any acts to the injury of the public or of any individual, as in the cases covered by Chapter VIII of the Criminal Procedure Code.

I may also notice here the contention of the Advocate-General that the Indian Press Act of 1910 is a self-contained enactment. He points out that it provides for its own rules of procedure and evidence (see sections 21, 25) and section 20, creates a special Court of Appeal for revising certain orders passed under the Act (section 18) and expressly limits jurisdiction of the ordinary Courts in respect of the principal matters dealt with by the Act (section 22). None of these provisions, however, singly or collectively have necessarily the effect of taking away our revisional jurisdiction over the proceedings of the Magistrate if he was acting judicially.

The Legislature, however, in delegating to the Magistrate the functions under section 3 (1) does not regard him as a Court, but as an Executive Officer entrusted with the performance of certain administrative duties. If an Executive or an Administrative Officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court, whether by means of a writ of *certiorari* or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action.

The petition is dismissed.

AYLING, J.—This is a petition presented on behalf of Mrs. Annie Besant, Editor of "New India" and keeper of the "New India Printing Works." It is connected with Ordinary Petition No. 122 of 1916.* In that petition presented under section 17 of the Press Act (I of 1910), we were asked to set aside the order of forfeiture of security passed by the Madras Government on 25th August 1916 under section 4 of the same. The present petition, which was presented during the hearing of the other, asks for the cancellation of an earlier order of the Chief Presidency Magistrate, dated 22nd May 1916, in which he required petitioner to

*See 37 Ind. Cas. 525—Ed.

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deposit; security, to the amount of Rs. 2,000 under section 3 (1) of the Act. This security was duly deposited; and is the security which was declared forfeited by the order of Government dated 25th August, 1916.

The main ground alleged in the present petition for setting aside the Chief Presidency Magistrate's order is that it was passed without jurisdiction; but section 7 of the petition runs:—

"7. That the order of the Magistrate is further invalid because the Press Act, or in any event section 4 thereof is *ultra vires* of the powers of the Governor-General in Legislative Council."

This was not seriously pressed. We have nothing to do here with section 4. If, as is suggested, the whole Press Act is *ultra vires* and of no effect, it is open to petitioner to seek her remedy in the ordinary Courts. It is no possible ground for the exercise of our revisional jurisdiction.

The contentions of Mr. C. P. Ramaswami Aiyar, who argued the case very ably and fully for the petitioner, may be summarised as follows:—

A. That the order of the Chief Presidency Magistrate, dated 22nd May 1916, was *ultra vires*, because, by a previous order dated 2nd December 1914, he had passed an order dispensing with security in respect of this press, and had thereby exhausted his powers under section 3. He could not afterwards "cancel or vary" it.

B. That it is open to us to set aside the said order, dated 22nd May 1916, in exercise of our powers under sections 106 and 107 of the Government of India Act of 1915.

(Section 435 of the Criminal Procedure Code was also referred to in the petition; but was not relied on in argument; as adding anything to the above).

C. That we should exercise our power and set the order aside.

It is not suggested that we can order return of the security; but that our order will set petitioner free to pursue her remedy further at Common Law.

Each of these positions requires careful examination.

The first, A, depends on the proper construction of section 3, (1) of the Press Act, which runs as follows:—

"Every person keeping a printing press who is required to make a declaration under section 4 of the Press and Registration of Books Act, 1867, shall, at the time of making the same, deposit with the Magistrate before whom the declaration is made security to such an amount, not being less than Rs. 500 or more than Rs. 2,000, as the Magistrate may in each case think fit to require, in money or the equivalent thereof in securities of the Government of India:

Provided that the Magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this subsection."

It is beyond dispute that on 2nd December 1914, the Chief Presidency Magistrate passed an order under the first part of the proviso dispensing with the deposit of any security for the petitioner's press. The contention is that this order is irrevocable; and that, once it is passed, the press is exempt from all possible liability for security under the Act as long as it remains in the same hands.

It is argued (1) that the words "any order under this section" do not cover an order dispensing with security; and (2) that the proviso merely gives the Magistrate an option of two alternatives (a) to dispense, (b) to cancel or vary, of both of which he cannot avail himself.

Some argument was also devoted to the question of whether the clause requiring the record of special reasons applied to an order cancelling or varying. I feel no doubt whatever that they do not. Their position, enclosed between the words "may" and "dispense," to my mind clearly indicates that their operation is limited to an order dispensing with security. If the first "may" followed instead of preceded the words "if he thinks fit, for special reasons to be recorded by him", it would be different.

Now, returning to the first argument above recited, it is, I think, clear that the term "proviso" as applied to the second paragraph of sub-section 3 (1) is a misnomer. As pointed out by the learned Officiating Chief Justice in the course of argument, the effect of the paragraph is simply to give the

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Magistrate additional powers over and above those conferred by the first paragraph. To quote from Lord Halsbury: "The substance, and not the form, must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before." Halsbury's Laws of England, Volume 27, page 137.

This being so, the sub-section must be treated as a whole; and there is no reason why the words "any order" should not cover an order dispensing with security. As the Advocate-General very pertinently argued, had the intention of the framers of the Act been that ascribed to them by Mr. Ramaswami Aiyar, in place of "any order under this sub-section", we should have "any other order under this sub-section". There is no reason why we should read into the "proviso" the word "other" as petitioner's case requires us to.

Just as the first argument requires the insertion of the word "other," so, it seems to me, the second argument requires the insertion of the word "either" after the first "may." It is hardly necessary to say that where a person is by Statute empowered to take a course A or take a course B, the one is not necessarily exclusive of the other and in fact will not be, unless there is something to suggest a choice between two alternatives. There is nothing of the kind here: and the words "from time to time" are strongly against such an interpretation.

The sub-section may not be a triumph of draftsmanship: but its meaning seems to me to be reasonably clear. It is designed to give the Magistrate the fullest discretion both as regards requiring security and determining the amount: and this discretion is to be exercised not once for all, but may be revised from time to time.

If this be, as I think, the true construction, then the order of the Chief Presidency Magistrate passed on 22nd May 1916 was perfectly legal.

Passing then to the second point B, supposing that the order of the Chief Presidency Magistrate of 22nd May 1916 was bad for want of jurisdiction by reason of his previous order dated 2nd December 1914, what powers of interference do we possess?

The petition as originally presented referred us to section 107, Government of India Act, 1915, which is substantially identical with section 15 of the Charter Act, but at the outset of the hearing petitioner was allowed leave to add section 106 of the same. The object was to include the power of interference by way of *certiorari* which was said to be covered by the latter section. Neither side were able to refer us to a single instance in which this power has been exercised by this Court, and whether section 106 really adds anything to the powers of superintendence under section 107 was the subject of much argument: as also whether this was a case of the class to which writs of *certiorari* apply. The main difficulty in petitioner's way is, however, section 22 of the Press Act. This runs as follows:—

"Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court, on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

The second clause which I have italicised is the important one, and everything turns on the effect to be given to it. It seems to me to be absolutely comprehensive. To quote the language of Jenkins, C. J., in connection with another section of the Act, "its language is as wide as human ingenuity could make it."

I cannot for a moment entertain the suggestion that it only applies to proceedings by way of forfeiture. There is nothing to support such a reading. The language is clear "no proceeding purporting to be taken under this Act", and it must be held to include the proceedings of a Magistrate under section 3 (1).

I must also reject without hesitation the argument that the Chief Presidency Magistrate's order dated 22nd May 1916 did

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not purport to be one under section 2 (1). A perusal of this order itself is sufficient.

Mr. Ramaswami Aiyar has, however, argued that in spite of this section, the power of the Court to interfere by way of *certiorari* is left unaffected, provided the proceedings were taken without jurisdiction. The case mainly relied on by him is that of *Bradlaugh, Ex parte* (10), in which the learned Judges held that a section in an Act of Parliament taking away *certiorari* did not apply where there was an absence of jurisdiction, or, as Cockburn, C. J., put it, "where the application for the *certiorari* is on the ground that the inferior Tribunal has exceeded the limits of its jurisdiction."

I have very carefully considered this decision, but it seems to me that the principle therein enunciated is not applicable to the present case. Whether the power of interference by *certiorari* is taken away absolutely or only in respect of proceedings with jurisdiction, must depend in each case on the wording of the Statute which takes the power away. No one contends that it is not within the competence of the Legislature to take it away altogether; and in cases of a newly constituted offence or liability, it might, without any undue jealousy of the power of the Court, elect to do so. It is in this connection that the greatest importance attaches to the words in section 22 "proceeding purporting to be taken under this Act." There is nothing corresponding to this in 2 and 3 Vict., C. 71, the Act which was relied on as taking away the *certiorari* in *Bradlaugh, Ex parte* (10). This, as it seems to me, makes all the difference. The reason underlying the decision above quoted and others to the same effect is thus concisely stated by Lord Halsbury: "Although *certiorari* is taken away, it may be granted even on the application of the defendant, where the inferior Court has acted without or in excess of jurisdiction, for in such a case the Court has not brought itself within the terms of the Statute taking away *certiorari*."

Here the jurisdiction of this Court is equally barred in respect of proceedings purporting to be taken under the Press Act, as in respect of proceedings taken under the said Act with jurisdiction.

There is really nothing very startling in this view of the matter. The Press Act is an entirely new enactment brought into force in the interests of public tranquillity and imposing novel liabilities on the keepers of presses and publishers of newspapers, chiefly in the matter of security. As far as can be seen it is self-contained and complete: and reference to the Courts of Law is only left open by section 23 (which relates to prosecution before a Magistrate for failure to deposit security) and applications to this Court under section 17. As regards the latter, sections 17—21 limit most carefully the scope of the enquiry and the nature of the order to be passed; they also provide for the constitution of a special Tribunal, and for the enactment of special rules for its procedure, together with a special provision as regards evidence (section 20). Apart from this, section 22 bars the jurisdiction of all Courts as regards proceedings purporting to be taken under the Act. It is open to any one to argue that the enactment is unnecessary or impolitic: but there is nothing which would justify us in refusing to give effect to what seems to be its plain meaning. I am of opinion that by reason of section 22 it is not open to us to set aside the Chief Presidency Magistrate's order.

Either of the above points is sufficient to dispose of the petition: and I only add a few words because they are both points on which I have the misfortune to differ from the learned Officiating Chief Justice and from my learned brother, Seshagiri Aiyar, J. There remains the question of whether the order of the Chief Presidency Magistrate is of such a nature that we could interfere with it under section 106 or 107 of the Government of India Act, even if we were not prevented by section 22 of the Press Act. This is a matter in which I feel considerable doubt, due chiefly to the very wide interpretation given by the English Courts in numerous cases to the expression "judicial act." I recognise, however, the force of the arguments on the other side: and will merely say that if it were in my view necessary to determine this question I should not be prepared to dissent from the conclusion arrived at by the learned Officiating Chief Justice and

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Seshagiri Aiyar, J. I would, however, prefer to base my decision on the grounds set forth above.

I may add that, even assuming that we possess the power of interference under either section, it would still be, to me, a matter of grave consideration, whether that power should be exercised in this case (Point C). I am not prepared to accept the Advocate-General's contention that by depositing the security as required by the order, petitioner waived her right to subsequently question its validity. But if the order was illegal, it was open to her to petition this Court the very next day to exercise its powers under sections 106 and 107. Instead of this she took no action whatever till more than three months later when the Government, proceeding on the assumption that the initial order of the Magistrate was valid, took further steps under section 4 and forfeited the security. In other words, she waited until the matter had reached another stage altogether before questioning the legality of the order.

Our exercise of these extraordinary powers is always discretionary; and I doubt whether in such circumstances we should feel called upon to exercise our power.

I would dismiss the petition.

SESHAGIRI AIYAR, J.—This is an application to revise the order of the Chief Presidency Magistrate calling upon the petitioner to deposit security. Mr. C. P. Ramaswami Aiyar asked the permission of the Court, at the outset, to include section 106 of the Government of India Act of 1915 among the provisions of law he relied on. The point argued related to the powers of the High Court to call up and revise the proceedings of the learned Chief Presidency Magistrate. Before dealing with the specific questions discussed, a short resume of the history of the jurisdiction of the High Court over such matters may be given.

In the Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December 1800 (39 and 40 Geo. III, Chap. 79), it was stated that the Court "shall have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain,

called England, as far as circumstances will admit." By 24 and 25 Vict., Chap. 104, the High Court was constituted. Under section 9 of the Act it was provided that "the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts." By section 8, the Supreme and the Sudder Courts were abolished, and the records of those Courts became "records and documents of the High Court established in the Presidency". It is thus clear that the High Court inherited all the powers which the old Supreme Court had. Section 10 which deals with the powers exercised over persons living beyond the local limits of the original jurisdiction need not be considered in this connection. The Letters Patent accompanying the charter distinctly enacts by section 16 "that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras." Then came 28 Vict., Chap. 15. The Letters Patent issued with reference to this Statute re-enacted by section 17 the powers given already, and stated that the powers hitherto "exercised before the publication of these presents" shall vest in the High Court. The consolidating Act of 1915 confirms the said powers by enacting that the High Court shall have such jurisdiction "as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act." It is apparent from these recitals that the High Court has the same powers over persons resident within the local limits of its ordinary original jurisdiction as are exercised by the Court of the King's Bench in England.

Mr. Ramaswami Aiyar's contention was that as the Chief Presidency Magistrate is subject to the appellate jurisdiction of the High Court, his order demanding security

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should be revised by us. He asked us to issue a writ of *certiorari* against the Magistrate's proceedings. The solution of this question involves the determination of the following among other points:—

A. Is the writ in form and substance available to the petitioner?

B. Is our jurisdiction taken away by virtue of the provisions of section 22 of the Press Act?

C. Is the Chief Presidency Magistrate, in performing his duties under the Press Act, amenable to our jurisdiction?

D. Is the action of that functionary illegal or irregular?

As regards the *first* of these questions, the learned Advocate-General argued that as the Press Act created a new kind of liability which cannot be said to correlate to any of the Common Law rights possessed by the subject, this Court, inheriting the rights of the Court of the King's Bench, had no right to interfere. One broad proposition was advanced that the right to keep a press was not an inherent right of every subject. The learned Advocate for the Crown suggested that the right to have a press is analogous to the right to carry on any trade or profession and consequently, a license should be obtained in that behalf. This argument is so opposed to all ideas of free press and of free speech that we asked for some authority for this proposition. The learned Advocate-General referred us to what obtained during the Third Republic in France and to the Press Laws passed in Ireland when the Coercion Acts were in force. The preamble to the Press Act does not say that this is an emergency measure passed to steer the country during times of apprehended danger. The Act is apparently a permanent addition to the Statute book, intended to regulate the conduct of the press during peaceful and normal times. I do not think that the exceptional circumstances which made the authorities in France and Ireland regard the use of free speech and free writing as exercisable only on licenses obtained thereto have any analogy. In England, the law is clear that the right of free writing is a Common Law right. The early law on the subject is fully stated by Professor

Blake Odgers in his article on the Liberty of the Press contributed to 8 Encyclopædia of the Laws of England, page 155. At its inception, Kings, Peers and Priests unaccustomed to the sarcasms printed against them resolved that printing presses should be under the King's supervision. Then a company of certain merchants was given the privilege of keeping a press. Afterwards the universities were each allowed to have one. In the days of Queen Elizabeth, the publications issuing from the press had to be read over by the Bishops and the Privy Councillors. In 1637 the Star Chamber decreed that all printed matter should be submitted to licensers. After the abolition of the Star Chamber, the Long Parliament passed similar decrees. Against this Milton protested in his famous work, "A Speech for the Liberty of Unlicensed Printing." In 1695, when the revision of Statutes came up before the House of Commons, the law of the Long Parliament was omitted from the Statute book after a conflict with the House of Lords. From that year onwards, the liberty of the press has not been interfered with. This short statement about the legal history of the English Press shows conclusively that the freedom of the press is not a "licensed calling," but a Common Law right inherent in every subject, subject to certain limitations. Lord Mansfield in *Rex v. Dean of St. Asaph* (51) said that "the liberty of the press consists in printing without any previous license, subject to the consequence of law." The principle recognised in England is that so long as free writing does not offend the law of libel, the press is unfettered. Lord Ellenborough in *Rex v. Cobbet* (52) stated: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary. But if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." "The power of free discussion," said Lord Kenyon, C. J., in *Rex v. Reeves* (53), "is the right of every subject of this

(51) 3 T. R. 423 n.; 100 B. R. 657.

(52) 29 State Trials 41 at p. 49.

(53) (1793) Peake Add. C. 84; 4 R. R. 891.

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country." The latest pronouncement on the subject is that of Lord Russell of Killowen, C. J., in *Reg. v. Gray* (54). He said: "the liberty of the press is no greater and no less than the liberty of every subject of the Queen." Professor Dicey in commenting upon some of these cases says: "This principle is radically inconsistent with any scheme of license or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the Courts to restrain the circulation of a libel, until, at any rate, the publisher has been convicted of publishing it." Of course exceptional circumstances connected with the safety of the Empire may demand a departure from these principles, e. g., the appointment of a censor, etc. But I am unable to hold that the law as to freedom of writing in India is not an offshoot of the principles that obtain in England, but has been borrowed from the emergency laws of the Third Republic. I am prepared to hold that even after the Press Act, the right to keep a press and to use it is a Common Law right and has not the slightest resemblance to the exercise of a trade or calling for which a license should be taken out.

Another argument for the Crown was that a writ of *certiorari* contemplates that the High Court is capable of substituting its own judgment for that of the Tribunal whose proceeding is revised, and that as we cannot say what the exact amount of the security should be and whether it should be demanded or not, we have no power to revise the order. I do not think that it is a condition precedent to the issue of the writ that we should be able to place ourselves in the position of the Court whose order is complained against. The writ may assume various forms. It may be an order to transfer proceedings (see sections 526 and 528 of the Code of Criminal Procedure and sections 22 and 25 of the Code of Civil Procedure). It may relate to the stay of proceedings (the Code of Civil Procedure provides for

this). It may seek to set aside orders or judgments (section 115 of the Code of Civil Procedure, section 435 of the Code of Criminal Procedure and section 25 of the Provincial Small Cause Courts Act). In short, it is enough that in the exercise of our jurisdiction, we direct the lower Court to re-consider its order or judgment. I am, therefore, of opinion that the fact that we cannot place ourselves in the position of the Chief Presidency Magistrate is not a bar to our entertaining the application.

The learned Advocate-General also seemed to suggest that as the right to issue the writ has now been engrafted into legislative provisions, the old prerogative need no longer be invoked. The fact that our powers are recognised in legislative provisions is not an argument for holding that that power does not exist *abunde*.

The next branch of the argument was that by section 22 of the Press Act, the right, if any, possessed by us has been taken away. As I read the section, I am unable to understand it as expressly or even by implication taking away the power of the High Court. All that can be said is that the Act does not provide for the order under section 3 being revised. It is now well settled that unless the power to issue a writ of *certiorari* is expressly taken away, it inheres in the Court. It was held in *R. v. Reeve* (55) that the writ, being one for the benefit of the subject, cannot be taken away *without express negative words*. See also *R. v. Jukes* (56) and *R. v. Plowright* (57). The English Judges have been so jealous in preserving this right, that they have held that even when the Legislature provided that certain matters shall be finally determined by an inferior Court, the Court of King's Bench was not powerless. *R. v. Reeve* (55). I am, therefore, clear that section 22 has not taken away the right.

Moreover, even if the right is taken away, the High Court can interfere, if there has been a want of jurisdiction in the inferior Court. The reason of the rule is that the

(54) (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

(55) (1760) 2 Burr. 1040; 97 E. R. 696.

(56) (1800) 8 T. R. 542; 5 R. R. 445; 101 F. R. 1536.

(57) 3 Mod. 94; 87 E. R. 60.

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power *prima facie* exists in the High Court in all matters which are not within the cognisance of the inferior Court; and when this latter Court acts beyond its powers, it usurps jurisdiction which the High Court can control. The leading authority on the subject is *Bradlaugh, Ex parte* (10). Mellor, J., stated in that case that "it is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction." *King v. Justices of Somersetshire* (11) and *Queen v. Wood* (12) are to the same effect. In *Queen v. South Wales Railway Company* (13) Coleridge, J., stated: "Where that (want of jurisdiction in the inferior Court) is made out, the statutory prohibition does not apply and the inherent jurisdiction of this Court is unrestrained."

It is on this principle that the High Courts in this country have acted in interfering with orders passed by Magistrates under section 145 of the Code of Criminal Procedure. Section 435, clause (3), would seem to suggest that High Courts should not revise orders passed under Chapter XII and section 176. But there are no positive words affecting the jurisdiction of the High Court. Consequently, there has been a long course of decisions holding that the prohibition did not affect our powers of interference when want of jurisdiction was made out. The absence of jurisdiction may be founded upon certain proceedings which have been made essential preliminaries to the inquiry or upon facts to be adjudicated upon in the course of the inquiry. See *Colonial Bank of Australasia v. Willan* (20) and *Rex v. Wood House, Ryder, Ex parte* (9). A further qualification has been introduced in favour of the interference of the Court of the King's Bench. Even when jurisdiction to issue the writ was expressly taken away, if fraud has been practised in the procuring of the judgment the writ can issue. *R v. Gillyard* (58).

I shall now consider the *third* question. I had considerable doubts during the course of the argument upon this subject. Mr.

Ramaswami Aiyar and the learned Advocate-General placed before us a bewildering array of authorities. The question whether a particular act done by an avowedly judicial Tribunal is performed by that Tribunal ministerially or judicially is not easy to determine. I concede that *prima facie* an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. I shall also grant that the officer need not be sitting as a Court to attach to himself judicial functions. The fact that he may have to take evidence is not a conclusive test of acting judicially. In *Rex v. Wood House, Ryder, Ex parte* (9), Vaughan Williams, L. J., doubted whether the fact that there was no jurisdiction to make an administrative as distinguished from a judicial order would enable the Court to issue a *certiorari*. Lord Justice Fletcher Moulton, after an elaborate discussion on the meaning of the terms "judicial acts" and "administrative acts", says: "The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at Common Law." The position is thus succinctly expressed in 6 American Cyclopædia 753: "It necessarily follows that the writ will not lie to review acts which were not done in the exercise of judicial power or authority, but were merely ministerial, executive, or legislative in their character." I do not propose to examine the English authorities any further. I am bound, however, to consider a few Indian decisions. The most important of them is that of the Judicial Committee in *Shankar Sarup v. Mejo Mal* (50). The question related to the construction of section 295 of the old Code of Civil Procedure. Lord Robertson in delivering the judgment of the Board said: "The scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be

(58) (1848) 12 Q. B. 527; 17 L. J. M. C. 153; 12 Jur. 65; 116 E. R. 965.

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the rights of parties, without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present." In making the distribution, the Court had to hear parties and to decide upon the merits. Mainly relying upon this decision, a Full Bench of our High Court held in *Sivagami Achi v. Subrahmaniam Ayyar* (31) that a District Munsif acting under section 287 of the Code of 1882 was only performing a ministerial duty and that his proceedings were not subject to revision by the High Court. The District Munsif in settling the proclamation under that section was entitled to take evidence and to come to a conclusion on the question. The learned Judges were much influenced by the circumstance that by section 288, the officer was given the same protection from being proceeded against for damages as Act XVIII of 1850 gave to ordinary judicial officers. The inference they drew was that in settling the proclamation, he was not acting judicially. This proposition applies with equal force to the present case. Then there is the decision in *Vijayaghavalu Pillai v. Emperor* (27), to which I was a party with my learned brother Mr. Justice Ayling. I do not think the present case is stronger than that. In Calcutta we have *Rudolf Stallmann v. Emperor* (29) and *Gulli Sahu v. Emperor* (30), which support the view taken in the Madras case. Reference should also be made to *Minakshi Naidu v. Subramanya Sastri* (15), in which the Judicial Committee held that a District Judge in appointing a committee member under section 10 of Act XX of 1863 was performing a ministerial duty. As against these decisions may be put the decision in *Nundo Lal Bose v. Corporation of Calcutta* (25). In that case, however, some judicial authority was given to the Tribunal. On the whole, I am inclined to the view that the Chief Presidency Magistrate was not acting judicially when he called upon the petitioner to deposit security. An examination of the provisions of the Press Act leads to the same conclusions. (a) There is nothing in the Act which compels the Magistrate to hold any enquiry, although I do not say that he is debarred from doing so. (b) The nature

of the information to be laid before him is, not specified—Mr. Ramaswami Aiyar has drawn our attention to the fact that an application was made, as a matter of fact, by Mr. Brightwell. (c) The Magistrate is not bound to state any reasons. (d) He has an unfettered discretion in fixing the amount. (e) A special provision is made in section 22 of the Act granting the same protection for proceedings passed in good faith as are secured to judicial officers by Act XVIII of 1850. These considerations have influenced me in holding that the action of the Chief Presidency Magistrate was not judicial but only ministerial.

The last point for consideration is, whether in the exercise of the power given to him by the Act, the Chief Presidency Magistrate acted illegally. Sub-section (1) of section 3 before it reaches the proviso has two substantive provisions: (1) The keeper of the press shall make a deposit at the time of the declaration, and (2) that the amount of the deposit shall be fixed by the Magistrate between Rs. 500 and Rs. 2,000. The first requirement is imperative. The second gives a discretion to the Magistrate. The proviso also consists of two parts: (1) The Magistrate may for special reasons to be recorded by him dispense with any security, and (2) he may from time to time cancel or vary any order under the sub-section. From the context it is clear that the power to dispense with the security only qualifies the rule which imposes the security. The first part of the proviso to my mind is a conditional avoidance of the antecedent clause to demand the security. It should be regarded as a defeasance clause to the first part of the section. The second proviso naturally would govern the power to vary given in the second portion of the section. When the Legislature gave a discretion to the Magistrate to fix the amount, it also gave him power to vary the amount from time to time. It would, therefore, seem that the second part of the proviso should be read as qualifying the clause which gives discretion to demand a varying security. The learned Advocate-General naturally laid stress upon the use of the words "vary any order" under this sub-section. Those words are capable of including orders passed under the proviso;

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but it has to be noticed that the clause calling upon the Magistrate to record special reasons cannot grammatically be read with the clause beginning with "or may from time to time vary," etc. Is it reasonable to hold that an order which necessitated the record of reasons at its inception was intended to be capriciously set at nought the next moment. That would be imputing incongruity to the Legislature. Further the use of the disjunctive participle, or seems to suggest that the order contemplated by the second clause of the proviso is different in nature from that which the first part enables the Magistrate to make.

I have thus far submitted the section itself to a close analysis. Very able arguments were addressed to us on both sides upon the meaning and office of a proviso. A great deal would depend upon the draftsmen. A proviso may at times serve to introduce an exception. It is often in the nature of a condition precedent to the enforcement of the operative clause. It is doubtful whether it can ever add to the clause itself. The learned Advocate General referred us to *Rhondda Urban Council v. Taff Vale Railway* (41). In that case, the so-called proviso was in a separate section. It was held that this new section created a new liability. I do not think this case helps us much. Nor does *Mohummud Buhâdor Khan v. Collector of Bareilly* (59) decide that a proviso can add to the section. On the other hand, the Lord Chancellor, Lord Watson and Lord Herschell held in *West Derby Union v. Metropolitan Life Assurance Society* (24) that a proviso cannot enlarge the scope of the section. In a later case, Lord Justice Fletcher Moulton says: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Partington, Ex parte* (60), *In re Brockelbank* (61) and *Hill v. East and West India Dock* (59) 1 I. A. 167; 13 B. L. R. 292; 21 W. R. 318; 3 Sar. P. C. J. 363.
(60) (1844) 6 Q. B. 649; 115 E. R. 214.
(61) (1889) 23 Q. B. D. 461; 58 L. J. Q. B. 375; 61 L. T. 543; 37 W. R. 537; 6 Morrell 133.

Co. (62), have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso." See *Rez v. Dibdin, Thompson, Ex parte* (63). The preponderance of authority is in favour of the view that a proviso annexed to a section should not be read as enlarging the scope of that section.

In the present instance we have first a clause making the deposit absolute, then a proviso which enables it to be dispensed with after recording reasons; and we are asked to add a new power which would allow the Magistrate to cancel the last order without assigning any reasons. I am free to confess that the language of the section is by no means clear. Nor are the authorities as to the construction of a proviso uniform. But I am not prepared to impute to the Legislature the want of logic and reasonableness which the construction contended for by the Crown entails. I am, therefore, of opinion that the Chief Presidency Magistrate had no power to demand security after having dispensed with it at the time of the declaration.

But as I have held that the order was passed by the Magistrate in his executive capacity, I am of opinion we have no power to interfere in revision under the Government of India Act. It is hardly necessary to say that the petition has been argued with great ability on both sides.

Petition dismissed.

V. R. P.

(62) (1884) 9 A. C. 448; 53 L. J. Ch. 842; 51 L. T. 163; 32 W. R. 925; 48 J. P. 788.

(63) (1910) P. 57 at p. 125; 79 L. J. K. B. 517; 101 L. T. 722; 26 T. L. R. 150.

RAM BEHARY LAL v. JAGAN NATH.

OUDDH JUDICIAL COMMISSIONER'S
COURT.

CRIMINAL MISCELLANEOUS APPEAL No. 11
OF 1916.

April 18, 1916.

Present:—Mr. Stuart, A. J. C.

RAM BEHARY LAL—APPELLANT

versus

JAGAN NATH AND OTHERS—CREDITORS—
RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 43, 46—
Insolvent vexatiously refusing to produce books of
account, whether can be punished before order of
discharge.*

A Court is not bound to defer punishment in respect of acts and omissions mentioned in section 43 of the Provincial Insolvency Act, until the insolvent applies for his order of discharge. [p 638, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 23rd February 1916.

Mr. St. C. Thompson, for the Appellant.

JUDGMENT.—This is an appeal under the provisions of section 46 of Act III of 1907 against an order passed by the District Judge of Lucknow, sentencing the appellant to undergo one month's simple imprisonment under the provisions of section 43 of the Provincial Insolvency Act for refusing to produce his books of account and concealing his assets. The learned Counsel for the appellant argues that it is not open to the District Judge to take action of this nature until an order of adjudication has been made and proceedings have reached the point when the insolvent applies for his discharge. The words of section 43 are, however, absolutely clear. The insolvent is required under the law to produce his books of account and give inventories of his property, etc., etc., and it is stated that if before or after the making of an order of adjudication he does certain acts or fails to do certain other acts, sometimes wilfully, sometimes fraudulently, sometimes vexatiously, he shall be liable to disciplinary punishment. There is absolutely nothing in the section and nothing in any of the decisions that have been quoted to me to support the proposition that the Court must defer punishment in respect of such acts or omissions until the insolvent applies for his order of discharge, and were such a view taken the section would stand self-condemned, because, if such were the rule,

the Court would be deprived of the power to enforce its orders in respect of the producing of books of account and the like.

I, therefore, have no difficulty in deciding against the argument to the effect that the Court acted prematurely when it passed this order of imprisonment. I observe that the point is academic, as far as the insolvent is concerned, for it is admitted that he had already served his sentence before this appeal came on for hearing. I have now to consider whether he should be given the somewhat empty satisfaction of having it declared that he was imprisoned wrongly on the ground that the learned District Judge decided the case against the weight of the evidence. Upon this point I see no reason to differ with the findings of the learned District Judge. The evidence was clear enough and showed that the appellant did keep books of account and that he had a business. An attempt has been made before me to produce additional evidence in the shape of a registered sale-deed, to prove that the appellant had sold his business premises sometime ago. There is nothing, of course, to show that the sale-deed in question refers to the premises where the appellant's creditors assert that he carried on his business, and no sufficient reason has been given why I should at this stage permit fresh evidence to be produced. In any circumstances the attempt to produce further evidence does not cover the point as to why the appellant vexatiously refused to produce his books of account. I am satisfied that he has books of account and that his refusal to produce them was vexatious or fraudulent or both.

I, therefore, dismiss this appeal. The learned Counsel for the appellant has stated that the learned District Judge has refused to carry on the insolvency proceedings against his client. This record does not show what the learned District Judge has or has not done in this matter. There is nothing in the order before me to indicate that the learned District Judge has discontinued the proceedings. The order with which I am concerned is not an order refusing to continue the proceedings, and if the appellant has any grievance in connection

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with the action or inaction of the learned District Judge in the matter, he should go to the District Judge. The appellant will pay his own costs. The other side has incurred no costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 724 OF 1916.

November 16, 1916.

Present:—Justice Sir George Knox, Kt.

SALIMULLAH—APPLICANT

versus

BIRJHAN SINGH AND OTHERS—

OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Complaint, delay in passing orders on—Magistrate, duty of.

Orders should be passed expeditiously by Magistrates on complaints presented to them. It is, in the highest degree, improper to delay orders for months.

Criminal revision against the order of the Magistrate, first class, Ballia, dated the 17th August 1916.

Mr. G. W. Dillon and Dr. S. M. Sulaiman, for the Applicant.

Mr. Satya Chandra Mukerji, for the Opposite Parties.

JUDGMENT.—It appears from the papers before me that Salimullah applicant on 30th June 1916 filed a complaint before a Magistrate of the first class at Ballia. The Magistrate appears to have put the complaint into his *kutcheri* box and to have passed no order upon it until the 17th of August 1916. I have in previous cases commented strongly upon such conduct on the part of Magistrates and I am surprised to find a Magistrate of the first class acting in this way. Magistrates have no right whatever to keep complaints instituted before them without order, as the learned Magistrate did in this case. Such action is in the highest degree improper and shows want of proper understanding as to what their duties are. The complainant came here on the 21st of September and filed an application against the order of the Magistrate dismissing the

AVADH BEHARI MISRA v. DWARKA PRASAD SINGH.

complaint under section 203 of the Code of Criminal Procedure. The first two grounds taken in the application are not entitled to weight. If the Magistrate had passed the order he did in June, whether the order so passed had been proper or improper, it would not have been open to attack on these two pleas.

There remains the third plea. I have nothing before me to show how far these persons were seriously hurt and their injuries examined in the hospital. Looking to the nature of the case, I think it inexpedient after the time that has elapsed to re-open the matter; but I draw the attention of the District Magistrate to the complaint and to the seriously improper action of the first class Magistrate. It will be for the District Magistrate to consider whether any action should be taken to secure the keeping of the peace and at this stage I leave the case. The application is dismissed.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 34 OF 1916.

April 17, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Jwalu Prasad.

AVADH BEHARI MISRA—PETITIONER

versus

DWARKA PRASAD SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (6), 439 Sanction to prosecute—Revision—Delay in applying to High Court, effect of.

The revisional jurisdiction of the High Court is discretionary and it will not interfere in revision at the instance of applicants who do not shew reasonable diligence in prosecuting their cases. [p. 640, col. 2.]

Criminal revision against an order of the Sessions Judge, Monghyr, dated the 22nd December 1915, revoking a sanction granted by the Magistrate of the 1st class, Monghyr, dated the 23rd September 1915.

Sir Ali Imam (with him Messrs. Mazharul Haque and Naresh Chandra Sinha), for the Petitioner.

Mr. Sultan Ahmad (Deputy Government-Advocate), for the Opposite Party.

AVADH BEHARI MISRA v. DWARKA PRASAD SINGH.

JUDGMENT.—Dwarka Prasad Singh brought a charge against the petitioner and 20 others under sections 143 and 179, Indian Penal Code. All were eventually acquitted and the Magistrate on the application of the petitioner sanctioned the prosecution of Dwarka Prasad Singh on charges under sections 193 and 211, Indian Penal Code. The sanction was revoked by the Sessions Judge and we are now asked to set aside the Judge's order and restore that of the Magistrate.

There is a conflict of authority on the question whether a third Court can interfere in a case of this kind under section 195 (6), Code of Criminal Procedure, or must interfere if at all, under section 439 of the same Code. It is not necessary for us to decide this question of law, for in our opinion the order of the Sessions Judge is clearly right and should not be disturbed even if this matter should be treated as coming before us by way of appeal.

The Magistrate who tried the original case summarised his conclusions as follows:—“For the reasons stated above I entertain very great doubt as to the truth of the case for the prosecution...Avadh Behari's (present petitioner's) daughter was dangerously ill in her father-in-law's house at Hajipur and he went there about the time of the alleged occurrence. The *alibi* of this accused has been proved to my satisfaction by witnesses of Hajipur, the telegram, and the evidence of two railway clerks and the entries in their registers”.

Counsel for the petitioner relied upon this passage as shewing that this was eminently a case in which sanction should be given for the prosecution of the complainant. But we are not bound to accept the Magistrate's estimate of the value of the evidence produced to prove the *alibi* set up by Avadh Behari, and on examining that evidence, we find that part of it is irrelevant and that the remainder is of no value. The offence is said to have been committed on February 13th, 1915. The telegram shews that Avadh Behari was summoned to Hajipur on the 9th, and one of the railway officials states that he sold a ticket to Avadh Behari on that date. A ticket-collector proves that he collected at Kiul a ticket issued at Hajipur

on the 14th. It is suggested that Avadh Behari travelled back from Hajipur with that ticket, but the ticket-collector did not identify him and it does not appear why Avadh Behari should have booked to Kiul when in the ordinary course he would book to Lakhiserai. Thus the railway evidence is either valueless or irrelevant. The evidence of the two witnesses from Hajipur can certainly not be accepted as proving satisfactorily that Avadh Behari was at Hajipur on February 13th.

We notice also that the plea of *alibi* was set up in such a way as to prevent the prosecution from enquiring into it or testing it except by impromptu cross-examination. Avadh Behari, when examined by the Magistrate on July 21st, said that he would put in a written statement. The examination of witnesses for the defence began on August 5th, but Avadh Behari did not put in his written statement or the telegram till August 21st when he produced his witnesses. Thus the prosecution had no notice of the defence to be set up until the very day on which the evidence in support of it was produced.

We are surprised that the Magistrate should have expressed the opinion that Avadh Behari's *alibi* was proved. We find that it was not proved, and we think that there is no prospect whatever of a conviction being obtained, if sanction is given for the prosecution of Dwarka Prasad Singh. In our opinion, therefore, sanction should not be given.

Lastly, we note that the present application for revision was presented not less than three months after the order of the Sessions Judge. The revisional jurisdiction of this Court is discretionary and we wish it to be clearly understood that the Court will not interfere in revision at the instance of applicants who do not shew reasonable diligence in prosecuting their cases.

Application rejected.

RAM DAYAL PANDEY v. GENDA TEWARI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2760 OF 1914.

July 7, 1916.

Present:—Mr. Justice Atkinson and

Mr. Justice Kingsford.

RAM DAYAL PANDEY AND OTHERS—

DEFENDANTS—APPELLANTS

versus

GENDA TEWARI AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss 102, 105, 105A—Record of Rights, suit for amendment of entries in—Jurisdiction of Civil Courts.

In proceedings under section 105 of the Bengal Tenancy Act, to which plaintiffs were parties, certain entries in the Record of Rights, describing plaintiffs as tenure-holders and defendants as *raiya*s, were affirmed as correct. Plaintiffs brought a suit asking that the Record of Rights be amended and their names entered as *raiya*s instead of those of the defendants, and that they should be put in possession:

Held, that the status of the plaintiffs having already been determined under section 105 of the Bengal Tenancy Act by a Revenue Court having jurisdiction, the suit was barred by section 109 of the Act [p. 642, col. 1.]

Sheodhani Pandey v. Beni Pershad Koeri, 16 Ind. Cas. 935; 16 C. L. J. 67, approved.

Second appeal from a decision of the Subordinate Judge, Arrah, dated the 7th May 1914, reversing that of the Officiating Additional Munsif, at Buxar, dated the 29th January 1913.

Messrs. *Susil Madhab Mullick and Uma Charan Laha*, for the Appellants.

Mr. *Pugh* (with him Messrs. *Kalwant Sahai and Rajendra Prasad*), for the Respondents.

JUDGMENT.

ATKINSON, J.—The plaintiffs in this action seek a declaration against the defendants to the effect, that the Record of Rights, which was published on the 14th December 1911, may be amended, and that the plaintiffs, who have been recorded in the Record of Rights as tenure-holders, may be recorded as *raiya*s, and that the defendants, who have been recorded as *raiya*s shall have their names struck out or expunged from the Record and the plaintiffs inserted in their stead; and that consequential upon such declaration the Court shall be pleased to decree possession in favour of the plaintiffs of this holding, now enjoyed and held by the defendants as tenants to the plaintiffs. That is the form of the action. The

facts out of which this action arises are shortly as follows.

The Maharaja of Dumraon brought a proceeding under section 105 of the Bengal Tenancy Act, 1885, against the plaintiffs for enhancement of rent; and in that proceeding the plaintiffs lodged an objection as to their status under section 105A, protesting that their description as tenure-holders was wrong, and that they were in fact *raiya*s. The Settlement Officer, who had jurisdiction under section 105 to hold the inquiry, having heard the parties, held that the plaintiffs in this suit were properly recorded as tenure-holders of the Maharaja, and that the Record of Rights was maintained and held to be accurate. In that Record, as I have stated, the defendants were recorded as *raiya*s.

This action is now brought claiming the relief which I have stated. Mr. Mullick, on behalf of the defendants, raised the point under section 109 of the Bengal Tenancy Act, that this action was not maintainable, on the ground that it was an application or suit concerning a matter which had been already the subject-matter of an application under section 105 of the Bengal Tenancy Act; and that therefore, it was not competent for any Civil Court to entertain such an application or suit.

The very essence of the plaintiffs' case here is, to try and get behind the Record of Rights, to have their status as therein described altered and changed to something different, essentially different, and to have the defendants' character as *raiya*s changed. That is the real motive and object of this action; and that consequential upon the change of status of the plaintiffs and the defendants, that then the plaintiffs should be entitled to possession.

Mr. Pugh, when he was faced with this difficulty—although his colleague on the last occasion when this case was argued, frankly admitted that if the identity of the lands could be established in this suit with those giving rise to the proceedings under section 105, then he would admit that there was no jurisdiction in this Court to entertain this action—Mr. Pugh says now, "Oh, this does not matter. I do not want this declaration. What I asked for by my plaint may go by the board

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I want to maintain that part of my claim which deals with recovery of possession. I am suing the defendants here as trespassers. This is an action on title for ejectment against trespassers."

Every bit of the claim, every averment in the claim, is inconsistent with that relief. Mr. Pugh wants us now to give the go by to the entire pleading, to the form in which the plaintiffs have stated the relief they seek in the prayer to the plaint, and treat this action as one for trespass. I shall, for one, be no party to such a proceeding. If the plaintiffs think they have or had, a claim for trespass as against these defendants, they could and might have brought it. And if they had brought it, section 109 of the Bengal Tenancy Act would not have applied. But they did not think fit, acting no doubt within their discretion, to bring the action in that form; and they proceeded in the present case for the relief prayed for. In our opinion it is obviously clear what was the meaning and intention of the Legislature in enacting section 109. It was to avoid conflicts arising between the Revenue Courts on the one side and the Civil Courts on the other; and when an issue is decided by a Revenue Court having jurisdiction, as in this case, under section 105, the decree having the force and effect of a decree of a Civil Court, no action was capable of being entertained by a Civil Court in connection with any matter decided in the proceeding under section 105.

One cannot, for one moment, entertain the suggestion that this is not an action touching and concerning a matter that had been determined by the Settlement Officer under section 105. The basis of the objection then made by the plaintiffs was as to their status, and it is that status they want now to have rectified, and that is the foundation of their claim.

I desire to refer to the case of *Sheodhani Pandey v. Beni Pershad Koeri* (1). This case was before a Full Bench and there the very same point as here was taken, but it was not taken until second appeal, and Sir Lawrence Jenkins said, apart altogether from the merits, "In our

opinion, however, the suit should have been dismissed under section 109 of the Bengal Tenancy Act; because this is a suit which concerns a matter which has been the subject of an application made and proceedings taken under section 105 of that Act, and a suit of such a character cannot be entertained by a Civil Court under section 109. It was, therefore, not open to the lower Courts and to Mr. Justice Carnduff to try the merits of this case". We adhere to the ruling of that distinguished Judge. Therefore, we think this action should be dismissed on the ground that there was no jurisdiction in the Court under section 109 to entertain this action in its original form.

We allow this appeal, so far as it deals with the plots set out in the Schedule on page 22 of the paper-book from 17 to 347, and we dismiss the action.

The costs in the lower Court, in the lower Appellate Court and in this Court will be paid by the plaintiffs.

KINGSFORD, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 376 OF 1915.

September 5, 1916.

Present:— Justice Sir William Ayling, KT.,
and Mr Justice Srinivasa Aiyangar.

GOKULA VENKAMMA—PLAINTIFF—

APPELLANT

versus

GOKULA NARASIMHAM AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 93, 120, 126.
—Document impugned as forgery, whether should be set aside by suit—Unnecessary prayer for barred claim, joinder of, with other substantial reliefs not barred, effect of—Hindu widow—Suit to declare alienation void and a Will relied on by widow a forgery—Latter claim barred under Article 93—Dismissal of suit, legality of—Civil Procedure Code (Act V of 1908), O. II, rr. 1, 2 (1).

There is no obligation on a party, who challenges as a forgery a document purporting to confer rights, to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on any one even before it is set aside. [p. 644, col. 1.]

(1) 16 Ind. Cas. 935; 16 C. L. J. 67.

VENKAMMA v. NARASIMHAM.

Ratnamasari v. Akilandammal, 26 M. 291; 13 M. L. J. 27, *Malkarjun v. Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 10 M. L. J. 868; 7 Sar. P. C. J. 739; 27 I. A. 216, *Petherpermal Chetty v. Muniandy Servai*, 34 C. 551 (P. C.); 12 C. W. N. 542; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 16 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98, referred to.

The joinder of an unnecessary prayer in a claim which is barred with other substantial reliefs not barred cannot entail the dismissal of the suit. The former may be struck out and the claim adjudicated with regard to the substantial reliefs. [p. 644, col. 1.]

Plaintiff, as next reversioner to a Hindu widow, sued for a declaration that an alienation made by her was void beyond her lifetime. In a previous suit by the widow against the plaintiff for partition, she had produced a Will under which she claimed as heiress of her husband. The plaintiff challenged it as a forgery, but a partition was ordered without any adjudication on the genuineness of the Will. The plaintiff in his present suit also claimed a formal declaration of the forgery of the Will. This portion of the claim was admittedly barred under Article 93 of the Limitation Act. The Trial Court dismissed the suit as barred:

Held, (1) that there was no obligation on plaintiff to set aside the Will; [p. 644, col. 1.]

(2) that the relief claimed in respect of the Will was unnecessary and did not affect plaintiff's rights to the other substantial reliefs into which the Court was bound to enquire. [p. 644, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 14 of 1913.

Messrs. A. Krishnaswami Aiyar, and K. S. Aravamudhu Aiyangar, for the Appellant.

Messrs. L. A. Govindaraghava Aiyar, T. Ramachandra Rau and A. N. Sitarama Sastri, for the Respondents.

JUDGMENT.—This is quite a plain case. The plaintiff, a Hindu reversioner, sues the widow of his divided brother for a declaration that an alienation of her husband's property by her to her brother, the 2nd defendant, was void beyond her lifetime and for the appointment of a Receiver of husband's estate to prevent waste and preserve the property. That is the substance of the claim. The suit was dismissed by the Subordinate Judge of Vizagapatam without a trial of the merits as barred by limitation and the plaintiff appeals. If the suit was of the nature described above, it is obviously not barred as it was instituted within six years of the husband's death and the Articles of limitation applicable to suit to obtain the above reliefs are Articles 125 and 120 which give a

period of six years from the date of the cause of action. But it appears that the widow, previous to the present suit, brought an action against the plaintiff for a partition by metes and bounds of certain common properties and produced a Will purporting to have been executed by her husband giving his properties absolutely to her. The present plaintiff as defendant in that suit challenged the document as forgery but no final decision was obtained on this matter and the widow obtained a partition on her title as heiress of her husband. This production of the Will was more than three years before the institution of the present suit and in the present suit the plaintiff claims a formal declaration of forgery of the Will. The right to this relief, it is said, is barred under Article 93 of the Limitation Act and that the further consequence is, that the claim to the other reliefs is inadmissible. The argument was put in this way by the learned Pleader for the respondent. It is only in cases where the widow claims as heiress that the reversioners are entitled to institute an action of this sort and it must be a part of their case, whether expressly so stated in their plaint or not, that the last male owner died intestate and if the widow claimed under an alleged Will of her husband, the reversioner cannot have any relief unless he first obtained a judicial declaration of the forgery of the Will. It is no doubt true that in a suit, of this sort, by a reversioner it is a part of his case that the last male owner died intestate for he has to allege that the widow or other female heir succeeded to a limited estate under the Hindu Law, but there is no presumption in such a case that the deceased left a Will any more than in the case of a suit by an heir-at-law to recover possession of the property of the ancestor against a stranger in possession. If the defendant pleads a Will he has to prove it. In cases where the plaintiff cannot succeed, without setting aside a transaction—whether an act of parties or an order of Court—then if he does not set it aside within the period allowed by law, of course, the suit must be dismissed. This will be the consequence, whether he expressly prays for a relief setting aside the transaction or ignores it in the plaint.

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This really is not a question of limitation but of substantive law, though no doubt particular Articles of the Limitation Act may throw light on the question. The question was discussed and the principle formulated by Bashyam Aiyangar, J., in *Ratnamasari v. Akilandammal* (1), in his dissenting judgment and that has been accepted by the Privy Council in their subsequent decisions on the construction of the Articles dealing with adoption in the Act of 1877. The general principle was formulated by their Lordships in *Makarjun v. Narhari* (2), where they held that if an order is a nullity there is no need to set it aside and the same principle was applied by them to a *benami* sale in *Petherpermal Chetty v. Muniandy Serrai* (3). Here the Will is challenged as a forgery and it was, therefore, waste paper and there can be no obligation to set it aside. Nor is it possible to contend that it would be binding till set aside. In this view it is quite clear that the suit in so far as it prays for a substantial relief is not barred; the prayer for a declaration of forgery is wholly unnecessary and the appellant's Pleader said that the same may well be struck out without in the least affecting the real reliefs to which, if his case be true, he is entitled.

In this view it is unnecessary to decide the question whether the relief for a formal declaration of forgery of the Will is now barred or not, more especially as the records in the previous proceedings are not filed. The appeal is allowed and the decree of the lower Court reversed and the suit remanded for fresh trial. Costs here and in the lower Court will abide.

Appeal allowed; Case sent back.

V.R.P.

(1) 26 M. 291; 13 M. L. J. 27.

(2) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 2 Bom. L. R. 927; 10 M. L. J. 363; 7 Sar. P. C. J. 739.

(3) 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 95.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 149 OF 1915.

July 24, 1916.

Present:—Mr. Justice Beaman.

MARSHALL AND CO.—PLAINTIFFS

versus

NAGINCHAND PHULCHAND AND OTHERS

—DEFENDANTS

Contract C. I. F. D/A.—Vendor and purchaser—Shipment of goods—Outbreak of hostilities between Governments of shipper and consignee while goods and shipping documents in transitu—King's Proclamation forbidding commercial intercourse with enemies, effect of—Commercial Intercourse with Enemies Ordinance (VI of 1914)—Tender of bill of lading.—Liability of buyer—Vessel seized as prize—Acceptance of bill of exchange after announcement of hostilities—Non-payment at maturity—Subsequent delivery of goods.—Liability of buyer to pay bill with interest—Seller negotiating with shipper for passing goods on to buyer.—Priority of contract—Effect of War Proclamation—Negotiable Instruments Act (XXVI of 1881), ss. 32, 43—Contract Act (IX of 1872), s. 56.

Ordinarily C. I. F. contracts, under which one of the parties is bound to supply the other with shipping documents before the latter can be compelled to repay him his outlay, are regulated by the provisions of sections 32 and 43 of the Negotiable Instruments Act. The consideration for the acceptance of the bill of exchange under C. I. F. contracts D/A, i. e., acceptance against documents, is, according to law and mercantile usage, no more than the tender of good and valid shipping documents to the buyer, and if the buyer accepts the seller's bill, the matter is finally concluded between the seller and the buyer. Any risk thereafter is the buyer's and he is not entitled to refuse payment on maturity, and if he does, he is liable for overdue interest after that date. [p. 648, col. 2; p. 649, col. 1.]

Exceptions have, however, been grafted on this rule by war conditions. [p. 647, col. 2.]

A contract of affreightment entered into in time of peace between the subjects of countries which go to war, while part at least of that contract is executory, is thereby immediately and finally avoided. [p. 648, col. 2.]

Where the bill of exchange and shipping documents are presented to and are accepted by the buyer before the commencement of hostilities, the buyer is bound to pay for them at maturity even though the goods were for a time detained *in transitu* as prize if they are subsequently delivered to him and, if he refuses to pay on maturity, he is liable for overdue interest after that date. [p. 647, col. 1.]

Dubitante.—Where the buyer accepts a bill of lading, but neither the goods nor the shipping documents are delivered to the buyer owing to outbreak of war between the Governments of the parties, it must be held, following *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co. v. Burgett and Newsam*, (1915) 2 K. B. 379; 84 L. J. K. B. 1673, that, inasmuch as the bill of lading had become void before it was tendered to the buyer, there was at the time a failure of consideration for

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the acceptance of the bill and the buyer was not bound to pay at maturity. [p. 654, col. 2.]

Semble.—If the matter were *res integra*, it is difficult to see how, if the shipping documents came into the possession of the buyer as good contracts before the declaration of hostilities, the fact that war broke almost immediately afterwards, would absolve the buyer from his obligation to pay the bill which he had accepted against the shipping documents. [p. 652, col. 2; p. 653, col. 1.]

Contracts entered into between subjects of countries which were at peace when the contracts were made, are not necessarily abrogated by the breaking out of hostilities between those countries. The general rule appears to be that unless the contracts are of a very special kind, the effect of war is not to avoid them totally but merely to suspend the remedies of one or other of the parties to them. Such contracts would doubtless remain in abeyance during the continuance of hostilities but upon their ceasing no good reason can be shown why the rights still enforceable should not be duly enforced, the Governments of the parties to such contracts having now re-established all peaceful and normal relations. [p. 647, col. 2.]

There are, however, exceptions to be engrafted upon these general rules. If the contract is of a kind requiring continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war, and further suspension of such mutual rights and obligations for an indefinite period going much beyond merely placing the contract in abeyance, the result in the eye of the law would be that the original contract is void, inasmuch as taking it up upon cessation of hostilities would be something more than renewing it, would, in fact, be substituting for it an entirely new contract. A like rule would doubtless be applied to the case of partnerships between subjects of belligerent states. [p. 647, col. 2; p. 648, col. 1.]

Looking to the spirit of the King's Proclamation and the Commercial Intercourse with Enemies Ordinance, VI of 1914, the words 'forbidding commercial intercourse with enemy subjects' would mean purchasing goods, wares or merchandise of and from the enemy's country. It does not prohibit every kind of intercourse between the King's subjects and the enemy. The scheme of the Proclamation, especially the preamble, rests on the old Common Law and is intended to prohibit actual trading or the institution and maintenance of commercial relations with the enemy on and after the date of the existence of a state of war. It is doubtful, however, whether merely taking over a suspended contract, the completion of which, if it ever could be completed, could not by any means augment the enemy's wealth or increase his efficiency, would be any contravention of the spirit of the Proclamation. It would be otherwise if, in order to effect the completion of such a contract, it were necessary to do anything to the detriment or diminution of His Britannic Majesty's resources and the corresponding increase of those of the enemy. [p. 650, col. 2; p. 651, col. 1.]

In cases where the seller gets the shipping documents from the shipper and the insurance company and has completed all that he is bound to do under a C. I. F. contract by forwarding to the buyer valid

and legal bills of lading and a valid and legal insurance, he has done all that he is required to do under the contract and is entitled to claim immediate payment, though he cannot have the documents owing to intervening conditions of space and time which prevent their instant transference to the buyer. The contract between the shipper, the insurance company and the buyer cannot be treated in the first instance, as has been done by the Courts in England, as a contract between the shipper, the insurance company and the seller, so that in the event of its becoming void before the goods reach the seller, the resultant loss would fall on the seller and not on the buyer. [p. 654, col. 1.]

Defendants, a Bombay firm, ordered of the plaintiffs, merchants in Glasgow, certain goods to be delivered at Madras C. I. F. terms. The plaintiffs shipped the goods from a German port through two German ships, Barenfels and Kybels on 15th July 1914 and 25th July 1914 respectively. The bill of exchange for the first shipment and other shipping documents were presented to defendants and accepted by them on 31st July 1914. The bill of exchange for the second shipment was presented to and accepted by defendants on 10th November 1914. Both bills were not honoured at maturity. War having broken out between England and Germany the Barenfels was seized as a prize during voyage, but was allowed later to continue her voyage and the goods were delivered to defendants at Madras on payment of the first bill. The cargo by the Kybels was never delivered to defendants. Plaintiffs sue for interest on the first bill from the date of maturity to date of payment and for the amount due on the second bill with interest:

Held, (1) that defendants were liable on the first bill for the overdue interest after maturity; [p. 647, col. 1.]

(2) that as the bill of lading for the second shipment had become a void contract before it was tendered to the defendants, defendants were not liable for the amount of the bill or interest. [p. 654, col. 2.]

Biddell Brothers v. Clements Harb. Company, (1911) 1 K. B. 934 at p. 954; 16 Com. Cas 197; 80 L. J. K. B. 584; *Distington Hematite Iron Company, Limited v. Possehl & Co.*, (1916) 1 K. B. 811; 85 L. J. K. B. 919; *Esposito v. Bowden*, (1877) 7 El. & Bl. 763; 21 L. J. Q. B. 17; 3 Jar. (N. S.) 299; 5 W. R. 732; 119 E. R. 1430; 29 L. T. (O. S.) 295; 110 R. R. 812; *Arnold Karberg & Co. v. Blythe Green, Jourdain & Co.*, *Theodor Schneider & Co. v. Burgett & Newsum*, (1915) 2 K. B. 379; 84 L. J. K. B. 1673; *Duncan Fox & Co. v. Schrempf & Benke*, (1915) 1 K. B. 365; 84 L. J. K. B. 2208; *Nissim Isaac Bekhor v. Sultanali Shustary*, 28 Ind. Cas. 433; 17 Bom. L. R. 249; 40 B. 11, *Rev v. Oppenheimer*, (1915) 31 T. L. R. 264; 84 L. J. K. B. 1760, referred to.

Mr. Binning, (with him Mr. Strangman), for the Plaintiffs.

Messrs. Wadia, Desai and Tarapore, for the Defendants.

JUDGMENT.—The plaintiffs, Messrs. Marshall & Co. of Glasgow, sue the defendants, Naginchand Fulchand, a firm, upon accepted bills of exchange drawn by the plaintiffs upon the defendants in respect

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of two cargoes shipped on the Hansa Line "Barenfels" and Hansa Line "Kybfels"—terms C. I. F. C. I., goods aluminium circles—Date of shipment on "Barenfels" 15th July 1914—date of shipment on "Kybfels", 25th July 1914. The plaintiffs' general allegation for the purposes of this suit is that they were never principals but merely defendants' agents for the purpose of these goods. That was not the form in which they originally brought the suit, and there cannot be the least doubt that they have had recourse to this line of attack as the result of a judgment recently delivered by the Chief Judge of the Small Cause Court. In my opinion, after hearing Mr. Binning's argument upon this point, the alternative case is entirely without foundation. I cannot discern any feature of agency or in the least resembling agency in the transactions between the plaintiffs and the defendants revealed by the evidence in the present case. The only agent in the matter was Abdul Kader and he was the plaintiffs', not the defendants', agent. Colour may always be given to forlorn hopes of this kind by the inclusion in the Indian indent forms of C. I., in addition to the C. I. F. universally used and understood throughout the commercial world. It is only necessary to look at the original plaint, the evidence of Abdul Kader and the invoice for the goods per SS. "Kybfels" to see how unsubstantial the plaintiffs' contention is that they were, by some process altogether unexplained and inexplicable, as far as I can see, converted into defendants' agent. In truth both the transactions are ordinary commercial dealings between principal and principal on C. I. F. terms and the additional C. I., I presume, is intended for the benefit of Abdul Kader. Whether it be or whether it be not, would not affect my conclusion in the slightest degree that neither were the plaintiffs ever in fact defendants' agents nor ever thought themselves to be so until they were probably advised that their position as principals in a litigation of this kind was insecure. It is plain enough that, up to the 17th September 1914, the plaintiffs had a truer idea of their own rights and liabilities in these transactions than the legal advisers whom they then consulted. This

change of front appears to have occurred between the 17th September and 9th October, upon which date they resolved to send on the somewhat belated shipping documents relating to the "Kybfels" shipment of aluminium circles and get the defendants' acceptance of the bill drawn against those goods. The points raised in the argument are points of very great interest and subtlety.

But before disposing of them it is necessary to clear the ground by dealing with, and laying out of the case, the claim in respect of the shipment per SS. "Barenfels" of the 16th July 1914. As to that, the position now appears to me to be simple and clear both in law and fact. The goods were duly shipped by the German steamer "Barenfels" which put to sea before the outbreak of war. The shipping documents, that is to say, the invoice, insurance policy and bill of lading were duly presented to the defendants, Naginchand Fulchand, in Bombay along with the bill of exchange for acceptance on the 31st July 1914. The terms agreed upon by the parties to these dealings were clearly D/A or acceptance against documents. The defendants duly accepted against these documents, which were at that time in good order and all quite legal and valid. That being so, the property in the goods thereon passed to the defendants and the plaintiffs disappear from the transaction. That is to say they would have disappeared but for the happening of an untoward event and the subsequent refusal by the defendants to pay the bill on maturity. The "Barenfels" appears to have been captured in the Mediterranean and taken as prize into Alexandria. Eventually she was sent on her voyage to Madras, her original port of destination, and the defendants obtained possession of their goods. But they refused to pay the plaintiffs' interest between the date of maturity and the date of the taking of the goods as well as the small sum of Rs. 10, notarial charges. Having regard to the true nature of C. I. F. contracts about which I entertain no doubt, it appears to me that upon these minor heads the defendants have no case. They obtained all that they were entitled to obtain under the C. I. F. contract when the bill was

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presented to them for acceptance, that is to say, good shipping documents. They accepted against them and thereafter the risk was entirely their own and they were not entitled to refuse payment on maturity, and having refused payment on maturity they are clearly liable for overdue interest after that date. And that, I think, sufficiently disposes of the claim in this suit in respect of the first cargo.

The case is much more complicated with regard to the "Kybfels". There appears to be no doubt but that the shipping documents were duly obtained on the 25th and 31st July; that is to say, a German bill of lading on the 25th and an English policy of insurance on the 31st. Strictly speaking, that is all that the plaintiffs were required to do, in the ordinary course of dealings under a C. I. F. contract, provided, of course, that they forthwith forward such shipping documents to their purchasers along with their bill to be accepted by the latter. The terms may be $\frac{1}{A}$ or $\frac{D}{P}$. But in the present case there is no doubt that the understanding of the parties was that acceptance was to be against documents. Unfortunately long before these shipping documents could have reached the defendants in Bombay, a state of war had broken out between His Britannic Majesty and the Empire of Germany. And the question then arises: What are the resultant legal rights and liabilities of parties under C. I. F. contracts, situated as the plaintiffs and defendants were here? Speaking generally we may adopt the judgment of Kennedy, L. J., in the case of *Biddell Brothers v. Clemens Horst Company* (1), unqualifiedly approved in the House of Lords as finally and satisfactorily determining what is the course of business and what are the rights and obligations of parties to and under such C. I. F. contracts. The more delicate questions which have been argued here with considerable skill on behalf of the plaintiffs do not, however, arise under normal conditions but are dependent upon variations introduced by the existence of a state of war.

(1) (1911) 1 K. B. 934 at p. 954; 16 Com. Cas. 197; 80 L. J. K. B. 584.

Taking it as settled law that in the ordinary course of business a seller on C. I. F. terms is entitled to be prepaid by his buyer on presentation to the latter of valid and legal shipping documents, the question to be answered here is: How is that course of business affected by, and in the eye of the Courts by what rule should it be governed under war conditions? In the first place what is to be examined is the effect of war upon contracts made between the subjects of belligerent states before war was declared. As a general legal proposition the Courts appear to have accepted this, that contracts entered into between subjects of countries, which were at peace when the contracts were made, are not necessarily abrogated by the breaking out of hostilities between those countries. The general rule appears to be that unless the contracts are of a very special kind, the effect of war is not to avoid them totally but merely to suspend the remedies of one or other of the parties to them. Such contracts would doubtless remain in abeyance during the continuance of hostilities, but upon their ceasing no good reason can be shown why the rights still enforceable should not be duly enforced, the Governments of the parties to such contracts having now re-established all peaceful and normal relations. But there are exceptions to be engrafted upon these general rules. Some of those depend upon the very special features of the contracts under consideration, and a better illustration perhaps could not be found than in the case, recently decided by Rowlatt, J., of *Distington Hematite Iron Company, Limited v. Possehl & Co.* (2). The *ratio decidendi* in all cases of that kind is a rule of common sense rather than law and is referable to this dominating consideration that if the contract is of a kind requiring continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war and further suspension of such mutual rights and obligations for an indefinite period going much beyond merely placing the contract in abeyance, the result in the eye of the law would

(2) (1916) 1 K. B. 811; 85 L. J. K. B. 919.

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be that the original contract is void inasmuch as taking it up upon cessation of hostilities would be something more than renewing it, would, in fact, be substituting for it an entirely new contract. A like rule would doubtless be applied to the case of partnerships between subjects of belligerent states and many other special cases might be given. The particular contracts, however, with which I am here concerned seem to have been excepted in the earlier judgments of the Courts almost as matters of course and without reference to any special considerations of this kind. In his judgment in the case of *Esposito v. Bowden* (3), Willes, J., lays it down as an accepted principle of the maritime law that all contracts of affreightment are put an end to by the outbreak of hostilities between the Governments of the shipper and the ship-master. In all such cases, he adds that it is the duty of the shipper to unload his goods and of the master to find a new employment for his ship. Obviously, however, that would be quite impossible in a great number of cases under conditions such as those which subsisted at the time when the "Kybfels" took her cargo on board. Nor is it easy to say why a contract of affreightment should necessarily be put an end to by the outbreak of hostilities between the Government of the ship-master and the Government of the port of its destination. Doubtless no captain could be expected in such circumstances to carry out a voyage at once and so far as his liability for freight money paid to him extends he would have the ordinary excuse excepted in almost every bill of lading that the fault was not his but referable to restraint of Princes. As far then as the mere obligation of a shipper, who has received freight to make the voyage, extends, this may be a case which, in the eye of the law, becomes impossible of fulfilment, and time being of its essence, the result is not merely to suspend but entirely to avoid the contract. It may, however, be doubted whether the holder of the bills of lading, as evidence of such contract of affreightment, would not still retain some valuable rights against the ship-master upon the cessation

of hostilities, and it can hardly be said that looking upon the bill of lading rather as a receipt for goods than as imposing any continuous obligation upon the captain of a ship to carry them to a distant port that document would still not retain some commercial value. Willes, J., indicated a doubt whether the same sweeping legal proposition would be applicable to cases such as the case of the "Barenfels" in which the voyage had been commenced before the outbreak of hostilities. In principle I confess I can see no distinction between the two classes of cases though the practical results might be different. In point of fact the whole of the "Barenfels" cargo was duly received at the port of destination, so far as this consignee was concerned, after her capture as prize by the British authorities. But left to herself there can be no question that the "Barenfels" would not have continued her voyage or taken the risk of capture by the enemy. So that, viewed merely from the theoretico-legal standpoint, I cannot myself say that any valid distinction can be drawn between cases in which the voyage had, and cases in which it had not, begun. Indeed in the latter case the remedy suggested by the learned Judge must, where the ship is still lying in a hostile port, be entirely beyond the reach of the shipper. Taking it, however, to be settled law that contracts of affreightment, entered into in time of peace between the subjects of countries which go to war while part at least of that contract is executory, are thereby immediately and finally avoided, it is to be seen how that rule would operate upon parties to c. i. f. contracts one of whom is obliged to supply the other with shipping documents before that other can be compelled to repay him his outlay. It is not uncommonly said that in cases of this kind, which are partly no doubt cases under the general law of contract, but partly, and I think I may say in a much larger degree, governed by special war Proclamations prohibiting trade with the enemy, viewed in the first light the rights of parties fall to be regulated under sections 32 and 43 of the Negotiable Instruments Act. I think, however, that those sections, so far from exhausting, do not really touch the point of difficulty with which I am dealing. The consideration for the

(3) (1857). 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1209; 5 W. R. 732; 119 E. R. 1430; 29 L. T. (O. S.) 295; 110 R. R. 822.

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acceptance of the bill of exchange under C.I.F. contract D/A, according to all mercantile usage and as is now established and well-understood law, is no more than the production of good shipping documents, and if those documents are good shipping documents and valid at the time they are proffered to the buyer, then the fact that they become invalidated and void by the subsequent outbreak of war, so making the case appear to fall under section 43 of the Negotiable Instruments Act, would have, as far as I can see, neither logical nor legal bearing upon the already established rights and liabilities of the parties to C.I.F. contracts. For it is clear that eliminating all war conditions, once the buyer has accepted the bill of lading and the insurance policy and has paid against them, his only remedy is under the one or the other of these contracts and he has no right to recover against the vendor, should the terms of either of them be infringed either by the ship-master or the Insurance Company. It is only, I suppose, when, upon arrival, the goods themselves should be found to be of an entirely different or inferior quality from the goods ordered, or not be the goods ordered, or in extreme cases of that kind, that a case for damages against the C.I.F. seller might be made out. I am not, however, concerned with circumstances of that kind. What I wish to emphasize is that the insurance, freight and invoice papers, all at the time in due order, legal and valid, having been tendered to the buyer and the buyer having accepted the seller's bill against them, the matter is, so far as the C.I.F. contract may be taken to run its normal course, finally concluded between the seller and buyer. This hardly needs illustration, as, for example, in the not uncommon case of the ship having actually become a total loss before the shipping documents reached the buyer. Nevertheless no one shall say that he is thereby absolved from his liability to the seller on C.I.F. terms, nor has any such contention, I think, ever been raised. But one would have thought that so common and staring a feature of contracts of this kind would have led to a little more careful and searching analysis of the extent to which the same principle governs or is modified by the sudden introduction of an entirely new element such as the outbreak

of war and the terms of war Proclamations against trading with the enemy. We have no greater authority on this branch of the law than Scrutton, L. J., who, as Scrutton, J., decided the very interesting and instructive case, referred to him by arbitrators, of *Arnhol Kurberg & Co. v. Blythe, Green, Jourdain & Co. Theodor Schneider & Co. v. Burgett & Newsam* (4). There Scrutton, L. J., lays it down that the key to many of the difficulties arising in C.I.F. contracts is, in his opinion, to hold firmly before the mind this point, that in law what is contracted to be sold and paid for is not the goods but the shipping documents. And he goes on to say that it is not essential that if the goods do not arrive, the buyer should have a good claim on one of the contracts, but it is essential, in his opinion, that before the buyer can be asked to accept the bills drawn against such shipping documents, the contracts, he is thus asked to take over substituting himself thereunder for his seller, should be good legal contracts such as he may lawfully enter into. Upon the first point, the Court of Appeal consisting of Swinfen Eady, L. J., Bankes, L. J., and Warrington, L. J., dissented from Scrutton, J., while, upon the second point, they unanimously agreed with him. This has caused me the greater difficulty because while upon analysis I should have thought that there was little doubt that the first dictum for all practical purposes was correct, I think there was as little doubt that the second was at least arguable. But in all cases of this kind, which are cases of contracts governed by the Royal Proclamation, there can be very little doubt that, what would have been comparatively easy perhaps to analyse and understand, had become somewhat confused by the literal adhesion of Courts to every word of that somewhat loosely phrased and sweeping Proclamation. For example, in such a case as that of *Duncan Fox & Co. v. Schrempf & Bouke* (5) there can be no doubt but that the decision was mainly influenced by the consideration that the bills of lading were for a voyage terminating at a German port, and, therefore, the Judges had no

(4) (1915) 2 K. B. 379; 84 L. J. K. B. 1673.

(5) (1915) 1 K. B. 365; 84 L. J. K. B. 2206.

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hesitation whatever in finding that as between the plaintiff and defendant in the suit before them, compelling the defendant to accept against such shipping documents would be the same thing as compelling him to trade with the enemy. The goods were clearly, in the opinion of the Court, in course of transmission to an enemy port. Doubtless, if they had got there and had been of service, use and comfort to the enemy, any mercantile transaction which could have contributed to that result would have been within the spirit as well as the letter of the Proclamation. But when we come to analyse what has really occurred in all dealings of this kind notwithstanding the ease with which the result is brought within the actual language of the Proclamation, it may, I think, be fairly debateable whether that Proclamation has in law any decisive bearing upon the rights established between the seller and buyer, situated as were the seller and buyer in *Duncan Fox & Co. v. Schrempft & Bonke* (5). For in all cases of that kind there is really a double contract, the latter part of which may or may not be trading with the enemy but has really nothing to do with the contract originally entered into between the parties before the war broke out. Thus, before the outbreak of hostilities, let us say *A* buys from *B* certain goods to be consigned to a destined port. *B* procures the goods at his own cost, puts them on a vessel, obtains the shipping documents and sends his bill to *A* for the price *C. I. F.* and along with his bill he sends the shipping documents. Now, here is a complete contract between *A* and *B*, and certainly *B*, the seller, can have no intention of trading with the enemy or trading with anybody but *A*. *A* may have had it in his mind to trade with the enemy or anybody else, but what concern is that of *B*'s? *B* is out of his money for the goods purchased on *C. I. F.* terms in the course of business for *A* and by his order. Unfortunately, war breaks out and the destination of the ship happens to be an enemy port and *A* desires to avoid the contract (although he might, in the particular case before the Court, very easily have deflected the course of the voyage or unloaded his goods), relying upon the language of the King's Proclamation, and seeks to be released from his lawful obligation to *B*,

upon the ground that he had the unlawful intention himself of trading with the enemy, which he cannot now carry out. So in a recent Bombay case, that of *Nissin Isaac Bekhor v. Sultanalli Shustary* (6), where the goods were apparently to be shipped from Germany, although the point which Macleod, J., discussed in the greater part of his judgment was entirely different, he appears to have entertained no doubt that the presentation of such shipping documents was no consideration for the acceptance of the seller's bill. He dismisses the subject in a sentence, merely saying that he cannot understand how such operations could be said not to violate the provisions of the Proclamation. The matter has here to be very much more minutely considered and it does not appear to me to admit of such easy and, if I may say without offence, summary treatment. It is quite true that having regard to the current of authorities in England, the words of the Proclamation have been enforced with rigorous exactness to the letter, which in such cases as *Rex v. Oppenheimer* (7), certainly seems to go very much beyond the spirit. That was the case of one prosecuted criminally under the Proclamation for obtaining goods, wares and merchandise from the enemy's country; and it was found as a fact that the goods he obtained were his own although he doubtless obtained them from the enemy's country. That was held to be no justification in law. He was convicted at the Assizes and the Court of Appeal felt no doubt in confirming the conviction. Yet one would have thought that looking to the spirit and intention of the Proclamation the words relied upon by the Trial Judge Atkin, J., for his ruling of law, which was approved upon the same phrase in the Court of Appeal, would, in their natural context, mean obtaining goods, wares or merchandise of and from the enemy's country. For it could hardly be contended that, if the thing could be done, obtaining one's absolute property, which had happened to be left at the outbreak of war in the enemy's country, from that country, could, either in theory or practice, in letter or spirit, be a

(6) 28 Ind. Cas. 433; 17 Bom. L. R. 249; 10 B. 11.

(7) (1915) 31 T. L. R. 269; 84 L. J. K. B. 1760.

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violation of the King's Proclamation. That Proclamation has been extended in every direction to matters which are not, strictly speaking, within the ordinary meaning of trade and commercial relations, so as to prohibit every kind of intercourse between the King's subjects and the enemy. But all those extensions have been upon a very definite principle which is entirely different from the rigorous application of the words in the manner and sense in which they were enforced in *Oppenheimer's* case (7). And if we look at the scheme of the Proclamation as a whole particularly with reference to the preamble, we find that it rests mainly upon the old common law, and after reciting the dates upon which war broke out, or a state of war existed between His Britannic Majesty's Dominions and those of the German Empire and the Dual Monarchy, respectively, it goes on to say that it is contrary to law for any person, etc., to trade with or have commercial transactions with, etc., Then follow many specific prohibitions, of which those contained in the seventh clause are by far the widest and cover almost every conceivable case of illegitimate trading or having commercial relations with the enemy. Still, speaking generally and having regard to the object of the Proclamation, I should suppose that it was intended to prohibit actual trading or the institution or maintenance of commercial relations with the enemy, on and after the date of the existence of a state of war. It is true that special reference is made to certain continuing contractual relations, particularly those under life insurance policies and the like. But I should doubt whether merely taking over a suspended contract, the completion of which, if it ever could be completed, could not by any means augment the enemy's wealth or increase his efficiency, would be any contravention of the principle, at any rate, of this Proclamation. It would be otherwise if in order to effect the completion of such a contract it were necessary to do anything to the detriment or diminution of His Britannic Majesty's resources and the corresponding increase of those of the enemy. And if that be the true scope and intention of the Proclamation, then it would be a question of some nicety whether in the case of contracts made between an Englishman and a German

before the outbreak of the war, the taking over by another Englishman, from the original contracting Englishman of that contract, would in itself constitute disobedience to the King's orders, that is to say, if the party so taking over were content to await the termination of the war on the chance of then obtaining his rights, and particularly where the contract was of such a character that only the executory part must of necessity advantage the King's subject and correspondingly diminish the resources of the enemy.

Referring now to the second dictum of Scrutton, J., in the trial of *Arnhold Karberg and Company's* case (4) the learned Judge has laid it down that in c. i. f. dealings, while it is not essential that the buyer should have a good claim on the contracts sent him by the seller, it is essential that those contracts should be of a kind into which he could lawfully enter. In this and all cognate cases the logical infirmity of the conclusion never appears to have given the English Courts any trouble, even assuming that it was present to the minds of the Judges. For, in all cases of the kind the contracts of which Scrutton, J., was speaking are contracts not between the c. i. f. seller and buyer, but really between the c. i. f. buyer and third parties, that is to say, the ship master and the insurance company; and those contracts at the time they are made are made by the seller in pursuance of the ordinary course of business, not for himself, but for his buyer with the intention of passing them on to him as soon as they can be carried. In a very large number of cases, bills of lading are made out in the name of the buyer directly, and in all such cases the contract between himself and the shipmaster is concluded on the day of the execution. It appears to me in theory to make not the least difference, though their transmission may be delayed by days or weeks or according to distances even by months. Is it then a case of compelling buyers to enter into contractual relations with the enemy subjects in contravention of the King's Proclamation? This appears to me to be the real ground of the leading English decisions on the point. Quite apart from any consideration of policy, quite apart from any consideration whether or

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not what remains to be done under the contract, assuming that it can possibly be done, would be to the advantage of the enemy country, the Courts appear to have gone upon what looks like rather a sentimental reason, namely, that in this peculiar form of dealing, the buyer is not to be forced into contractual relations with an enemy, before his contract with his seller is completed. But upon the line of reasoning I am following, there need be no such renewal or substitution of such contractual relations, where the bill of lading and the insurance policy are in the first place taken out in the name of the buyer, even for a moment. With the taking out and execution of them, all the contractual relations which ever will exist between buyer, the ship-master and the insurance company, are already in existence. And the mere forwarding of the documents makes no substantial alteration in what has already passed. Doubtless there would be a difference if after the outbreak of hostilities the seller had taken out an insurance policy with the enemy or received a bill of lading from the master of an enemy ship. Both these contracts would have been in their inception illegal, and not such contracts as could be proffered by way of consideration for the payment of the price of the merchandise. When Scrutton, J., says that contracts entered into by the seller, on behalf of the buyer, meaning, of course, the ordinary shipping documents, must be contracts which the latter could lawfully enter into, it appears to me that it is only in the case I have suggested that that dictum could invariably be applied. For, even where the bill of lading is not taken out in the name of the buyer but in that of the seller, according to the decision of Kennedy, L. J., in *Biddell's* case (1) the property in the goods still passes from the moment of shipment, and the only effect of the seller getting the shipping documents in his own name is that he retains a *jus disponendi* until he has endorsed them over to the buyer. But this *jus disponendi* is something different from what the law means by property in the goods, and there can be no question, I think, but that even where the seller has so obtained the shipping documents in

his own name, as soon as he afterwards hands them over to the buyer, the property in the goods in law must be taken to have passed from the moment of shipment. The transfer of the documents by endorsement, either direct to the buyer or in blank and so conveyed to the buyer, merely eliminates the *jus disponendi* which up to that moment the seller had retained. And I am now to examine whether in such a case there is any real renewal of a contract between the buyer and him who, in the first instance, executed the shipping documents to the seller. I have already shown that this need not necessarily be so. Is it in fact ever so within the meaning of the Proclamation? I confess I entertain grave doubts. It is not for himself that the seller has made these contracts. He is to take no benefit under them. He merely acts pursuant to the ordinary course of business in this matter, for and on behalf of the buyer, and the substitution of the real for the apparent relation seems to me to leave the matter exactly where it was at the time the shipping documents were obtained.

This brings me to my last criticism and clear statement of what I conceive to be the logical infirmity underlying all these cases. It turns upon an exact view of the importance of the time element. If I am correct in the first part of my judgment, and I have no doubt I am, in holding that a tender of shipping documents which at the time are so tendered are in all respects good and in order, finally completes the contractual relations up till then existing between the seller and the buyer, so far, that is to say, as any obligation of performance still rests on the seller, it is obvious that where war is imminent according to the decisions of the English Courts everything depends upon the precise moment of time at which the shipping documents passed into the hands of the buyer. If they come into his possession as good contracts before the declaration of hostilities, then the decision in such cases as *Arnhold Karbergs & Company's* case (4) certainly could not apply to them and the fact that war broke out almost immediately afterwards would not, in my opinion, absolve the buyer from

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his obligation to pay the bill which he had accepted against these shipping documents. But if that be so, then it is clear that in effect, from the first, no logical ground could be assigned for drawing a distinction in the rights and obligations of the parties to each other in C. I. F. dealings according as the shipping documents, all good legal contracts at the time, either were or may happen to come into the hands of the buyer before or after some wholly unexpected supervening condition has rendered them void. In a case, for example, such as that with which I am dealing, suppose the parties had been within three days' post of each other, the plaintiffs might have sent the shipping documents relating to the cargo aboard the "Kybfels" to the defendants just one day before the outbreak of the war. In every other respect the relative position of the parties would have been exactly the same. Every fact would have remained unaltered. And if the defendants had accepted against these documents on the 3rd August, I do not see how they could have been heard to say afterwards that they were not obliged to pay on maturity. It is clear, therefore, that so far as the first and by far the most important stage of these transactions is concerned, there was nothing wrong with the documents which the plaintiffs obtained, nor would their transmission to, and acceptance by, the defendants at any point of time before the 4th August 1914 have enabled them to say that by substituting the real and intended contractual relations between themselves and the shipping-master, for those which nominally appeared in the first instance on the papers between the plaintiffs and the shipping master, they were entering into contractual relations with the enemy or in any other sense contravening the words or intention of the King's Proclamation. Now, see how finely these two conflicting results can be brought together in point of time. What would have been in all respects perfectly good consideration on Wednesday, let us say, may be a very bad consideration, according to the decisions of the English Courts, on Thursday; and between these two days we may still further narrow the line of distinction. I confess that when the subject is approached in this way the

substantial ground upon which most of the English cases rest seems to me to become extremely infirm and insecure. In the first place because, as I have said, it is not really a case of a person entering into new contractual relations with an enemy, as is always assumed in the judgments of the English Courts. Rightly analysed they were, and were intended to be, his contractual relations and nobody else's from the moment that the papers of the contract were duly executed, and, *secondly*, because I do not think that if that be really so, it can be a case of the kind contemplated by section 56 of the Indian Contract Act. It is not according to my understanding, as between the seller and the buyer on C. I. F. terms, the case of a contract good at its inception becoming void by the supervening of new condition; for as between the seller and the buyer with whom alone I am concerned, the particular contracts under examination do not exist and never have existed, and I have already shown that this must be so, the commonest cases which may occur often introducing no special difficulties due to the outbreak of war. In no C. I. F. contract that I have heard of, once the shipping documents had been obtained in good order and made over to the buyer, has the seller any further concern with them whatever. But it is said that he must tender, as consideration for the buyer accepting his bill, valid, legal and existing contracts. I really do not see that that consists with the theory of C. I. F. dealings. Certainly they must have been at the time they were made legal and valid contracts. Else, doubtless, they would form no consideration whatever for the buyer parting with his money before the receipt of the goods, but once they fulfil those conditions they are in themselves the consideration for which the buyer pays his money; and the fact that owing to the length of time required for their transmission and the supervening of altogether unexpected and paramount conditions, they have unfortunately become void before they reached the buyer, appears to me on a strict analysis to be a question as much between him and the other parties to those contracts, and one from which the seller is entirely excluded as though the supervening of those

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conditions had been postponed till, say, one minute after the shipping documents had come into the buyer's hands. If the true view of the law be that the seller has completed all that he was bound to do under a C. I. F. contract by procuring for the buyer valid and legal bills of lading and a valid and legal insurance, then it may be argued, as it has been argued here, and I think that the weight of logic and reason is in favour of that argument, that he has done all that he was required to do under the contract and is entitled to claim immediate payment. He cannot have immediate payment owing to intervening conditions of space and time which prevent the documents being instantly transferred to the buyer; but for the sake of theoretical exactness I should have thought that that consideration might have been ignored and the result regarded as being wholly unaffected by it. Such, however, does not appear to have been the view of the Courts in England. They appear to have thought that the contract between the shipper and the insurance company and the buyer was in the first instance a contract between the shipper and the insurance company and the seller, and that if it should unfortunately become void before it could reach the buyer, the resultant loss was to be the seller's and not the buyer's. But that presupposes that which is not in fact true, namely, that these contracts are really in the first instance contracts made for the benefit and advantage of the seller and that there is a real transference and in substance the making of a new real contract between the buyer and those who in the first instance contracted with his seller. It is there, I think, the fallacy underlying all these decisions can be exposed.

I have endeavoured to lay this matter out in some detail because I wish in the first instance to disentangle the decision of cases of this kind from considerations drawn from section 43 of the Negotiable Instruments Act and section 56 of the Indian Contract Act. Next, because I do not think that the cardinal principle upon which all these cases have to be decided is really affected in the slightest degree by the prohibition of the King's Proclamation. And lastly, because in certain of the more recent cases there seems to me to have been considerable confusion of prin-

ciples, some drawn from the common law and some from the King's Proclamation, to which Courts have referred as the ground of their decisions. That has made the subject difficult and complicated. But it does appear to me to have been too hastily assumed that in every case of the kind buyers are at liberty to resile from their contracts when loss is inevitable, merely because the shipping documents, perfectly good at the time they were made, have become void as between those who are the true parties to them, and in this manner to shift what ought to be the buyer's loss to the seller.

Such are my own views at present and expressed with the greatest deference to English authority upon this somewhat vexed question. Nevertheless I should hesitate to give effect to them in a case of this kind which is exactly covered by a decision of the English Court of Appeal. There is in fact no point which I can discover upon which it would have been differentiated upon principle from the decision in *Arnhold Karberg & Company's* case (4). That case was decided by the most eminent authority in England upon this particular branch of law. His opinion was confirmed by three eminent Judges of appeal; and it would seem to be merely inviting appeal and further expense if I were to set up my own opinion against such high authority. Considering the case undistinguishable in all essentials from *Arnhold Karberg & Company's* case (4), I think it would really be to the interest of all parties to hold myself bound by that decision, and, therefore, to say that inasmuch as the bill of lading had become a void contract before it was tendered to the defendants on the 10th November 1914, there was at the time a failure of consideration for the acceptance of the bill of exchange and they were, therefore, not bound to pay at maturity. It has been contended that their acceptance was unconditional and, therefore, in any event they were bound to pay. That cannot be. The plaintiffs have never denied that they were bound to supply the ordinary shipping documents according to the custom of C. I. F. dealings. They cannot contend that the defendants would have been equally bound to pay at maturity if they had not supplied them with any shipping documents at all. That

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would have been a case of making a negotiable instrument without any consideration whatever. So it is clear, and that is the footing upon which the case has been mainly argued, that the plaintiffs were bound to supply the defendants with good, legal contracts under the heads I. and F.

I think I have sufficiently indicated my own opinion, had the matter been *res integra*, that the plaintiffs had completely met their obligations and would have been entitled to immediate payment on maturity. But in view of the great authority the other way, I shall not give effect to what I have tentatively expressed in the form of a reasoned criticism of the matter but shall abide by the current of decisions in the English Courts. I must, therefore, hold that in respect of the shipments of aluminium circles per SS. 'Kybfels' the defendants were justified in refusing to pay at maturity and that the plaintiffs in respect of so much of their claim have no case, and the suit must, therefore, be dismissed with all costs, save and except such costs as may on taxation be held to have been incurred over so much of the claim, *viz.*, Rs. 201, as in the first part of this judgment I have decreed to the plaintiffs. Those costs the plaintiffs will have from the defendants.

The amount deposited by the defendants in Court, *viz.*, Rs. 4,001, the defendants to have liberty to withdraw.

Suit dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO 86 OF 1915.

September 13, 1916.

Present:—Mr. Abdur Rahim, Officiating
Chief Justice, and Mr. Justice
Seshagiri Aiyar.

V. RAMASWAMI AIYAR—PLAINTIFF—
APPELLANT

versus

THE MADRAS TIMES PRINTING AND
PUBLISHING COMPANY, LIMITED—

DEFENDANT—RESPONDENT.

Master and servant—Incompetence, dismissal of servant for, before stipulated term of service—Wrongful dismissal, action for—Damages.

Where a person is employed who has not the requisite competency for the office, his dismissal before the stipulated term of service is not wrongful and no action lies for damages therefor. [p. 656, col. 1.]

There is no material difference between a servant who will not and a servant who cannot perform the duty for which he is hired. [p. 656, col. 1.]

Harmer v. Cornelius, (1858) 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; 4 Jur. (N. S.) 1110; 6 W. R. 749; 141 E. R. 94; 116 R. R. 654; *Jenkins v. Batham*, (1855) 15 C. B. 168; 3 C. L. R. 373; 24 L. J. C. P. 94; 1 Jur. (N. S.) 237; 3 W. R. 283; 139 E. R. 384; 100 R. R. 297; *Shain v. Arnott*, 2 Stark. 256, followed.

Appeal from the decree and judgment of Mr. Justice Bakewell, dated the 29th September 1915, in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 71 of 1914, reported as 32 Ind. Cas. 350.

Messrs. J. L. Rozario, V. V. Srinivasa Aiyangar and N. Chandrasekhara Aiyar, for the Appellant.

Messrs. A. Suryanarayana Aiyar and O. Srinivasan, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—This is a suit for damages for wrongful dismissal. The plaintiff was appointed co-editor of the Madras Times in January 1912 for a period of ten years. He was dismissed from service on the 21st of February 1914. The learned Judge held that the dismissal was right. The appeal raises questions relating to the validity of the plaintiff's appointment and the competency of the Directors to dismiss him. It is not necessary to deal with these questions. The appeal can be disposed of on a shorter ground.

Mr. C. P. Ramasami Aiyar, examined for the plaintiff, deposed thus:

By THE COURT.—You said that the plaintiff has not, to your knowledge, been employed elsewhere since leaving the *Times*?

A.—Yes.

Q.—Could he have obtained employment?

A.—I do not think so at all.

Q.—Why?

A.—He cannot be a co-editor or manager of a paper elsewhere from my knowledge of him. He has not the qualifications for it.

The plaintiff has not gone into the witness-box to swear to the contrary. We must, therefore, take it as established that the plaintiff should not have been appointed as co-editor as he had no

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qualifications for the appointment. On this conclusion of fact, it is obvious that the plaintiff cannot recover damages from the defendant.

In Smith's "Master and Servant," it is pointed out, quoting Chitty on Pleadings, that a servant suing for wrongful dismissal will have to plead that he was and is competent to discharge his duties, but that he was wrongfully dismissed. Willes, J., says in *Harmer v. Cornelius* (1) that "when a skilled labourer, artizan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes." The further question is where a person is employed who has not the required competency for the office, is his dismissal wrongful, because he has been turned out before the time fixed in the agreement. Mr. Rozario is right in his contention that there is nothing in the records of this case to warrant the suggestion of the learned Trial Judge that the plaintiff "obtained his position under the Company in a manner which is unexplained and extremely suspicious." It must be assumed for the sake of argument that both the parties acted honestly and that the plaintiff practised no deception. Even then, on the finding, as to want of capacity the dismissal must be upheld. Mr. Justice Willes in the case already quoted states that "the failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and, therefore, misconduct." On this fiction of law it has been held that the dismissal of a servant would be right. Jervis, C. J., in *Jenkins v. Betham* (2) upheld the dismissal of an arbitrator for "ignorance of the subject and incompetency to act in the business." Lord Ellenborough in *Shain v. Arnott* (3) held that "there is no material difference between a servant who will not and a servant who cannot perform the duty for which he was hired."

Applying the above principles, it is clear that the dismissal of the plaintiff by the company was justified. The learned Judge has, however, directed that the plaintiff to pay "costs in the higher scale." The case does not present any difficulties and no reasons are given why the plaintiff who was employed for a fixed period should be regarded as having abused the process of the Court in suing for damages for wrongful dismissal. The appeal must be dismissed with costs, but the decree of the learned Judge must be modified by directing that the ordinary costs of a single Counsel be paid by the plaintiff for the original trial.

ABDUR RAHIM, OFFG. C. J.—I agree.

Appeal dismissed.

V.R.P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1391 OF 1915.

July 12, 1916.

Present:—Mr. Justice Walsh and

Mr. Justice Sundar Lal.

GANGA PRASAD—PLAINTIFF—APPELLANT

versus

HIRA LAL AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 22, 66—Hundi, payable sixty-one days after date—Presentation for acceptance, whether necessary—Presentation for payment, when to be made—Maturity.

In the case of a hundi payable sixty-one days after date, the payee or endorsee is not bound to present it for acceptance at once [p. 657, col. 2.]

Every bill of exchange, which is not expressed to be payable on demand, at sight, or on presentment, is at maturity on the third day after the day on which it is expressed to be payable, and must be presented for payment at maturity. [p. 657, col. 2.]

Therefore, a hundi drawn on 7th May and payable sixty-one days after date, would be correctly presented for payment on July 10th. [p. 657, col. 2.]

Second appeal from a decree of the First Additional Subordinate Judge, Allahgarh.

Mr. Gulzari Lal, for the Appellant.

Mr. Panna Lal, for the Respondents.

JUDGMENT.—The plaintiff in this case sues to recover a sum of Rs. 609 due on a hundi dated 7th May 1909, drawn by Lal Das-Kedar Nath on Ram Gopal-Bhagwan Das of Delhi, payable sixty-one days after date. The payee is a firm consisting of the defendants of the first

(1) (1858) 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; 4 Jur. (N. S.) 1110; 6 W. R. 749; 141 E. R. 94; 116 R. R. 651.

(2) (1855) 15 C. B. 168; 3 C. L. R. 373; 24 L. J. C. P. 94; 1 Jur. (N. S.) 237; 3 W. R. 283; 139 E. R. 384; 103 R. R. 297.

(3) 2 Stark. 256.

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party. The *hundi* was endorsed by the payee to the plaintiffs on 11th May 1914. The plaintiffs endorsed it to Khub Chand-Saligram, who endorsed it to Kanhaya Lal-Brij Lal. The *hundi* was never presented to the drawers for acceptance, but some time on the 10th July 1914, it was presented by the holder for payment. In the meantime the firm of the drawers failed somewhere about the 8th to 10th July 1914. The drawees refused to pay the amount. The last holder, therefore, demanded repayment from his endorser and obtained it. In the same way the plaintiffs in their turn had to pay to their endorsee, and in their turn they now claim payment from the defendants of the first set (their endorsers) as well as the drawers. The Courts below have given a decree against the drawers, but have dismissed the suit against the payees. The decree against drawers is perhaps of but little value as their business has failed. The plaintiffs, therefore, have appealed to this Court with the object of obtaining a decree against their endorsers. The *hundi* was never presented for acceptance by any one, and payment was refused when it was presented for payment on 10th July 1914. The question in the case is, whether the payees who endorsed over the *hundi* to the plaintiffs are responsible for the amount claimed.

Under section 35 of the Negotiable Instruments Act (XXVI of 1881) in the absence of a contract to the contrary, whoever endorses and delivers a negotiable instrument before maturity, without in such endorsement excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of the dishonour has been given to or received by such endorser as hereinafter provided.

Again under section 37, "the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for..... the drawer or acceptor, as the case may be." Section 38, however, lays down that "as between the parties so liable as sureties, each

prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party."

Under these sections the defendants-payees are liable to the plaintiff, provided notice of the dishonour has been given to, or received by, them as provided by the Act. In paragraph No. 5 of the plaint, the plaintiff alleges the giving of such notice, which is not denied in Hira Lal's written statement. The grounds on which the defendants or respondents seek to repudiate their liability are:—

(1) That the *hundi* was not presented at proper time for acceptance.

(2) That the last purchaser of the *hundi* did not give notice of non-acceptance to the contesting defendant at the proper time.

(3) That Khub Chand and Kalian Das, after purchasing the *hundi*, took discount two months in advance from the drawers and gave them two months' further time to pay the *hundi* and did not send it for acceptance to the drawee.

In the case of a *hundi* like this, payable sixty-one days after date, the payee or endorsee is not bound to present it for acceptance at once, though it would be prudent for him to do so. Non-presentation for acceptance, therefore, does not relieve the defendants from responsibility. The defendants themselves might have presented it for acceptance before endorsing it over to the plaintiffs. They, however, did not do so, nor did they make it a condition of their liability that presentment for acceptance should be made within a specified time. I come now to the second point raised by the defence. Every bill of exchange, which is not expressed to be payable on demand, at sight, or on presentment, is at maturity on the third day after the day on which it is expressed to be payable (*vide* section 22 of the Act). A bill of exchange payable at a specified period after date must be presented for payment at maturity (section 66 of the Act). The period of sixty-one days expired on 7th July 1914, and the bill was at maturity on 10th July 1914. The presentment for payment on 10th July was, therefore, correctly made. It is said that the business of the drawers failed on some date between 8th and 10th July 1914. The lower Appellate Court has not found the exact date on which the business of the drawers failed but the endorseees were, however, not bound to

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present it for payment before 10th July 1914. The delay in presentment for payment does not relieve the defendants respondents from liability. Section 94 lays down that notice of dishonour must be given within a reasonable time, and the party receiving such notice in order to make a prior party liable should give notice of such dishonour within a reasonable time (section 95). The learned Judge has recorded no finding on the point. The view of the law taken by him is entirely erroneous. Neither Court has recorded any finding on the third point. We cannot at this stage determine the case finally. The learned Subordinate Judge has, on an erroneous view of law, held that the respondents are not liable, and has disposed of the case on a preliminary point. We would allow the appeal, set aside the decree of the lower Appellate Court and remand the case under rule 23 of Order XLI to the lower Appellate Court, with directions to restore the appeal to the file of pending appeals and hear and dispose of the same according to law. Costs here and hitherto incurred will abide the result.

Appeal allowed; Cause remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3835 of 1912.

June 14, 1916.

Present:—Mr. Justice Sharfuddin and

Mr. Justice Roe.

BISHEN NARAIN DAS PODDAR AND

OTHERS—APPELLANTS

versus

CHANDRA KANTA NAIK AND ANOTHER

—RESPONDENTS.

Chota Nagpur Tenancy Act (VI B.O. of 1908)—Bengal Rent Act (X B. C. of 1859), s. 82—Eviction of raiyat—Status of under-raiyat after ejectment of occupancy tenant for non-payment of rent—Locus standi to object to decree against occupancy tenant.

After an occupancy tenant has been ejected from a holding for non-payment of rent, his under-raiyat is a mere trespasser, and is liable to ejectment at the instance of the landlord. [p. 659, col. 1.]

An under-raiyat has no *locus standi* to question the validity of a decree of ejectment passed against the occupancy tenant. [p. 659, col. 2.]

Appeal against the decree of the District Judge, Manbhum, dated the 2nd

September 1912, confirming that of the Subordinate Judge, Manbhum, dated the 19th April 1912.

Mr. Naresh' Chandra Sinha, for the Appellants.

Mr. Hasan Imam (with him Mr. Lal Mohan Ganguli), for the Respondents.

JUDGMENT.

ROE, J.—In this case the appellant is a cultivator of the District of Manbhum, who, prior to the passing of the Chota Nagpur Tenancy Act, was an under-raiyat in an occupancy holding from which the occupancy raiyat had been evicted for failure to pay rent. He retained possession after the decree against the occupancy raiyat and also after the execution of that decree by delivery of possession to the decree-holder. That decree was obtained on the 6th April 1908, and possession was delivered on the 8th June 1908 and the present suit instituted on the 3rd July 1911. The Chota Nagpur Tenancy Act was extended to the locality in which this holding is situate in the year 1909. The proceedings before us, therefore, prior to the present suit, were under the Rent Act X of 1859, and the present suit itself is to be considered in the light of the Chota Nagpur Tenancy Act.

The plaintiff claims to evict the defendant as a trespasser. To be on the safe side he also issued a notice upon him to quit, but as he states in his plaint he is confident that any such notice was unnecessary. The defendant puts up three defences.

First, that he is a tenant and that, therefore, under the Chota Nagpur Tenancy Act he is not liable to eviction by any Civil Court save that of the Deputy Commissioner of Manbhum. *Secondly*, that he is an under-raiyat and that the interest of an under-raiyat is an incumbrance upon the holding not void but only voidable and that his under-tenancy has never been avoided in the manner contemplated by the Rent Act; and *thirdly*, if he is to be regarded as a trespasser he has a right to enter into a contest upon the validity of the decree made against the occupancy raiyat for ejectment for failure to pay rent. Practically, therefore, we have to consider only one question in this case and that is whether the defendant was a trespasser or a tenant. If his interest was an incum-

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brance obviously he was a tenant; if he was a tenant no suit against him would lie; if he is a trespasser action may be taken against him in the ordinary Civil Court.

The lower Courts have concurred in finding that he is a trespasser. After full consideration of this question we feel that we must agree with the conclusions arrived at by the lower Courts. We have searched the Weekly Reporter for any expression of opinion in respect to the status of an under-*raiyyat* in the case of an occupancy holding from which a *raiyyat* has been evicted for non-payment of rent. There is ample justification for the proposition that where a holding of an occupancy *raiyyat* is sold, the interest of an under-*raiyyat* is not void but voidable. But there is no case of an under-*raiyyat's* status being recognised in a case in which the occupancy holding is entirely destroyed under the old Rent Law. Section 82 seems to us to completely decide the question by its direction that when a decree is for eviction, the decree-holder shall be put in actual physical possession of the land. There is a clear distinction between proceedings in regard to a tenure-holder and proceedings in regard to a *raiyyat*. Where the proceeding has been with regard to a tenure-holder or under-tenant the decree is to take the form of an order to all *raiyyats* to pay rent to the decree-holder, and it seems to us that it is impossible to say that the decree-holder can be put into actual physical possession of the land, unless indeed it be conceded that the under-*raiyyat* is completely ignored and treated as having no *locus standi*.

The remaining point for decision is whether the under-*raiyyat* can, in the proceedings now before us, contest the validity of the decree against his lessor. His lessor was Rajendra Chowdhury and he obtained the holding by a sale for arrears of rent. It is clearly set out in Act X of 1859 that a sale for arrears of rent can only take place in the case of an interest which is transferable. It is clearly laid down that a decree for ejectment can only be made in a case in which the holding is not transferable.

Therefore, Mr. Naresh Chandra Sinha argues

that the two decrees are contradictory in terms; one or other of them must be wrong, and he contends that it was open to his client to come forward and contest the second decree. Here again it is clear that the under-*raiyyat* could not contest the validity of that decree in this suit as defendant, unless he had a *locus standi* to contest the validity thereof in a separate suit in which he would have been the plaintiff. We can find nothing whatever in any part of Act X of 1859 which could give an under-*raiyyat* a *locus standi* to institute such a suit or proceeding as plaintiff. He might perhaps have maintained a suit for a declaration that the decree was fraudulently obtained and, therefore, a nullity. But he had no *locus standi* to have it declared that it was contrary to law. Therefore, he cannot put forward the illegality of that decree as a defence to a suit in which it is sought to declare him a trespasser.

In these circumstances we feel the decision of the lower Court is correct and that the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 958 OF 1915.

September 20, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Spencer.

M. K. RAMASWAMI PATTAR—

PLAINTIFF No. 1—APPELLANT

versus

GOPALAN STYLED KALLAMPALLI

VALIA NAYAR AVERGAL (DEAD) AND

OTHERS—PLAINTIFF No. 2 AND DEFENDANTS—

RESPONDENTS.

Malabar Law—Maintenance, family arrangement in lieu of, by karnavan, whether can be set aside by succeeding karnavans.

Where the *karnavan* of a Malabar *tarwad*, by a family arrangement, grants specific lands to the junior members of the *tarwad* in lieu of maintenance, the arrangement is binding on the succeeding *karnavans* and cannot be set aside unless for good cause. [p. 660, col. 1.]

Ekknath Eachara Unni Valia Kaimal v. Manakkat Vasunni Elaya Kaimal, 5 Ind. Cas. 774; 7 M. L. T. 102; 20 M. L. J. 344; 33 M. 436, followed.

A suit for recovery of possession of such land cannot be maintained by a succeeding *karnavan*, unless the latter seeks to set aside the arrangement

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and offers to make some other suitable arrangement for the junior members who are in possession of the land. [p. 660, cols. 1 & 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 272 of 1914, preferred against that of the District Munsif, Alatur, in Original Suit No. 82 of 1913.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.

Mr. P. Appu Nair, for the Respondents.

JUDGMENT.—The 1st plaintiff obtained a lease from the 2nd plaintiff, the present *karnavan* of the *tarwad* to which the defendants belong. It is found that the 1st plaintiff, as a matter of fact, did not pay the Rs. 600 towards the consideration of the lease and the Munsif has also found that the lease was not a *bona fide* one. But it is contended by Mr. Ananthakrishna Aiyar that the question of consideration is not relevant, so far as his client's right to recover possession from the defendants is concerned. The 2nd plaintiff, on the decree being made dismissing the suit, did not appeal against the decree. It is the 1st plaintiff that appealed to the lower Court. Therefore, so far as the 2nd plaintiff is concerned, the decree against him is binding and is conclusive of his rights. So far as the 1st plaintiff's rights are concerned, even supposing that the 1st plaintiff had a *bona fide* lease, we do not think that he is entitled to oust the defendants from the possession. The defendants are in possession as junior members of the *tarwad* under an arrangement made sometimes ago, by which they were given possession of this land in lieu of maintenance to which they were entitled.

It has been held in *Ekknath Eachara Unni Valia Kaimal v. Manakkat Vasunni Elaya Kaimal* (1) that where there has been a *bona fide* arrangement of this character, that arrangement is binding on the succeeding *karnavans* and cannot be set aside unless for good cause. No such cause is alleged in this case. Further it was ruled in Second Appeal No. 563 of 1905 that a suit for recovery of

possession of land which has been granted in lieu of maintenance, cannot be maintained unless the succeeding *karnavan* seeks to set aside the arrangement and offers to make some other suitable arrangement for the maintenance of the junior members who are in possession of the land.

It is urged by Mr. Ananthakrishna Aiyar that Ayling and Seshagiri Aiyar, JJ., in Second Appeal No. 78 of 1915 have dissented from that view. Apparently the judgment in Second Appeal No. 563 was brought to their notice, but the learned Judges do not discuss the question and do not say that they did not agree in the view of law laid down in Second Appeal No. 563 of 1905. They only say that the offer of maintenance is not a condition precedent to the maintainability of a suit of this character. We think that the law as laid down in Second Appeal No. 563 of 1905, which is in accordance with the view expressed in *Ekknath Eachara Unni Valia Kaimal v. Manakkat Vasunni Elaya Kaimal* (1), is reasonable and correct.

The third point argued by Mr. Ananthakrishna Aiyar is that the 1st plaintiff should at least have been given a decree for arrears of rent. But his main case was that the defendants were not entitled to possession and it was he that was entitled to possession under the lease. No doubt under clause 6 of the lease (Exhibit A) the 1st plaintiff is entitled to recover the arrears of rent from the defendants for the year 1087 in lieu of interest on Rs. 500, which is said to have been paid by him. It has been found, however, by both the Courts that he did not pay any such amount. That being the finding, we see no force in this contention of Mr. Ananthakrishna Aiyar.

The result is, the appeal is dismissed with costs.

Appeal dismissed.

(1) 5 Ind. Cas. 774; 33 M. 436; 7 M. L. T. 102; 22 M. L. J. 344.

SUKH LAL v. BISHAMBHAR.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 50 OF 1916.

November 23, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

SUKH LAL—DEFENDANT—APPELLANT

versus

BISHAMBHAR—PLAINTIFF—RESPONDENT.

Mortgage—Right to receive dues at funerals, mortgage of, validity of—Maha Brahmins, right of—Existing right—Transfer of Property Act (IV of 1882), s. 6.

A mortgage by a Maha Brahmin of his rights to receive the dues and offerings at funerals of Hindus on particular days is not null and void. [p. 663, col. 2.]

Obiter dictum.—No Maha Brahmin can bring a suit to compel any person carrying out a funeral to employ him and in the absence of a special agreement a Maha Brahmin cannot bring a suit against another Maha Brahmin for fees received. [p. 663, col. 1.]*Raghoo Pandey v. Kassy Pandey*, 10 C. 73; 13 C. L. R. 263; 8 Ind. Jur. 197; 5 Ind. Dec. (N.S.) 51, followed.*Puncha Thakur v. Bindesri Thakur*, 28 Ind. Cas. 675; 19 C. W. N. 580; 43 C. 28, explained.

The right to receive the dues at funerals is an existing right. [p. 663, col. 1.]

Appeal under section 10 of the Letters Patent against the order of Mr. Justice Walsh, dated the 27th March 1916.

FACTS.—The facts material for this report are as follows:—

One Niadar, a Maha Brahmin now deceased, mortgaged his *birt jajmani* right to the plaintiff, another Maha Brahmin, by a usufructuary mortgage-deed, dated 19th June 1906, for Rs. 300. The stipulation was that the mortgagee would officiate as priest at Hindu funeral ceremonies in place of the mortgagor and appropriate the profits for the first six days in every alternate month in the town of Sarsawa and the appurtenant villages in lieu of interest. The plaintiff alleged that he enjoyed this right till August 1912, when he was dispossessed by the defendant, the successor of the mortgagor. He came into Court claiming Rs. 350 as damages suffered on account of dispossession and seeking to bring to sale the *birt jajmani* right to raise the above amount.

The defence, *inter alia*, was that the *birt jajmani* right of a Maha Brahmin was not immoveable property and by its nature was not capable of being mortgaged.

The Court of first instance, the Munsif of Shaharanpur, accepted the defendant's plea and dismissed the suit. On appeal the Dis-

trict Judge set aside the decree of the Munsif and held that such a right was immoveable property and could be validly mortgaged. The defendant then appealed to the High Court and that Court confirmed the decree of the District Judge. Thereupon the defendant filed a Letters Patent Appeal.

Mr. A. Haider, for the Appellant.—Maha Brahmin's *birt jajmani* right is not immoveable property as understood in the Transfer of Property Act, and if such a right is not immoveable property it cannot be the subject of a mortgage (section 58 of the Transfer of Property Act). Then such a right from its very nature is uncertain. There is a mere chance or possibility of getting something. The gift to a Maha Brahmin is voluntary and one may choose his priest. Such a property, if it be called a property, cannot be transferred (section 6 of the Transfer of Property Act).

[RICHARDS, C. J.—Is there anything illegal in pledging whatever right one has?]

Mr. A. Haider.—No, but in this case the right is so uncertain.

[BANERJI, J.—If there be an agreement between Maha Brahmins to take offerings in turn is it enforceable?]

Mr. A. Haider.—Yes, but it is not immoveable property and is not a specific something.

Referred to *Jhummun Pandey v. Dinoonath Pandey* (1) and *Puncha Thakur v. Bindesri Thakur* (2). The principle of the last ruling applies in this case and is in my favour.

[RICHARDS, C. J.—The reasoning in the last case is self-contradictory. If no property passed by sale how could the sons be given possession?]

Mr. A. Haider.—There is a ruling of this Court in which it has been held that such a right cannot be mortgaged; *vide Gopi Nath v. Jhandu* (3). There is no doubt that in this case *birt jajmani bahies* were mortgaged but really it was a right to take offerings from the persons whose names were entered in the *bahies*.

[RICHARDS, C. J.—Take the case of a ferry right. Can it be transferred?]

(1) 16 W. R. 171.

(2) 28 Ind. Cas. 675; 19 C. W. N. 580; 43 C. 28

(3) 4 A. L. J. 712; A. W. N. (1907) 232.

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Mr. A. Haider.—Yes, but a Maha Brahmin's right is altogether different. It is intangible. It is *res extra commercium* also. Gour's Transfer of Property Act, Volume I. The present is like the case of *pujaries*.

[RICHARDS, C. J.—In the case of *pujaries* it is a purely voluntary offering. In the case of Maha Brahmins offerings are always made but there may be a choice.]

Mr. A. Haider.—In the case of *pujaries* also one may choose his *pujari*.

There is no estoppel if the mortgagor comes into Court and says that there can be no mortgage of a right like this.

There is necessity of the property being specific; *vide* Gour's Transfer of Property Act, Volume II, page 799.

[BANERJI, J.—It is specified as the offering of the six days?]

Mr. A. Haider.—No one may come on those six days.

[BANERJI, J.—He takes his chance.]

[RICHARDS, C. J.—Suppose there is a right of fishing on particular days. There is no certainty of one's catching fish on those particular days. Can such a right be transferred?]

Mr. A. Haider.—It can be transferred for the fish is there.

[RICHARDS, C. J.—I only give the illustration to show that the uncertainty of getting the thing is not the test.]

Mr. A. Haider.—Then the Court should not pass a decree which cannot be executed. *Vide Durga Prasad v. Genda* (4). It is in the nature of a personal service and cannot be attached or sold in execution of the decree.

Mr. Binode Bihari, for the Respondent.—This kind of right is of great value to the possessor and there is a custom of transferring such right. Such a right is peculiar to Hindu Law and has always been treated as immoveable property. *Vide Krishnabhat v. Kapabhat* (5), *Balwantrav v. Purshotam Sedheshwar* (6), *Baghoo Pandey v. Kassy Parey* (7).

He was then stopped.

(4) A. W. N. (1889) 169.

(5) 6 B. H. C. R. A. C. 137.

(6) 9 B. H. C. R. 99 at p. 105.

(7) 10 C. 73; 13 C. L. R. 263; 8 Ind. Jur. 197; 5 Ind. Dec. (N. S.) 51.

JUDGMENT.—This appeal arises out of a suit brought on foot of an alleged mortgage. The mortgagor and the mortgagee were both Maha Brahmins. This is a sect which performs certain ceremonies and duties at funerals of Hindus. They generally carry out their duties at some place frequented for the purpose of cremations and other funeral ceremonies. It frequently happens that the Maha Brahmins between themselves arrive at some arrangement by which certain Maha Brahmins are allowed the exclusive right of taking offerings and remunerations on particular days. The mortgage in the present case took the form of a mortgage of the right to the dues and offerings on six days every two months. The defendants are the collateral heirs of the deceased mortgagors; but they themselves claim to have succeeded to the very rights (such as they were) which belonged to Niadar, the mortgagor. The Court of first instance dismissed the claim. The lower Appellate Court decreed the plaintiff's claim in part. The learned Judge of this Court confirmed the lower Appellate Court. The contention at both hearings in this Court, and apparently also in the lower Appellate Court, on behalf of the defendants, is that the mortgage itself is absolutely null and void, that it did not operate to transfer any right nor had Niadar any right which he was capable of transferring by mortgage or otherwise. It has been fairly and properly admitted here that our decision in the present appeal ought to be exactly the same as if the suit was one between the original mortgagee and the original mortgagor. Section 6 of the Transfer of Property Act has been quoted to us, and it is said that this so-called right of Niadar was at best a "mere possibility" within the meaning of clause (a) of that section and that the "mere possibility" was incapable of being transferred. It cannot be disputed that certain offices are performed by Maha Brahmins at the funerals of Hindus, nor can it be disputed that Maha Brahmins receive for those duties certain remunerations. The amount largely depends upon the surrounding circumstances, the generosity of the relatives carrying out the funeral and very probably, the wealth and position of the deceased. The offerings in this sense are

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not purely voluntary. No doubt there is no obligation upon any person to employ any particular Maha Brahmin. No Maha Brahmin could bring a suit to compel any person carrying out a funeral to employ him and it is probable that in the absence of a special agreement a Maha Brahmin could not bring a suit against another Maha Brahmin for fees received. That the right to receive the dues at funerals is looked upon by the Maha Brahmins themselves as an existing right is to some extent illustrated by this very case. The mortgage was made as far back as the year 1906, and the defendants themselves consider that they have succeeded to the rights of Niadar as his heirs. A very similar question arose in the case of *Raghoo Pandey v. Kassy Parey* (7). That was a suit to redeem a mortgage of these very rights. There the plaintiff was seeking to pay back money in order that he might be restored to rights which had been transferred by way of mortgage. The defendants were actually resisting redemption, considering that they had acquired rights which they would rather keep than receive the plaintiff's money. This case was decided in the year 1858, and we refer to it at the present moment as showing to what an extent these rights have been recognised by the Maha Brahmins themselves. We have already pointed out that they consider the rights of so substantial a nature that they frequently enter into arrangements between themselves specifying particular periods when different Maha Brahmins may be present at cremation grounds to perform the offices and receive dues. We have been referred to several cases, amongst others the case of *Puncha Thakur v. Bindeari Thakur* (2). There the plaintiffs, the sons of a deceased priest, brought a suit to be restored to a 3-anna share in the offerings at a certain temple. Their father had made a mortgage of the 3-anna share. The Court of first instance had given the plaintiffs a decree for possession and this decree was affirmed by the Calcutta High Court. The learned Judges considered that the offerings at the temple were not a class of property which could be transferred by way of mortgage and that accordingly the mortgage was null and void. We may remark that the offerings at a temple do not stand on the

same basis as remuneration which Maha Brahmins receive for the services they perform at Hindu funerals. Furthermore, in that case whilst the learned Judges held that neither the mortgage nor sale conveyed any rights, nevertheless the plaintiff appears to have been successful in getting a decree for possession of these very rights. On the whole we see no reason to disagree with the decision of the lower Appellate Court and the learned Judge of this Court. We accordingly dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

INSOLVENCY CASES NO. 250 OF 1911.

AND NO. 19 OF 1912.

June 16, 1916.

Present:—Mr. Justice Greaves.

In re SITAL PRASAD AND OTHERS—

INSOLVENTS.

Insolvency—Infant, whether can be adjudged insolvent.

The law does not contemplate that an infant should be adjudged an insolvent, under any circumstances even in respect of judgment-debts or necessities. [p. 664, col. 1.]

Mr. S. K. Chakravarti, for the Official Assignee.

Mr. Zorab, for the Secured Creditors.

JUDGMENT.—This is an application on behalf of Gouri Sunker and the other partners in the firm of Kedarnath and Juggernath, who were adjudicated insolvents on the 29th January 1912, Gouri Sunker having been adjudicated on the 22nd November 1911. These two insolvency proceedings have been consolidated. The application now before me is to set aside the order of adjudication so far as these three persons are concerned, on the ground that they were infants at the date when the orders of adjudication made against them respectively were passed. It appears that an order was passed in the Court of the District Judge of Ghazipore under section 7 of Act VIII of 1890 (The Guardians and Wards Act) on the 11th December 1909. These three persons were minors on that date and Gouri Sunker attained his majority in the year 1916 and the other two infants will attain their majority in the years 1925 and 1928 respectively, and by virtue

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of the order of the District Judge of Ghazipore the age of majority of the infants will be 21. The application is opposed by certain secured creditors, who have obtained an order for sale for the purpose of realising their securities under section 2, clause 18, of the Presidency Towns Insolvency Act and I was referred to two sections of the Contract Act, *viz.*, section 68, which provides that if a person incapable of entering into a contract is supplied with necessaries the person supplying the necessaries is entitled to be re-imbursed from the property of the person incapable of so contracting, and also to section 247 of the Contract Act, which provides that a person who is under the age of majority may be admitted to the benefits of partnership but cannot be made personally liable for any obligation of the firm; and the argument addressed to me founded upon these two sections was that the infants, who are rendered liable under these sections, must be debtors, or otherwise there would be no right against their property under those sections. I think that argument is not well founded. I do not think that the sections presuppose that they are debtors. In the case of infants who are under a disability, the law in this country to prevent hardships arising in the case of supply of necessaries, or in the case of a family partnership, has provided special remedies against their property, but I do not think for a moment that they are debtors, and so the distinction that Counsel who appeared for the secured creditors sought to make with regard to the English case of *In re Jones, Ex parte Jones* (1), the passage to which he referred being at page 119, does not seem to me well founded. I do not think that the law contemplates that an infant should be adjudged an insolvent, although there is a passage in Williams on Bankruptcy, 11th Edition, page 4, in which it is suggested that in respect of judgment debts or necessities an infant may be so adjudicated, but there is no decision which so lays down, and I do not propose to so decide in the absence of any authority for the proposition. My own view is that an infant cannot be adjudged an insolvent under any circumstances, and so I grant the application and set aside the orders of adjudication made

against Gouri Sunker and the other applicants Kedarnath and Juggernath. So far as the costs of the secured creditors are concerned, they can add their costs, of their appearing here, to their securities, and I make no order against Raghbir or against the infants themselves. The Official Assignee will take his costs out of the assets in his hands.

Application granted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2267 OF 1914.

August 15, 1916.

Present:—Mr. Justice Spencer
and Mr. Justice Krishnan.

ARAKKALAKATH KOYATTO AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

PANIGALATT KUNHAMMAD—

DEFENDANT—RESPONDENT.

Malabar Law—Kanom deed—Improvements, value of, stipulation for payment of, by jenmi on redemption—Kanom, redemption of, by melkanomdar—Suit for value of improvements paid to kanomdar, maintainability of—Transfer of Property Act (IV of 1882), s. 74—Contract Act (IX of 1872), s. 69.

Under the terms of a *kanom* deed, the *jenmi* undertook to pay the value of improvements when he redeemed the *kanom*. A *melkanomdar*, who redeemed the *kanom* and who paid the *kanomdar* the value of repairs effected by him, sued the *jenmi* for the same:

Held, that on the constructions of the *kanom* deed, the suit was premature. [p. 665, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Calicut, in Appeal No. 732 of 1913, preferred against that of the Court of the Additional District Munsif, Calicut, in Original Suit No. 236 of 1912...

Mr. K. P. Ramakrishna Aiyar, for the Appellants.

Mr. K. Govinda Maron, for the Respondent.

JUDGMENT.—The *melkanomdar* has redeemed the prior *kanom* and in so doing has had to pay for improvements made by the *kanomdar* and he seeks to recover the same from the *jenmi*.

His plea that when the *melcharth* was executed the *jenmi* misrepresented that he

(1) (1881) 18 Ch. D. 109; 50 L. J. Ch. 673; 45 L. T. 193; 29 W. R. 747.

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had carried out the repairs and that there was nothing more than Rs. 600 due to the *kanomdar*, has been found against. The plaintiff did not seek to avoid his own *melkanom* in consequence of having had to pay for improvements, and in this view, the lower Courts rightly found that his suit was premature.

It is now sought to make a cause of action out of a personal covenant in the *kanom* deed (Exhibit B) by the *jenmi* to pay for repairs, the *melkanomdar* having succeeded to all the rights of the *kanomdar*, when he redeemed his mortgage under section 74 of the Transfer of Property Act. But as we read Exhibit B, the *jenmi* has not undertaken to pay these sums until he pays the mortgage money, and it cannot be contended that he has been called upon to do this yet.

It was next sought to base a cause of action on section 69 of the Indian Contract Act, on the ground that the *jenmi* was bound by law to make the payment. But the *melkanomdar* in this case was bound to pay for improvements when he redeemed the *kanom* and the *jenmi* was not bound by law to pay for improvements till he himself redeemed the property.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

V. R. P.

PATNA HIGH COURT.
CIVIL RULE No. 1206 OF 1915.
May 22, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.

BHARAT MAHTO AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

NISARALI SHEIKH AND OTHERS—
DEFENDANTS - OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Specific Relief Act (I of 1877), s. 12—Suit for specific performance and damages for breach of contract, cognizance of, by Small Cause Court—Proper course—Plaint, amendment of—Pleadings.

Where a plaintiff asks for two alternative reliefs in the Small Cause Court, one of them not being

cognizable by that Court, but on the face of it a relief which cannot be given in law, the proper course is to direct that the plaint be amended by striking out the clause demanding that relief. [p. 666, col. 1.]

Rule against a decision of the Subordinate Judge, Manbhum, dated the 17th September, 1915.

Mr. Sishar Kumar Mitra, for the Plaintiffs.

Mr. Abani Bhusan Mukerji, for the Defendants.

JUDGMENT.—The facts of this case briefly are, that the applicants before us were mortgagees, and the opposite party, mortgagors, under a deed securing the sum of Rs. 200 to the applicants. In *Bysack* 1321 a contract was entered into, whereby in consideration of the making of an endorsement on the back of the mortgage-deed crediting Rs. 215 to the mortgagors' account under that deed, a number of cattle, bullocks and buffaloes should be handed over to the mortgagees. The mortgagors having failed to carry out their part of the contract, the mortgagees instituted a suit in the Court of Small Causes praying in the alternative for delivery to them of the cattle, or for damages to the extent of Rs. 215 and interest for their non-delivery. The learned Subordinate Judge was of opinion that the suit was in essence a suit for recovery of money due on the mortgage-debt; he, therefore, dismissed the plaintiffs' suit, and ordered the defendants to pay the plaintiffs' costs.

The matter now comes before us under section 25 of the Small Cause Courts Act at the instance of the mortgagee plaintiffs. It seems to us that the position throughout has been misconceived. The suit is in effect a suit upon a contract. The consideration on one side was the writing of certain words upon a piece of paper. That part of the contract has been performed by the plaintiffs. It is, therefore, necessary that the defendants should perform their part of the contract, or pay damages for its breach. Unless there is something remarkable about the bullocks and buffaloes, it is obvious that adequate compensation for the breach of the contract can be given in money. Therefore under the Specific Relief Act, section 12, no suit for specific performance would lie. But the plaintiffs have asked for that specific performance, and under section 15, Second Schedule

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Provincial Small Cause Courts Act, clause 15, a suit for specific performance is not cognizable by a Small Cause Court. The question before us is, the plaintiffs having asked for two reliefs in the alternative in the Small Cause Court, and one of these reliefs not being cognizable by that Court but on the face of it a relief which cannot be given in law, what action the Small Cause Court should have taken with regard to the plaint. We are of opinion that in the exercise of the discretion vested in us under section 25, substantial justice will be done if we direct that the plaint be amended by the striking out of the clause or clauses demanding specific performance of the contract. The suit will then be dealt with solely as a suit for damages occasioned by a breach of the contract. Let the learned Subordinate Judge be directed to assess those damages and to make a decree accordingly. In view of the mismanagement of this case by the plaintiffs' legal advisers we think it fair that they should pay the costs of the hearing of this Rule, hearing-fee one gold mohur. The costs of the Small Cause Court will, of course, follow the result of the action.

Rule made absolute.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 178 OF 1915.

September 7, 1916.

Present:—Sir Stanley Batchelor, Kt., Acting Chief Justice, and Mr. Justice Shah.

MANILAL BRIJLAL SHAH—

APPELLANT

versus

THE GORDON SPINNING AND MANUFACTURING Co., LTD.

—RESPONDENTS.

Companies Act (VII of 1913), s. 38—Rectification of register—Appeal, conditions precedent to—Purchaser of shares at Court sale, rights of—Transfer of shares—Articles of association—Discretion of Directors—Civil Procedure Code (Act V of 1908), s. 100, O. XXI, r. 79.

The proviso to section 38 of the Indian Companies Act, 1913, should not be confined to the last clause, but must be read as a general reservation imposed on all the clauses of the section. [p. 667, col. 1; p. 668, col. 2.]

Amrita Lal Ghose v. Shrish Chunder Chowdhry, 26 C. 944; 4 C. W. N. 101; 13 Ind. Dec. (N. S.) 204, referred to.

The conditions precedent to the existence of a right

of appeal under section 38 are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue. [p. 667, col. 1; p. 668, col. 1.]

An appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in section 100, Civil Procedure Code. [p. 668, col. 1; p. 670, col. 1.]

The purchaser of certain shares of a limited Company at a Court sale in execution of a decree against the share-holder is not entitled as of right to have the shares transferred by the Company to his name. The position of a purchaser at a Court sale is neither better nor worse than that of a private purchaser. [p. 667, col. 2; p. 669, col. 2.]

Reg. v. East Indian Railway Company, 1 Ind. Jur. (N. S.) 258; Bourke O. C. 395, distinguished.

Per *Batchelor, J.*—Whether the sale is made by a private individual or by a Court, it is clear that the thing sold and transferred from the seller to the buyer is merely the property in the shares plus a limited, not an absolute, right to have the transfer registered. The Court never has to sell the absolute right of forcing the Directors to register the purchaser's name. [p. 668, col. 1.]

Per *Shah, J.*—It does not follow from the provisions of Order XXI, rule 79, Civil Procedure Code, that the Directors are compellable to accept the purchaser as the transferee for otherwise the Company would have the benefit of the shares to itself. [p. 669, col. 2.]

First appeal from the decision of the District Judge, Ahmedabad.

Mr. G. N. Thakor, for the Appellant.

Mr. Jardine, Advocate-General (with him Mr. G. S. Rao), for the Respondents.

JUDGMENT.

BATCHELOR, A. C. J.—This is an appeal from a decision of the learned District Judge of Ahmedabad upon an application made under section 38 of the Indian Companies Act (VII of 1913). The only facts which it is necessary to state are these. The five shares in controversy were originally owned by one Dosabhai. A decree against him was obtained by one Balmukund, and in execution of that decree these five shares were sold by the Court. They were purchased by the present applicant. As the judgment-debtor Dosabhai was unwilling to execute the transfer deed in favour of the applicant, the deed was executed by the Court. In these circumstances the applicant claims that he is entitled as of right to have his name placed on the register. The Directors have refused to register the transfer, and the learned District Judge has decided against the applicant, who consequently brings the present appeal.

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The learned Advocate-General takes a preliminary point that under section 38 of the Act the appeal is not competent. The objection is put in two ways. *First*, it is said that the proviso, which occurs at the end of the section, must be confined to the third clause of the section. Mr. Jardine admits that upon this point we have nothing to guide us but the framing of the section and the setting in which the proviso is placed. It appears to me that these circumstances constitute too slight and uncertain a ground for the inference which is sought, and I am of opinion, following the decision in *Amrita Lal Ghose v. Shrish Chunder Chowdhry* (1), that the proviso should not be confined to the last clause of the section, but must be read as a general reservation imposed on all the clauses.

Secondly, it was contended that the appeal does not lie because the conditions under which alone an appeal is granted under this section are not in this case satisfied. Now the conditions precedent to the existence of an appeal are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue. The Advocate-General contends that no such issue was in this case directed to be tried, and consequently, that there is no decision of the kind from which alone an appeal under the proviso is sanctioned. Speaking for myself, I think that there is great force in this argument, and I am very doubtful whether strictly, and as of right, this appeal is competent. I think that the appeal is certainly not rendered competent merely by reason of the circumstance that there occurs in the lower Court's judgment a passage in which the learned Judge sets out the nature of the question before him, and that it is possible to regard that question as a question of law. It is clear that in every application made to the Court there must be some question or other for the Court's decision and I cannot concede that when that question is capable of being regarded as a question of law, nothing more is needed for the admissibility of an

(1) 26 C. 944; 4 C. W. N. 101; 13 Ind. Dec. (N. S.) 1204.

appeal. On the contrary, I think that if an appeal is to be admitted, there must be a specific issue of law directed by the Court to be raised, and directed with some advertence to the terms of this proviso. That has not been done in this case, and if the matter rested there, I should be inclined to say that the appeal did not lie. But it has been conceded before us that in the past the practice in these matters has been to this extent lax that wherever an Appellate Court could seem to discern a question of law in the judgment of the lower Court, an appeal has always been allowed, even though no specific issue had been directed to the point. In this state of circumstances, rather than allow the present appellant to be prejudiced by the laxity of procedure in the past, I am prepared to admit the appeal and consider it on its merits.

Now on the merits the simple question involved is whether the appellant is entitled to claim that the Directors shall register his transfer, and is so entitled by reason of the fact that he is a purchaser at a Court-sale and not a private purchaser. For admittedly, if he were a private purchaser, he would not be entitled to throw any such obligation upon the Directors. It is urged that his position in this respect is substantially improved because he is a Court-purchaser. But after all the argument which we have heard from Mr. Thakor, I am unable to see in what respect his position is materially altered or improved by the circumstance that he purchased at a Court-sale. It may be that when the Directors refuse to approve a transfer after a Court-sale in execution, there may ensue inconveniences in practice. But similar inconveniences will also ensue when a private purchaser's transfer is refused to be accepted by the Directors acting within the limits of their discretion. For the purposes of this argument, we must, of course, assume that the Directors would be within their powers in refusing to register the present appellant if he were a private purchaser, and not a Court-purchaser. Upon that assumption, I can see no reason why the Directors' powers should be curtailed merely because the appellant purchased at a Court sale. For whether the sale is

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made by a private individual or by a Court, it seems to me clear that the thing sold and transferred from the seller to the buyer is merely the property in the share plus a limited, not an absolute, right to have the transfer registered. But the appellant here contends, and must contend, that when he purchased from the Court, he purchased, over and above the share, the absolute right of forcing the Directors to register his name. But that is a right which *ex hypothesi* the Court never had to sell: I infer that the appellant never bought it. This conclusion seems to me to be reinforced by the consideration to which the learned Judge has referred, the consideration, namely, that upon the case for the appellant nothing would be easier than to override that part of the memorandum of association which invests the Directors with a discretion to refuse to admit undesirable candidates. For if the appellant is right, then a person whose professed object might be to wreck or damage the Company could nevertheless oust the Directors' discretion, and compel them to register him, by the simple process of purchasing through the Court after a collusive decree. On these grounds, I am of opinion that notwithstanding that the appellant's purchase was made through the Court, the Directors' powers, under the memorandum of association, of refusing to accept the appellant as a share-holder, are unaffected. Upon this point the learned District Judge has held that the Directors were justified in their refusal, and all that is necessary now to say upon this part of the case is that on the facts found no question arises which could properly be urged under section 100 of the Civil Procedure Code. It is clear from those facts that the Directors would be justified in thinking, as they did think, that the appellant's object in obtruding himself upon this company was to impede and hamper and embarrass the business of the company, not to promote it. I think, therefore, that the appeal fails and should be dismissed with costs.

SHAH, J.—I agree that the appeal should be dismissed with costs.

The preliminary objection raised by the learned Advocate-General on behalf of the respondent that no appeal lies in this case

is based on two grounds: *first*, that the proviso to section 38 of the Indian Companies Act (VII of 1913) applies only to sub-section (3) and not to the whole section generally; and, *secondly*, that the lower Court having omitted to direct an issue to be tried there can be no appeal.

As to the *first* ground, I have no hesitation in coming to the conclusion that the proviso applies to the section generally and not only to the last sub-section. The corresponding proviso to section 53 of the Indian Companies Act of 1882 has been held to be applicable to the whole section in *Amrita Lal Ghose v. Shrish Chunder Chowdhry* (1); and it seems to me that the position of the proviso with reference to the sub-sections in the new Act is all the more favourable to this construction. Besides, I am unable to appreciate the significance of this contention in this particular case, as under sub-section (3) the Court "generally may, decide any question necessary or expedient, to be decided for the rectification of the register." It is not possible to suggest that the question decided by the lower Court was not necessary for the rectification of the register.

The *second* ground is based upon the suggestion that in this case the Court has not directed any issue to be tried. It is apparently true that there is no such express direction. Having regard, however, to the procedure which is usually followed in applications under this section, it seems to me that though there was no express direction for the trial of the issue arising in this application, it was necessarily involved in the consideration of the application; and under the circumstances it is not unreasonable to hold that there was substantially a direction to try an issue raising the question set forth by the learned District Judge in his judgment, and that an appeal on the issue is competent. At the same time having regard to the fact that under the proviso as framed in the Indian Companies Act of 1913 the appeal is allowed from the decision of an issue directed to be tried, it is necessary and desirable that there should be a clear direction as to the trial of an issue, so that there may be no obscurity

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on the point, and no room for the argument that there was no issue directed to be tried and consequently no right of appeal. At the same time it is clear from the terms of the proviso that an appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in section 100 of the Code of Civil Procedure.

The issue in this case raises two questions, one of law, and the other of fact. The question of law is whether the purchaser of certain shares of a limited company at a Court-sale in execution of a decree against the share-holder is entitled as of right to have the shares transferred by the company to his name. It is contended on behalf of the appellant that the company has no discretion in the matter, and has no power to refuse to transfer the shares to the name of the auction-purchaser. It is common ground that a private purchaser from a share-holder must submit his application for transfer to the company and the application is liable to be dealt with by the Directors as provided by Articles 22 and 23 of the articles of association of the company in question. But it is argued that the auction-purchaser in virtue of his purchase at a Court-sale has a much higher right in this respect than a private purchaser. On principle I am quite unable to see how the purchaser at a Court-sale can have any higher right. He purchases the property subject to the same limitations to which the original owner could sell privately. The intervention of the Court, and the compulsory character of the sale, cannot prejudice the rights of the company and cannot alter the position of the purchaser in any way on this point. There is nothing in the provisions of the Indian Companies Act and the Code of Civil Procedure to support the argument that the company is deprived of its usual powers, and relieved of its corresponding obligations, to deal with a transfer application, when the transfer is sought in virtue of a Court-sale. Mr. Thakor has relied upon rule 79 of Order XXI of the Code of Civil Procedure in support of his argument. Under that rule, after the Court-sale both the judgment-debtor and the company are prevented

from transferring the shares and from receiving any dividend from, or paying it to, any person except the purchaser; and it is urged that if the company can be prevented from transferring the shares or paying the dividend to anybody except the purchaser, it must involve the result that the purchaser should be accepted as the transferee or else the company would be able to keep the benefit of the shares to itself. I do not think that the provisions of the rule involve any such result. Even though under the rule a company may be prevented from transferring the shares or paying the dividend to any person except the purchaser, it does not follow that the purchaser at a Court-sale is in any worse position than a private purchaser from a share-holder, whom the Directors have refused to accept as a proper transferee in the exercise of their powers under the articles of association. In considering this question we are not concerned with the inconveniences which would result to a particular individual from the Directors' exercising their discretion against him. It is enough for the purposes of this appeal to point out that in this respect the position of a purchaser at a Court-sale is not worse than that of a private purchaser under the rule, and that it cannot be made any better in virtue of the rule.

Mr. Thakor has relied upon *Reg. v. East Indian Railway Company* (2) in support of his argument. But as I read that case the decision turns upon the facts and circumstances of that case: it cannot be properly accepted as an authority for the broad proposition of law for which Mr. Thakor contends in this appeal.

I am, therefore, of opinion that the purchaser at a Court-sale is not entitled as of right to have his name entered in the register of the company as a share-holder. He is subject to the same rules on this point as a private purchaser undoubtedly is.

The second question raised in the issue is a question of fact, *viz.*, whether on the facts stated the Directors have exercised their discretion properly in refusing to

(2) 1 Ind. Jur. (N. S.) 258; Boulike O. C. 395.

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accept the present appellant as a transferee of the original share-holder. The learned District Judge has come to the conclusion that under the circumstances of this case the discretion of the Directors was "wisely" exercised. It is not necessary for me to express any opinion on this point; and I say nothing as to the merits or justice of the refusal by the Directors to transfer the shares to the present appellant. It is clear that the ground upon which the appeal is based is not covered by the grounds mentioned in section 100 of the Code of Civil Procedure.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2445 OF 1915.

June 21, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

Sheikh SAFAIT HOSSAIN—PLAINTIFF—
APPELLANT

versus

Sheikh WAIZUDDIN AND ANOTHER—

DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 153—
Appeal in suit for recovery of rent where amount
claimed does not exceed Rs. 100—Rent—Mafi allowed
to jeth raiyat, whether amounts to rent.*

A *mafi* from the total rent allowed by the landlord to a *jeth raiyat* in consideration of services to be performed by the latter is not rent, inasmuch as the amount is payable by the landlord to the tenant and, therefore, a decision ascertaining the amount of such *mafi* is not a decision as to the amount of rent annually payable by a tenant, within the meaning of section 153 of the Bengal Tenancy Act.

Second appeal against the decision of the District Judge, Muzaffarpore, dated the 31st July 1915, reversing the decree of the Munsif, 1st Court, Muzaffarpore, dated the 26th April 1915.

Mr. Baidyanath Narayan Sinha, for the Appellant.

Mr. Atul Krishna Ray, for the Respondents.
JUDGMENT.

SHARFUDDIN, J.—A preliminary objection has been made by the respondent in this appeal, namely, that under section 153 of the Bengal Tenancy Act no appeal lies inasmuch as the amount claimed in the suit

is within Rs. 100, and that the decree appealed against is a decree passed by a District Judge and there has been no decision arrived at as to the amount of rent annually payable by a tenant. On behalf of the appellant, by way of reply, it was contended that the order amounts to one that would naturally go to affect the amount of rent payable by the tenant. The facts of the case are, that a rent suit was instituted by the landlord against the defendant-respondent. A question arose in that suit how much was *mafi* in favour of the defendant of that suit, who was a *jeth raiyat*. The first Court gave a decree and in appeal to the District Judge that learned officer held that the *mafi* was Rs. 3-5-0 on the whole rent. The plaintiff has now appealed to this Court. We are of opinion that Rs. 3-5-0 or any sum that may have been mentioned in the *khatian* as *mafi* was not rent. The defendant who is a respondent in the present appeal was a *jeth raiyat*, and *jeth raiyats* have to perform certain duties under the landlord, as for example, calling tenants for the collection of rent and such similar duties, and for that they are allowed by the landlord, by way of wages and instead of payment in cash, a *mafi* from the total rent. This *mafi* is not rent because it is a sum of money payable by the landlord to the tenant. Rent is money which is payable by the tenant to the landlord, and the *mafi* is a set-off against the rent. It is also important to note that in the suit itself there was no dispute as to the annual rent payable by the tenant. The dispute was as to whether a tenant is or is not entitled to claim this *mafi* as a set-off, and for the above reasons we hold that under section 153 of the Bengal Tenancy Act no appeal lies to this Court.

The appeal, therefore, must be dismissed with costs.

ROE, J.—I agree.

Appeal dismissed.

UZIR v. HARI CHARAN PAL.

CALCUTTA HIGH COURT.

CIVIL RULE No. 480 of 1916.

July 21, 1916.

Present:—Justice Sir Asutosh Mookerji,
Kt., and Mr. Justice Cuming.Sheikh UZIR—*Pro forma* DEFENDANT

No. 2—PETITIONER

versus

HARI CHARAN PAL AND OTHERS—

PLAINTIFF AND *Pro forma* DEFENDANTS

Nos. 3 AND 4—OPPOSITE PARTIES.

Landlord and tenant—Suit for rent by co-sharer landlord, or in the alternative for refund of excess collected by other sharers, maintainability of—Necessity of distinct averments in plaint—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31.

A suit is maintainable by one of several joint landlords for recovery of the balance of rent due from a tenant and in the alternative, for recovery of sums which may have been collected by his co-sharers in excess of their legitimate share. [p. 671, col. 2.]

Ahamudin v. Grish Chunder Shamunt, 4 C. 350; 1 Shome L. R. 169; 2 Ind. Dec. (n. s.) 222; *Sham Singh v. Kishun Sahai*, 6 C. L. J. 190; *Srinivasa Raghava Ayyangar v. Pichakaran*, 29 M. L. 184; *Yerkola v. Mudiya Kamudu*, 4 Ind. Cas. 34; 19 M. L. J. 399; 5 M. L. T. 282, referred to.

The ground for this alternative claim should be specifically set forth in the plaint and should not be made to rest on the general, superfluous prayer asking for such reliefs as to the Court may seem fit, as such general prayer does not cover a relief arising from a different cause of action. [p. 671, col. 2; p. 672, col. 1.]

Mohummud Zahoor Ali Khan v. Musammat Thakooranee Rutta Koer, 11 M. L. A. 468; 9 W. R. P. C. 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 32; 20 E. R. 177; *Sital Das Babaji v. Pertap Chunder Sarma*, 3 Ind. Cas. 408; 11 C. L. J. 2; *Basawan Kurmi v. Nakchhedi Pande*, 27 A. 174; A. W. N. (1804) 207; 1 A. L. J. 628; *Gopi Narain Khana v. Bansidhar*, 32 I. A. 123; 27 A. 325; 9 C. W. N. 577 (P.C.); 2 A. L. J. 336; 2 C. L. J. 173; 7 Bom. L. R. 427; 15 M. L. J. 191; 8 Sar. P. C. J. 799; *Debi Dayal Sahoo v. Bhan Pertap Singh* 31 C. 433; 8 C. W. N. 408, referred to.

A suit by one of several joint landlords for recovery of sums which may have been collected by his co-sharers from the tenant in excess of their legitimate share is not cognizable by a Court of Small Causes. [p. 672, col. 1.]

Rule against the order of the Munsif, first Court, Sealdah, exercising the powers of a Court of Small Causes.

Babus Brij Mohan Mazumdar, Pramathanath Banerjee and Jatindra Mohan Chowdhury, for the Petitioner.

Dr. Dwarkanath Mitter and Babu Debendra-nath Mandal, for the Opposite Party.

JUDGMENT.—In this Rule the question for consideration is, whether the Small Cause Court Judge properly made a decree against

the petitioner. The plaintiff instituted this suit for recovery of arrears of rent from the 1st defendant, who was described in the plaint as the principal defendant. Three other persons were joined as *pro forma* defendants. The allegations in the plaint do not establish any cause of action against these persons, indeed, the only prayer was that a decree for Rs. 12 might be made in favour of the plaintiff against the defendant, that is, the principal defendant. At the trial, it transpired that the 2nd defendant (who was alleged by the plaintiff to be his co-sharer) had realised from the tenant defendant the amount claimed. The Court thereupon proceeded to dismiss the suit as against the tenant and make a decree against the 2nd defendant. The second defendant, who is the petitioner in this Court, contends that the decree should be set aside on two grounds; *first*, that as the plaint does not disclose a cause of action against him, he could not be justly made liable; and *secondly*, that even if the plaintiff were allowed to put forward a claim against him, such claim would be excluded from the jurisdiction of the Small Cause Court by the second portion of Article 31 of the Second Schedule of the Provincial Small Cause Courts Act. In our opinion these contentions are well founded.

As regards the *first* ground, it is not disputed that there was no prayer for relief as against the 2nd defendant and the facts set out in the plaint do not disclose a cause of action against him. It is argued, however, that the Court was competent to make a decree against him on the basis of the general prayer in the plaint. There is clearly no force in this contention. No doubt, a suit is maintainable by one of several joint landlords for recovery of balance of rent due from a tenant; and in the alternative, for recovery of sums which may have been collected by his co-sharers in excess of this legitimate share, *Ahamudin v. Grish Chunder Shamunt*(1), *Sham Singh v. Kishun Sahai*(2), *Srinivasa Raghava Ayyangar v. Pichakaran*(3), *Yerkola v. Mudiya Kamudu*(4). But, if relief is sought in the alternative in this manner,

(1) 4 C. 350; 1 Shome L. R. 169; 2 Ind. Dec. (n. s.) 222.

(2) 6 C. L. J. 190.

(3) 29 M. 184.

(4) 4 Ind. Cas. 34; 19 M. L. J. 399; 5 M. L. T. 282.

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foundation for the claim must be laid in the allegations. Assume that the Court possesses considerable latitude of judicial discretion to afford suitable relief to a plaintiff on the basis of the general prayer, which, it may be observed, is superfluous under Order VII, rule 7; Civil Procedure Code, yet it is plain that though a general prayer may well cover any other relief arising out of the same cause of action, it does not cover a relief arising from a different cause of action: *Mohummud Zahoor Ali-Khan v. Musammat Thakoranee Rutta Koer* (5), *Sital Das Babaji v. Tertap Chunder Sarma* (6), *Basawan Kurni v. Nakchhedi Pande* (7), *Gopi Narain Khana v. Bansidhar* (8), *Debi Doyal Sahoo v. Bhan Pertap Singh* (9). The relief granted must be consistent with and be founded on the allegations in the plaint; no decree can be properly made against a defendant, who, on the face of the plaint, is not called upon to meet any claim. From this point of view alone, the decree cannot be sustained.

As regards the second ground, it is clear that the claim against the 2nd defendant as now put forward, is in substance a claim for recovery of profits of immoveable property wrongfully received by him; it is not a suit for money had and received, as in *Narayan Bhaskar Khot v. Balaji Bapuji Khot* (10), *Damodar Gopal Dikshit v. Chintaman Balkrishna Karve* (11), *Vasudeo v. Damodar* (12), *Girjabai v. Raghunath* (13), *Anrudh Singh v. Amardat Singh* (14), *Subbu Reddi v. Veera Reddi* (15). Consequently, on the special facts of this case the suit as against the 2nd defendant would not be cognizable by a Court of Small Causes.

The result is that this Rule is made absolute and the decree of the Small Cause Court Judge set aside. The petitioner is entitled to his costs in this Court. We assess the hearing-fee at one gold mohur.

Rule made absolute.

(5) 11 M. L. A. 468 at p. 474; 9 W. R. (P. C.) 9; 2 Suth. P. O. J. 107; 2 Sar. P. C. J. 520; 20 E. R. 177.

(6) 3 Ind. Cas. 408; 11 C. L. J. 2.

(7) 27 A. 174; A. W. N. (1904) 207; 1 A. L. J. 628.

(8) 32 I. A. 123; 27 A. 325; 9 C. W. N. 577; (P. C.); 2 A. L. J. 336; 2 C. L. J. 173; 7 Bom. L. R. 427; 15 M. L. J. 191; 8 Sar. P. C. J. 799.

(9) 31 C. 433; 8 C. W. N. 408.

(10) 21 B. 248; 11 Ind. Dec. (N. s.) 168.

(11) 17 B. 42; 9 Ind. Dec. (N. s.) 28.

(12) 6 Bom. L. R. 370.

(13) 7 Bom. L. R. 741; 30 B. 147.

(14) 4 O. C. 89.

(15) 7 Ind. Cas. 390; (1910) M. W. N. 399; 8 M. L. T. 281.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 153 OF 1916.

January 25, 1917.

Present:—Mr. Justice Ormond.

MAUNG SAN LIN *alias* BAIK FARID

—DEFENDANT—APPELLANT

versus

MAUNG SHWE THEIN AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Compromise—Time fixed by consent, whether can be extended by Court.

In a suit for redemption, where the parties have by compromise fixed a time for redemption, the Court has no power to extend the time without consent of parties.

Australasian Automatic Weighing Machine Co. v. Walter, (1891) W. N. (Eng.) 170, referred to.

Mr. Cowasjee, for the Appellant.

JUDGMENT.—The plaintiff sued the defendant appellant for redemption. The case was compromised by consent. The terms were that on payment of Rs. 200 on or before first lazok of Tubodwe, 1277 B. E. by the plaintiffs to the defendants, the defendants were to make over possession of the disputed land to the plaintiffs. Failing payment as above, the plaintiff will lose all rights to the land. The plaintiff failed to make payment by the due date, but on the 1st of March 1916, that is, 11 days out of time, the plaintiff paid the money to the bailiff of the Court and applied to the Sub-Divisional Judge to allow the money to be paid in and extend the time for that purpose. His application was refused. He appealed to the Divisional Court and the Divisional Judge, out of sympathy for the plaintiffs who were agriculturists, thought that the time should have been extended by the Court and set aside the order of the Sub-Divisional Judge. The defendants now appeal. The Divisional Judge, I think, overlooked the fact that it was an order by consent. The Court has no jurisdiction to vary that order. See judgment in First Civil Appeal No. 138 of 1912 dated 4th March 1914, also *Australasian Automatic Weighing Machine Co. v. Walter* (1). The appeal is allowed with two gold mohurs costs, and plaintiff's application for extension of time is dismissed.

Appeal allowed.

(1) (1891) W. N. (Eng.) 170.

ABDUL KASIM v. THAMBUSAMI PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 768 OF 1915.

CIVIL MISCELLANEOUS SECOND APPEAL No. 88
OF 1915.

September 15, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Krishnan.

ABDUL KASIM—CLAIM-PETITIONER—
PETITIONER IN C. R. P. AND APPELLANT
IN O. M. S. A.

versus

THAMBUSAMI PILLAI AND OTHERS—
PLAINTIFF AND LEGAL REPRESENTATIVE
OF DEFENDANT NO. 1—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 47, 102,
115—Small Cause decree—Execution proceedings—
Claim by exonerated defendant, allowed by first
Court, but dismissed on appeal—Appeal or revision to
High Court, whether lies.*

A defendant who is exonerated from liability to the plaintiff under a Small Cause decree, does not cease to be a party to the suit unless his name is actually removed.

Gadicherla China Seetayya v. Gadicherla Seetayya, 21 M. 45; 7 Ind. Dec. (N. S.) 388; *Ramaswami Sastrulu v. Kameswaramma*, 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653, referred to.

An enquiry, therefore, into a claim presented by a defendant, thus exonerated, to property attached in execution against a co-defendant, against whom the suit was decreed, is a proceeding under section 47, Civil Procedure Code, and an appeal lies against the order passed therein. There is no further appeal to the High Court under section 102, Civil Procedure Code, against the order of the Appellate Court, nor does a petition lie in revision under section 115, Civil Procedure Code, inasmuch as the Appellate Court does not act without jurisdiction in entertaining the appeal.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge, Tanjore, and appeal against the decree of the said Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 580 of 1914, preferred against the order of the Court of the District Munsif, Negapatam, in Miscellaneous Appeal No. 598 of 1914, in Small Cause Suit No. 831 of 1912, on the file of the Court of the Subordinate Judge, Negapatam, and under execution in the District Munsif's Court of Negapatam.

The Hon'ble Mr. T. Rangachariar (with him Mr. N. M. Malim Sahib), for the Appellant.

Mr. R. Kuppuswami Aiyar, for the Respondents.

JUDGMENT.—The second defendant was

a party to the Small Cause suit in which the decree under execution was passed; and the lower Court's judgments were given, the District Munsif's allowing and the Subordinate Judge's dismissing his claim to the attached property.

The first question is whether this appeal to this Court lies. We must hold that it does not with reference to section 102 of the Code of Civil Procedure. Vide *Aithala v. Subbana* (1). The second appeal (Appeal against Appellate Order), therefore, must be dismissed.

Next he has also filed a revision petition and we have to consider whether the conditions postulated by section 115 of the Code of Civil Procedure are fulfilled. We have been pressed only by one argument, which calls for notice, that the second defendant was not a party throughout the suit in which the decree under execution was passed and that, therefore, the enquiry into his claim was not held under section 47 and no appeal lay. If the lower Appellate Court heard an appeal which did not lie, it would no doubt have acted without jurisdiction and interference under section 115 would be justified. We, however, are not satisfied that the second defendant was not a party throughout. The second defendant, as the decree states, was exonerated by the plaintiff. But there is nothing before us to show that this exonerated resulted in anything except the dismissal of the suit against him or that there was any such removal of his name from the suit as appears to have taken place in *Gadicherla China Seetayya v. Gadicherla Seetayya* (2). Vide also *Ramaswami Sastrulu v. Kameswaramma* (3). In these circumstances the 2nd defendant did not cease to be a party to the suit. The subsequent proceedings between him and the plaintiff were, therefore, under section 47 and the order in them was appealable. There is, therefore, no ground for interfering with the Subordinate Judge's order in revision. The civil revision petition is, therefore, dismissed with costs.

Petition dismissed.

V.R.P.

(1) 12 M. 116; 4 Ind. Dec. (N. S.) 430.

(2) 21 M. 45; 7 Ind. Dec. (N. S.) 388.

(3) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653

TAJ BEGAM v. SARVI BEGAM.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 98 OF 1915.
June 30, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Sundar Lal.

TAJ BEGAM—OBJECTOR—APPELLANT

versus

SARVI BEGAM—DECREE-HOLDER—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XX, rr. 5, 6, 7—Decree, construction of, principles applicable to—Order contingent on certain information called for, whether final—Review of order, dismissal of, effect of. Appeal, dismissal of, as premature—Enunciation of principles obiter—Appeal, subsequent, against final order—Res judicata—Compromise decree disallowing interest—Execution—Interest, claim for, legality of.

Where a compromise decree for mesne profits, which reserved the determination of the amount in execution, expressly disallowed interest thereon, an order passed in execution on the application of the decree-holder allowing interest, on the ground that under the Code of Civil Procedure the term 'mesne profits' includes interest on mesne profits, is illegal. [p. 680, col. 2.]

Where a decree is ambiguous or not clear it should be read in the light of the judgment, as the decree states only the final relief granted or other determination of the suit and does not afford any information as to the matters which were in issue or have been decided. [p. 679, col. 1.]

Kali Krishna Tugore v. Secretary of State, 15 I. A. 186; 16 C. 173; 12 Ind. Jur. 413; 5 Sar. P. C. J. 237; 8 Ind. Dec. (N. S.) 115, and *Amriteswari Debi v. Secretary of State*, 24 C. 604 at p. 519; 24 I. A. 33; 1 C. W. N. 249; 7 Sar. P. C. J. 101; 12 Ind. Dec. (N. S.) 1003, referred to.

An order passed by a Court contingent on certain information which the parties are directed to furnish is not a final decision, and the dismissal of an appeal against such order on the ground of its being premature, is not an affirmance of that order so as to operate as *res judicata* in a subsequent appeal against the final order passed after the information was furnished in respect of the matters in controversy. The decision in the earlier appeal is only an affirmance of the order directing the parties to furnish further information, and the discussion of some principles of law by the Appellate Court which were intended to help the parties and the Court below to arrive at the final order and to save the necessity of a further appeal, is only to be understood as *obiter dicta* and is not *res judicata* in an appeal against the final order. When no appeal lies, the Appellate Court has no jurisdiction to affirm, reverse or modify the decree or order of the Court below. [p. 679, cols. 1 & 2.]

Mubarak Hussain v. Bihari, 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199, *Lachman Prasad v. Jamma Prasad*, 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109, *Ganendra Nath Roy Chowdhury v. Surja Kanta Roy Chowdhury*, 15 Ind. Cas. 39; 17 C. W. N. 462, referred to.

Ram Kirpal v. Rup Kauri, 6 A. 269; 11 I. A. 37; 4

Sar. P. C. J. 499; 3 Ind. Dec. (N. S.) 718, distinguished.

The rejection of an application for review of a preliminary order does not give it any finality or make it *res judicata* in a subsequent proceeding. [p. 680, col. 2.]

Per Walsh, J.—No Court should construe a decree without looking at the issues and ascertaining what was really determined with the help of the judgment. Similarly, no satisfactory conclusion can be arrived at as to what was determined by an appellate decree without looking at the grounds raised in appeal and in some way or another ascertaining what issues were actually discussed and decided. An executing Court cannot go behind a decree in the sense that it cannot alter, modify or amend its terms. But it can go behind it to ascertain what the decree operates upon. [p. 680, col. 2; p. 681, col. 1.]

A compromise decree was passed in favour of S. for possession of certain property and mesne profits, the amount of the latter being left to be determined in execution. The decree specifically disallowed interest on the mesne profits. The mesne profits having been determined, S. applied for execution and claimed interest on the amount. The Subordinate Judge considered that, though the decree was silent as to interest, the same was legally awardable and he concluded his order by saying that S. was entitled to recover from T and others "Rs. 7,460-4-0 mesne profits up to date of plaint. This set of defendants are liable to pay the amount of mesne profits with interest and proportionate costs." No final orders were, however, passed but the decree-holders were required to state what amounts were due by each party of judgment-debtors and what sum was realized from T's share and what amount T. was liable to pay. The defendants applied for a review of this order, which was rejected. Without furnishing the information and awaiting final decision, the defendants appealed to the High Court against the said order which was dismissed as premature. The High Court proceeded, however, to discuss some principles of law. The final order having been passed allowing interest on the mesne profits, the defendants again appealed against it. It was contended for the plaintiffs that the dismissal of the earlier appeal operated as *res judicata*.

Held, (1) that the first order of the lower Court was not a final order; [p. 677, col. 1.]

(2) that the rejection of the application for its review did not place it on a better footing; [p. 680, col. 2.]

(3) that the dismissal of the appeal preferred against that order did not operate as *res judicata* in the present appeal; [p. 679, col. 2.]

(3) that it was competent to the High Court to construe the decree unaffected by its earlier order in appeal and to regard the matter as now open to appeal for the first time; [p. 679, col. 2.]

(4) that, on the construction of the decree, interest could not be awarded on the mesne profits. [p. 680, col. 2.]

Execution first appeal from a decree of the Subordinate Judge, Meerut.

The Hon'ble Dr. Tej Bahadur Sapru (with him Mr. Sham Nath Mushran), for the Appellant.

TAJ BEGAM v. SARVI BEGAM.

Mr. Peary Lal Banerji for the Respondent.
JUDGMENT.

SUNDAR LAL, J.—This is an appeal arising out of the execution of a decree made on 31st March 1905, in a suit brought by *Musammât Sarvi Begam* for her share in the estate of her father *Mir Khan Sardar Bahadur*. The sons of *Mir Khan Sardar Bahadur*, his daughters and other heirs were made defendants to the suit. The plaintiff also claimed mesne profits for a period of three years preceding the suit and also future mesne profits. The claim for possession of the property was decreed by compromise, and so also the claim for mesne profits. It was, however, expressly stated in the compromise that the amount of mesne profits would not carry interest. The amount of the mesne profits was to be determined in the execution department. The decree passed in the case embodies the terms of the compromise.

An application for the determination of the amount of mesne profits was made to the Court below and Mr. David, the then Subordinate Judge, determined the amount of mesne profits by his order dated 28th August 1905. It appears that the other daughters (among whom was *Taj Begam*) of *Mir Khan Sardar Bahadur* had also brought their suits for their share of their father's estate and mesne profits and had obtained their respective decrees for possession and mesne profits. *Taj Begam* got her decree for mesne profits with interest thereon at 12 per cent. per annum. One of the points which Mr. David had to determine in the enquiry was whether the daughters were liable to pay future mesne profits. He held that as the daughters were out of possession, they were not liable for future mesne profits. *Musammât Taj Begam* was held responsible only for profits for the three years immediately preceding the suit. Mr. David notes on his judgment the fact that in the case of *Sarvi Begam* the decree for mesne profits in her favour did not carry interest, but that in the case of the decree obtained by *Taj Begam* interest on mesne profits was allowed at 12 per cent. per annum. A decree for the amount of mesne profits passed by Mr. David was drawn up in accordance with his order. It seems from Mr. David's order that he held an inquiry about the mesne profits due to the other

daughters of *Mir Khan Sardar Bahadur* as well. He gives in his order a full history of the litigation. The amount of mesne profits found due to *Sarvi Begam* was fixed at Rs. 17,064-10-9.

On 28th February 1912, an application for the execution of the decree passed in favour of *Sarvi Begam* was made by the decree-holder against the several judgment-debtors, among whom was *Musammât Taj Begam*, who is the appellant in this appeal. Execution was sought to recover a sum of Rs. 10,904-8 by the sale of the property of the judgment-debtors.

The amount of Rs. 10,910-4-8 is stated to have been thus made up:—

	Rs.	a.	p.
1. On account of the amount shown as due on the previous application for execution which was struck off on 15th January 1912	6,514	6	6
2. An item of costs	135	8	2
3. On account of decree for proportionate amount— <i>Taj Begam, decree-holder v. Sarvi Begam</i> , No. 295 of 1909 of the Court of the Additional Judge of Meerut, realized out of the sale proceeds of the sale of the property of the judgment-debtors amounting to Rs. 10,325 by <i>Taj Begam</i> , the second decree-holder in execution Case No. 7 of 1906	4,159	6	4
4. Costs	101	0	0
TOTAL	10,900	4	6

I have already noted that the amount of mesne profits found due to *Sarvi Begam* was Rs. 17,064-10-9. In execution of that decree a sum of Rs. 10,325 was realized by sale of some of the property. The money so realized was taken by *Musammât Sarvi Begam* alone but *Taj Begam* had applied for a rateable distribution on account of her decree for mesne profits. The application was disallowed. She thereupon brought a regular suit for her share of the money. She obtained a decree for her proportionate part of the mesne profits out of this sum of Rs. 10,325, realized by *Sarvi Begam*. This is the suit referred to as Suit No. 295 of 1909. The amount decreed to *Taj Begam*

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with interest at 12 per cent. per annum (which was the rate of interest awarded to her by the decree obtained by her for mesne profits) came up to Rs. 4,159-6-4.

Musammât Sarvi Begam had, however, on the realization of Rs. 10,325 credited the whole of that amount against the mesne profits awarded to her (i.e., Rs. 17,064-10-9) and with that credit the decree was left outstanding for Rs. 6,514-6-9. This explains item No. 1 of the details given above, showing how the amount claimed in the application of 28th February 1912 was made up. Items Nos. 2 and 4 of the said detail require no explanation. When Taj Begam obtained a decree for her proportionate share of the mesne profits (which with interest awarded to Taj Begam by her decree amounted to Rs. 4,159-6-4), Musammât Sarvi Begam had to refund that amount, which she, therefore, became entitled to add to the sum of Rs. 6,514-6-6 mentioned under the first item, as still due. At the hearing of the appeal Dr. Tej Bahadur Sapru, on behalf of the appellant, stated that on the application for execution of 28th February 1912, no interest had been claimed by Sarvi Begam on the amount of mesne profits in accordance with the terms of the compromise decree and Mr. David's decree. Mr. Peary Lal Banerji was unable to make any statement on this point on that date. We, therefore, adjourned the case to enable him to examine the execution record and make his statement on the point. We have also examined the execution file. When the case came up again for hearing some weeks afterwards, Mr. Peary Lal Banerji was unable to point out from the record that any interest was actually claimed on the mesne profits. He asked us, however, for leave to file an affidavit on behalf of his client's agent to prove that interest was claimed as a matter of fact. The point under enquiry was one to be ascertained from an examination of the record itself. The record certainly does not show that interest was claimed on mesne profits. We cannot admit the version of the application for execution given in the form of an affidavit by the client's agent. It is the gloss put by him on the application for execution. This is a matter for the Court to determine for itself on an examination of the application for execution and we held that the affidavit was irrelevant

upon this point. The agent's reading of the application as put in the form of the affidavit could not be put in as evidence and we, therefore, refused to give leave to file the belated affidavit. Mr. Peary Lal Banerji then attempted to show that the application of 28th February 1912 did in fact claim interest on mesne profits. The details showing how the claim was made up certainly do not show that any claim for interest on mesne profits was made. It is true that in the third item of the detail, viz., Rs. 4,159-6-4 due to Taj Begam for her share on rateable distribution on account of her decree as explained above, included interest awarded by her decree to her at 12 per cent. per annum. This was the amount awarded to Taj Begam on her decree and this was her share out of Rs. 10,325 realized by execution. The balance left was all that was payable to Sarvi Begam. A refund of the rateable share of mesne profits to Taj Begam with interest awarded to her by her decree does not imply a claim by Sarvi Begam for interest on the mesne profits awarded to her. It is clear from the account that no interest, as a matter of fact, was claimed in the application for execution of 28th February 1912. Under a misapprehension, however, of the application Taj Begam among other objections urged that no interest should have been claimed on mesne profits. I will now state what happened under this erroneous impression.

Objections were filed to the execution of the said decree on 20th June 1912. We are not concerned with any objection other than the 9th objection in that case, which ran in the following terms, viz:—

"(9). No interest was awarded in the decree sought to be executed, but the decree-holder has executed it having charged interest thereon."

The decree-holder filed a reply to this objection on 20th January 1912, the 7th paragraph of which runs as follows:—

"(7). The word mesne profits includes interest also, which should be awarded according to law and justice."

Rai Bahadur Pandit Mohan Lal Hukku who heard the objections held that though no express order about the payment of interest on mesne profits was made in the decree, yet under the Code of Civil Procedure the term mesne profits includes in-

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terest on mesne profits. He concludes his judgment by holding that Sarvi Begam was entitled to recover from Taj Begam and others a sum of "Rs. 7,450-4-0 mesne profits up to the date of plaint. This set of defendants are liable to pay the amount of mesne profits with interest and proportionate costs."

He, however, passed no final orders but directed the decree-holders to furnish certain information. The formal order prepared in this order runs as follows:—

"It is ordered that Sarvi Begam, decree-holder, applicant, do state what amount or amounts are due by each party of judgment-debtors and show what sum has already been realized from Taj Begam's share in Baraut and other property and what amount Taj Begam is now liable to pay."

I have examined the execution records. I find that in the earlier stages of execution several applications are filed in which it is stated that the decree for mesne profits did not carry any interest, but by this time the old Pleaders who had appeared in the original suit had all died or retired. New men unacquainted with the history of the execution and the terms of the decree had taken their place, and a new officer was now presiding over the Court. I am not, therefore, surprised at the terms of the decree being overlooked both by the Pleaders and by Rai Bahadur Pandit Mohan Lal Hukku who decided the objection. They also overlooked the fact that in the application of 28th February 1912, no interest had in fact been claimed on the mesne profits. This order, however, was not a final order on the objection. The learned Subordinate Judge required the plaintiff to state what amount *Musammam* Taj Begam was liable for on the application. He further required the decree-holder to state what amount or amounts were due by each party of judgment-debtors, and what sum had already been realized by the sale of Baraut and other properties of Taj Begam.

A final order on this objection could only be made when the figures were supplied to, and examined by, the Judge. What happened is analogous to what is often done, *viz.*, recording a judgment on some of the issues in the case, the final judgment being passed later on when the remaining issues were decided. Although there was no final order in execu-

tion yet made to afford ground for an appeal under section 47 of the Code, Taj Begam preferred an appeal against the decision of some of the issues to this Court. No appeal lay at that stage, and it was clearly premature for her to file the appeal. The order of Pandit Mohan Lal Hukku (if it be pleaded as an authority under which alone the interest is claimable) did not mention the rate of interest awarded, nor the period of time for which interest was payable. He would have probably recorded orders dealing with all these points as soon as the decree-holder had furnished the figures.

Before however this was or could be done, Taj Begam preferred an appeal to this Court from the expression of views recorded by the Court below, on some of the points in issue, for this is all that was in effect done by this time, and the further stage necessary to give a right of appeal had not arrived yet.

This was First Appeal No. 94 of 1913. The appeal came up before a Bench of this Court presided over by the Hon'ble Sir Pramada Charan Banerji and the Hon'ble Mr Justice Ryves on 24th July 1913.

The judgment of their Lordships opens by saying that the appeal was premature. They observe that certain objections were made by the judgment-debtor in the Court below which the Court below had disposed of, but they pointed out that "that Court, however, has not made any final order in the matter, and it consequently seems to us that this appeal is premature."

After coming to that conclusion their Lordships, proceed to consider certain points of principle decided by the Court below and dismiss the appeal. The decree prepared in this Court on the appeal confirms the decree of the Court below and dismisses the appeal. One of the questions in this appeal is, whether it precludes the appellant from raising the question of interest on mesne profits which was raised in the Court below. Before, however, dealing with the points arising in the appeal, I will refer to two other matters which have some bearing on the appeal. An application for review of the judgment was made by *Musammam* Taj Begam. It was rejected on the 24th July 1913. On 27th May 1914, *Musammam* Taj Begam applied to Babu Bans Gopal, Subordinate Judge of Meerut, to amend the

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decree made by Mr. David on 28th August 1905, by adding words to the effect that the decree-holder will not be entitled to future interest on mesne profits. The application was made under sections 152 and 153 of the Code. It was rejected on 28th August 1914.

The application of 28th February 1912 is still pending. The decree-holder has now claimed interest on mesne profits. The judgment-debtor objected to the claim for interest on 31st August 1914. The Court below disallowed the objections on 22nd September 1914. It has supplied the deficiencies in the order of Pandit Mohan Lal Hukku and has directed that interest prior to the date of the determination of the mesne profits should be calculated at the rate of 12 per cent. per annum, and thereafter at six per cent. per annum. It is against this order that the present appeal has been lodged.

On the facts I have stated, which are evident on the examination of the decree of 3rd March 1910 and Mr. David's order of 28th August 1905, it is clear that no interest was payable on the mesne profits. The decree expressly says so, and so does Mr. David's order. He has not calculated and awarded any such interest for the period prior to the date of the determination of mesne profits. The order itself is conclusive on the point. Pandit Mohan Lal Hukku did not, in his order of 2nd September 1912, hold that interest for that period was payable. The order of Babu Bans Gopal awarding interest at 12 cent. per annum for the said period is erroneous, and contrary to the terms of the original decree and the decree or order by which the amount of mesne profits was determined. There is also no order in the decree or in Mr. David's order for the payment of future interest. Looking, therefore, to the merits of the claim, it is entirely untenable and is in the teeth of the compromise decree. The question before us, however, is whether by reason of any subsequent order the judgment-debtor is precluded from setting up the true state of things.

The first contention urged on behalf of Sarvi Begam, respondent, is that Pandit Mohan Lal Hukku's order of 2nd September 1912 has put a construction on the decree of 31st March 1900, which is

binding upon the parties. Pandit Mohan Lal Hukku never looked at that decree, nor attempted to construe it. He only considered a hypothetical case, where the decree was silent upon the point (but this decree is not silent upon the point, and expressly states that no interest will run on the mesne profits). There was no claim made by Sarvi Begam for interest, and the discussion was purely academical. The adjudication was also defective and incomplete in that it did not state the rate of interest, nor the period of time for which it was payable, and lastly no final order was made on the application. All that was done was to call for certain particulars which were to be supplied as a necessary preliminary to the passing of final orders on the application. There was nothing to preclude Pandit Mohan Lal Hukku, on the true state of facts being brought to his notice at any time before he made his final order, from correcting his previous orders on the issues provisionally decided by him. What has happened in this case is analogous to what sometimes happens in a Court of Appeal. A Judge hears an appeal and remits certain issues for trial by the Court below. Before the receipt of the findings the Judge who made the order is transferred. His successor may disregard the order remitting issues and re-hear and decide the whole case. *Mubarak Husain v. Bihari* (1), per Edge, C. J., and Burkitt, J., affirming Aikman, J., in appeal under Letters Patent; *Lachman Prasad v. Jamna Prasad* (2); *Ganendra Nath Roy Chowdhury v. Surja Kanta Roy Chowdhury* (3).

In the last mentioned case, even the Judge who had pronounced his views in an earlier stage of the appeal was not held bound to adhere to his views, if later on, before he had decided the appeal he saw reason to change them. What Pandit Mohan Lal Hukku did on 2nd September 1912, does not stand on a higher footing.

The next question which arises is, what effect has the decree of this Court in appeal against the order of Pandit Mohan Lal Hukku? The moment his judgment was appealed against, it ceased to be

(1) 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199.

(2) 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109.

(3) 15 Ind. Cas. 39; 17 C. W. N. 462.

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res judicata by reason of the pendency of the appeal. It has been argued that the decree of this Court affirmed the decree of the Court below. This is so. The decree of the Court below directs the decree-holder to supply certain information and that is all that is confirmed by the decree of this Court. If no other papers are to be referred to to ascertain what was decided and the question is to be decided on a perusal of the decrees alone, there is nothing in them to show that the question of interest payable on mesne profits was decided. It is, however, not enough to look at the decree alone. As observed by their Lordships of the Privy Council in the case of *Kali Krishna Tagore v. Secretary of State* (4), "In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided." In a later case, *Amriteswari Devi v. Secretary of State* (5), their Lordships again observed: "And they cannot avoid the observation that in the Court below sufficient attention has not been paid to the rule that, in cases where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause." The question in this case is of course not one of *res judicata*. We have merely to determine whether the question now before the Court has really been finally decided by a previous order made in the same execution proceeding. The same principles apply to a case like this, when it is necessary to ascertain what has been really finally decided on the previous occasion.

Looking to the judgment of this Court and reading the decree in the light of that judgment, it is clear that the appeal was dismissed on the ground that it was

(4) 15 I. A. 146; 16 O. 173; 12 Ind. Jur. 43; 5 Sar. P. C. J. 237; 8 Ind. Dec. (N. S.) 115.
(5) 24 O. 504 at p. 519; 24 I. A. 33; 1 C. W. N. 249; 7 Sar. P. C. J. 101; 12 Ind. Dec. (N. S.) 1003.

premature. It is true that the judgment of this Court proceeds to discuss a few other matters which had been placed before it by the parties. But if the appeal was premature, any discussion of those matters was no less premature and any pronouncement made upon them, though entitled to the highest weight and respect, is really not upon the same footing as matters disposed of which rightly arose and were decided in an appeal which this Court had jurisdiction to entertain. The observations were made more to help the parties and the Court below to arrive at the final decree and to save the necessity of a further appeal to obtain an expression of the view of this Court upon those points. The Court was, however, not invited to express any views on the question of interest on mesne profits (though it was the subject of a plea in the appeal). If an appeal lay to this Court, the failure to press that plea would have perhaps amounted to an implied adjudication of the point and affirmation of the views of the Court below. But where no appeal lies at all at that stage, the failure to invite this Court to express its views upon that point also does not stand upon the same footing. There was no legal obligation upon the appellant to invoke the decision of any point by a Court of Appeal, when no appeal lay to it. He may, as he was entitled to do, reserve it for decision when it arose in a proper appeal, and when the matter had become ripe for appeal later on. Even if there was an appeal to this Court at this stage, and the Court had decided all these points, according to the view taken in this Court in the case of *Shib Charan Lal v. Raghu Nath* (6), the decision of the Court upon the point first arising in order will be taken to be one upon which the decree is based. It is not necessary for us to go so far in this case; when no appeal lay to this Court, it had no jurisdiction to affirm, reverse or modify the decree or order of the Court below.

The decree of this Court cannot, therefore, be taken to be an affirmance of the views of the Court below on the question of interest, and upon this ground alone I would

(6) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.

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prefer to base my judgment. I think that the case had not reached a stage at which Pandit Mohan Lal Hukku could or did pass a final order. When the particulars required were furnished later on to his successor he was in a position to pass a final order in the case. This event has only happened now, and the present appeal has been preferred from that decision.

In the course of his able argument, Mr. Peary Lal Banerji relied upon the decision of their Lordships of the Privy Council in the case of *Ram Kirpal v. Rup Kuari* (7). In that case the plaintiff had claimed possession of certain property with mesne profits. The Court of first instance had made a decree in plaintiff's favour as claimed. That decree was affirmed by the Court of Sadar Diwani Adalat. On 20th December 1867 a question arose as to whether the decree awarded mesne profits, and the District Judge (Mr. Probyn) held that it did. No appeal was preferred against the said order. The parties had apparently accepted the order and execution proceedings had gone on for eleven years on foot of that order. It was then sought to re-open the question. Their Lordships of course refused to permit this being done. In that case Mr. Probyn, the District Judge, had made a final order which was open to appeal, but it had not been appealed against. In this case Mr. Mohan Lal Hukku had made no such order. He had reserved the making of a final order to a later date when the particulars required were supplied. In that case the judgment-debtor accepted the order. In this case the judgment-debtor did not do so but even preferred an infructuous appeal before the matter had become ripe for appeal. She has ever since been contesting it, and now that the matter has been finally decided by the Court below, she has preferred this appeal. We are, therefore, entitled to consider the question of the interpretation of this decree unaffected by the order of this Court and to regard the matter as now open to appeal for the first time.

There remain two other matters for consideration. The first is the effect of the order rejecting the application for review of the order of Pandit Mohan Lal Hukku. There was no final order open to review, and in any

(7) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 482; 3 Ind. Dec. (N. S.) 718.

case a refusal to entertain an application for review leaves the order sought to be reviewed standing on its own legs. It does not give it a firmer or better footing. The other order is the one passed on an application to amend the decree of Mr. David, dated 28th August 1905, determining the amount of mesne profits. The application was rightly rejected. Mr. David's order did not award any interest either for the past or in future, and the addition of the words proposed to be added was not required. The order as it stands does not award any interest on mesne profits, and it could not do so contrary to the terms of the decree on which it is based. The proceedings to determine mesne profits reserved for decision by the decree in the suit are proceedings in continuation of and supplementary to the proceedings in the original suit. The decree in the suit is supplemented by the order and the two must be read together. The refusal to amend the decree does not place the appellant in a worse footing.

We think that the decree under execution does not award any interest on mesne profits, either before or after decree. The order of the Court below, therefore, in so far as it awards such interest must be set aside. I would allow the appeal and set aside the order of the Court below awarding interest on mesne profits either before or after decree. The appellant will get his costs in this appeal.

WALSH, J.—I do not desire to add anything to what Mr. Justice Sundar Lal has so fully said in this case, except to draw attention to the state of the authorities with regard to the construction of decrees. I think it desirable to reiterate what appears to me to have been laid down as the law for a very long time by the highest authority, and also by this Court. It is well established that you cannot construe a decree in a suit without looking at the issues and ascertaining what was really determined, and it may be that you cannot arrive at a satisfactory conclusion without looking at the judgment as well. In the same way you cannot arrive at a satisfactory conclusion as to what was determined by an appellate decree without looking at the grounds raised in appeal, and in some way or another ascertaining what issues were actually discussed and

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decided. It is sometimes said that an execution Court cannot go behind a decree. That is perfectly true in the sense that it cannot alter, modify or amend its terms. But it is untrue in the sense that it cannot go behind it to ascertain what the decree operates upon. The matter could not be more clearly stated than in the passage from the judgment of the Privy Council which my brother has just read.

BY THE COURT.—We allow the appeal and set aside the order of the Court below awarding interest on mesne profits either before or after decree. The appellant will get his costs in this appeal.

Appeal decreed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 188 OF 1915.

September 14, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Krishnan.

MANEPALLI MANGAMMA AND OTHERS—
PETITIONERS—APPELLANTS

versus

MANEPALLI SATHIRAJU—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Promissory note, assignment of—Place of assignment, institution of suit at—Jurisdiction of Court—"Cause of action wholly or in part," meaning of.

The assignment of a promissory note by the payee is a part of the "cause of action" within the meaning of section 20 (c), Civil Procedure Code, and the assignee can sue on it in the Court having jurisdiction where the assignment took place. [p. 682, col. 1.]

Read v. Brown, (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131, followed.

Salig Ram v. Chuba Mal, 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160, distinguished.

On the principle of *stare decisis*, the said rule is applicable to India. [p. 681, col. 2; p. 682, cols. 1 & 2.]

Ittappan v. Manavikrama, 21 M. 153; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465; *Arunachalam Chetty v. Meyyappa Chetty*, 21 M. 91; 8 M. L. J. 28; 7 Ind. Dec. (N. S.) 421; *Dobson and Barlow, Limited v. Bengal Spinning and Weaving Co.*, 21 B. 126; 11 Ind. Dec. (N. S.) 86; *Murti v. Bholaram*, 16 A. 165; A. W. N. (1894) 65; 8 Ind. Dec. (N. S.) 106; *Sheo Prasad v. Lalit Kumar*, 18 A. 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975; *Dau Dial v. Munna Lal*, 24 Ind. Cas. 978; 36 A. 564; 12 A. L. J. 955; *Roghoonath Misser v. Gobindnarain*, 22 C. 451; 11 Ind. Dec. (N. S.) 30, followed.

Per Krishnan, J.—The expression "cause of action," in section 20, Civil Procedure Code, must be read with reference to the suit instituted by the plaintiff;

it means plaintiff's cause of action, and not the cause of action on the documents, sued on irrespective of the rights of the plaintiff under it, in other words, the cause of action as it existed when the right to sue on the note arose for the first time. [p. 683, col. 1.]

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Napier, dated the 28th September 1915, in Civil Revision Petition No. 1005 of 1914, preferred against the order of the Court of the Subordinate Judge of Kistna, at Ellore in Miscellaneous Appeal Suit No. 23 of 1913, in Original Suit No. 125 of 1911, Tanuku District Munsif's Court.

The following is the judgment of Napier, J., which was appealed against:—

"Following *Read v. Brown* (1) which construed the words 'part of cause of action' and held that an assignment is part of a cause of action, I dismiss this petition with costs."

Mr. M. Patanjali Sastri for Mr. B. Somayya, for the Appellants.

Mr. K. G. Sarangaraja Aiyangar, for Mr. V. Ramadoss, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The question in this case is whether the assignee of a promissory note can sue in the Court having jurisdiction where his assignment was made. The learned Judge has decided in the affirmative applying *Read v. Brown* (1).

If the matter was *res integra*, I should be inclined to dissent from his decision, because its consequence in India would be inconvenient in the extreme and I should be unwilling to adopt an interpretation of section 20 (c) of the Code of Civil Procedure which would authorise evasions of the restrictions imposed by the section by means of an easy device. But the general definition of cause of action contained in *Read v. Brown* (1) has been accepted in numerous cases in this country, *Arunachalam Chetty v. Meyyappa Chetty* (2), *Ittappan v. Manavikrama* (3) *Dobson and Barlow Ltd. v. Bengal Spinning and Weaving Company* (4), *Murti*

(1) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

(2) 21 M. 91; 8 M. L. J. 28; 7 Ind. Dec. (N. S.) 421.

(3) 21 M. 153; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465.

(4) 21 B. 126; 11 Ind. Dec. (N. S.) 86.

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v. *Bhola Ram* (5), *Sheo Prasad v. Lalit Kuar* (6), *Dau Dial v. Munna Lal* (7), and in *Roghoonath Misser v. Gobindnarrain* (8) it was expressly held that execution of an assignment within the jurisdiction would enable the Calcutta High Court to entertain the suit with reference to clause 12 of its charter, the terms of which are not for the present purpose distinguishable from those of section 20 (c). In these circumstances I am constrained to concur in the decision of the learned Judge and I would, therefore, dismiss the letters patent appeal with costs.

KRISHNAN, J.—The question for our decision is, whether the assignment of a promissory note by the payee to the plaintiff is a part of the cause of action within the meaning of section 20, clause (c), Civil Procedure Code, so as to give jurisdiction to the Court within whose local limits it took place. The learned Judge who heard the revision petition and against whose judgment the present appeal is filed, answered the question in the affirmative following *Read v. Brown* (1). After careful consideration I am inclined to agree with him.

The case quoted was one of an assignment of a debt and arose under the Mayor's Court Procedure Act, 20 and 21 Vict. C. 157, and the expression to be construed was "cause of action arising wholly or in part within the City of London or the liberties thereof." The Master of the Rolls Lord Esher, and Fry and Lopes, L. JJ., defined "cause of action" as "including every fact necessary to be proved, if traversed, in order to enable plaintiff to sustain his action and which if not proved will give the defendant an immediate right to judgment;" and held that the assignment alleged was part of the cause of action. That case is very similar to the present case and the words construed are the same as in clause (c), section 20. It followed a previous decision in *Cooke v. Gill* (9) and was itself subsequently affirmed in *Coburn v.*

Colledge (10): it has been accepted in England as settling the meaning of the expression "cause of action."

The definition given in it is no doubt a very comprehensive one. All the High Courts in India have accepted and acted upon it in numerous decisions under various sections of the Code and section 12 of the Letters Patent; see for example *It'appa v. Manavikrama* (3) and *Murti v. Bhola Ram* (5), under section 43 of the old Code; *Arumachalam Chetty v. Meyyappa Chetty* (2), as *res judicata*; *Salima Bibi v. Sheikh Muhammad* (11) and *Rajic Kuar v. Debi Dial* (12), under sections 31 and 45 of the old Code; and *Deep Narain Singh v. Dietert* (13) and *Dobson and Barlow Ltd. v. Bengal Spinning and Weaving Co.* (4), under section 12 of the Letters Patent. In *Dau Dial v. Munna Lal* (7) the definition was adopted in a case under clause (c) of section 20 itself. In *Roghoonath Misser v. Gobindnarrain* (8) the indorsement of a *hundi* was held to be a part of the cause of action under section 12 of the Letters Patent though *Read v. Brown* (1), was not referred to. The only case cited where that definition was not accepted is *Haramoni Dassi v. Harichurn Chowdhry* (14); that was a case under section 31 of the old Code and is in conflict with the Allahabad ruling above noted. In a case under section 103 of the Code of 1877 (Act X) the Privy Council held that the "cause of action" meant "the grounds set forth in the plaint as cause of action or in other words the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour"; see *Chand Kour v. Partab Singh* (15). Thus there is a strong current of authority in India for accepting the definition of cause of action in *Read v. Brown* (1) and I have no doubt we must follow it.

If the words "cause of action" mean the cause of action set out by the plaintiff in his plaint, as held by the Privy Council in *Chand Kour v. Partab Singh* (15) above cited, (10) 1897 1 Q. B. 702 at p. 707; 66 L. J. Q. B. 462; 76 L. T. 608; 45 W. R. 488.
(11) 8 A. 131; A. W. N. (1896) 2; 8 Ind. Dec. (N. s.) 794.
(12) 18 A. 432; A. W. N. (1896) 139; 8 Ind. Dec. (N. s.) 993.
(13) 31 C. 274; 8 G. W. N. 207.
(14) 22 C. 833; 11 Ind. Dec. (N. s.) 551.
(15) 16 C. 98 at p. 102; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. s.) 65.

- (5) 16 A. 185; A. W. N. (1894) 65; 8 Ind. Dec. (N. s.) 104.
(6) 18 A. 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. s.) 975.
(7) 24 Ind. Cas. 978; 36 A. 564; 12 A. L. J. 955.
(8) 22 C. 451; 11 Ind. Dec. (N. s.) 301.
(9) (1873) 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.

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we must necessarily hold that the assignment in plaintiff's favour is an essential part of his cause of action, for without it he could not have sued on the note as he has done. There is nothing in the language of section 20, Civil Procedure Code, itself to show that a restricted meaning should be placed upon the expression "cause of action." It was suggested that the term may be taken to mean the cause of action on the document sued on, irrespective of the rights of the plaintiff under it; or in other words, the cause of action as it existed when the right to sue on the note arose for the first time, in which case plaintiff's assignment will not be part of it. I think this suggestion cannot be accepted. The term has to be read with reference to the suit instituted by the plaintiff, dealt with under section 20; it must then mean plaintiff's cause of action.

It may be that the adoption of a wide meaning for the term "cause of action" will lead to inconvenience to defendants in particular cases; but that fact cannot, it seems to me, be used to control our interpretation of the section. A similar argument was raised in *Read v. Brown* (1) but was overruled. See judgment of Manisty, J. If any undesirable results will follow it will be for the Legislature to set the matter right. I may observe that both under the Letters Patent and the Presidency Small Cause Courts Act, where a suit is allowed to be filed if a part of the cause of action arose within jurisdiction, the Legislature has made it conditional on leave being previously obtained from the Court; for some reason not apparent perhaps because of section 22, Civil Procedure Code, no such condition is imposed under section 20, clause (c).

The ruling in *Salig Ram v. Chubu Mal* (6) is, it seems to me, not in point, as it dealt with a case of principal and agent whereas the present case is one on a promissory note. On the finding that no part of the cause of action arose in Hathras, as not only the making of the contract, the performance of it, and the payment of the money under it were to be in Karachi but the negligence or misconduct of the

agent was also in Karachi, the learned Judges held that the Hathras Court had no jurisdiction. That ruling, if I may say so with respect, is clearly correct. But with all respect I am not prepared to agree with the observation that clause (c) of section 20, Civil Procedure Code, must be taken to mean exactly what section 17, clause (a), with Explanation III of the repealed Code meant in all cases of contract. The words of the present Code are similar to those in the Letters Patent and seem to be manifestly wider in scope.

For the above reasons I agree with the judgment of Napier, J., and will dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 4 OF 1916.

June 19, 1917.

*Present:—*Mr. Justice Sharfuddin and
Mr. Justice Roe.

NILMANI GOSWAMI—APPELLANT
versus

ROHAN MAJHI—RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 231—Execution—Sale Judgment-debtor, application by, to set aside sale—Limitation.

Respondent obtained a decree on a mortgage-bond executed by the appellant, and in execution of that decree the latter's holding was sold and purchased by the former. Appellant applied to set aside the sale more than one year after its date.

Held, that under the provisions of section 231 of the Chota Nagpur Tenancy Act, the application should have been made within one year of the date of the sale, and that, consequently, it was barred by limitation. [p. 684, col. 1.]

Samundan Karkat Edathil Rayarappan Nambiar v. Matikandi Aketh Mayan, 23 Ind. Cas. 251; 26 M. L. J. 267, distinguished.

Appeal against the order of the District Judge, Purulia at Manbhum-Sambalpur, dated the 29th July 1915, reversing that of the Munsif, Purulia, dated the 30th January 1915.

Mr. Abani Bhushan Mukerjee, for the Appellant.

JUDGMENT.

SHARFUDDIN, J.—This miscellaneous appeal has been preferred by the decree-holder,

(16) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

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It appears that the decree-holder obtained a decree on a mortgage-bond executed by the present petitioner and in execution of that decree the holding in question was sold and purchased by the mortgagee decree-holder. The sale took place on the 21st December 1912 and was confirmed on the 15th February 1913. The application to set aside the sale was made by the judgment-debtor on the 28th August 1914. The learned Munsif held that Article 166 of the Limitation Act applied to the application and hence it was barred by limitation, because the judgment-debtor had put in the application to set aside the sale more than thirty days after the date of the sale. On this there was an appeal to the District Judge by the judgment-debtor, who allowed the appeal and directed the sale to be set aside. But that learned officer also held that it was Article 166 that applied to the application. Thereupon the decree-holder preferred the present appeal.

It seems to us that the application of the judgment-debtor to set aside the sale is barred by limitation. In the Chota Nagpur Tenancy Act there is a special provision for limitation as regards suits and applications, and section 231 of that Act clearly provides that if there is no provision of limitation in that Act for any suit or application, the limitation provided is one year and under the provisions of this special provision of the Chota Nagpur Tenancy Act the judgment-debtor should have applied to have the sale set aside within one year from the date of the sale. His application is after a year and some months from the date of the sale. On behalf of the judgment-debtor it was contended that the holding which was sold in execution of the mortgage-decree was a *raiyati* holding and under section 47 of the Chota Nagpur Tenancy Act such a holding could not be sold in execution of a decree, and hence it is contended that the sale was null and void. In this connection we have been referred to the case reported as *Samandan Karkat Edathil Rayarappan Nambiar v. Malikandi Aketh Mayan* (1), wherein we find in the head-notes mentioned that when the sale is a nullity section 166 has no application. The head-notes of that

ruling are misleading. We do not find in that report any such proposition of law. Even if section 166 has no application in the case of a sale which is a nullity, the special provision of the Chota Nagpur Tenancy Act has laid down that section 231 may be applicable. As already observed even under that section the judgment-debtor's application to set aside the sale is barred by limitation, and we do not propose to discuss the question as to whether by reason of section 47 of the Chota Nagpur Tenancy Act the sale was null and void. The appeal is, therefore, decreed.

ROE, J.—I agree. The application to set aside the sale was clearly barred by limitation, and the District Court had no jurisdiction to set aside the sale of its own motion.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 172 OF 1915.

July 14, 1916.

Present:—Mr. Justice Walsh and
Mr. Justice Sundar Lal.

MUHAMMAD HABIBULLAH—

APPLICANT

versus

MUSHTAQ HUSAIN AND OTHERS—

OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), s. 36, proceedings under—Transfer by insolvent, questions for determination in—Burden of proof—Dower debt, transfer in discharge of, whether made "before and in consideration of marriage"—Transfer of Property Act (IV of 1882), s. 53.

A transfer of his property by an insolvent to his wife, in lieu of dower settled upon her at the marriage, long after the marriage, is not a transfer made "before and in consideration of marriage" within the meaning of section 36 of the Provincial Insolvency Act. [p. 686, col. 2.]

A dower debt is like an ordinary debt and a transfer to a wife in discharge of dower payable to her may be for valuable consideration. But when such a debt is impugned as fraudulent and the Court holds an enquiry under section 36 of the Provincial Insolvency Act, the following matters are relevant, (1) the amount of the debt, (2) the delay in its discharge, (3) the nature of the debt, (4) the genuineness of the transfer and good faith on the part of the parties, (5) the value of the property transferred. [p. 687, col. 1.]

(1) 23 Ind. Cas. 251; 26 M. L. J. 267.

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Suba Bibi v. Balgobind Das, 8 A. 178; A. W. N. (1886) 51; 4 Ind. Dec. (N. S.) 1149, *Mackintosh v. Pogoze*, (1895) 1 Ch. 505; 64 L. J. Ch. 274; 13 R. 254; 72 L. T. 251; 43 W. R. 247; 2 Manson 27, referred to.

The onus of proving the good faith of the transferee is upon him. [p. 687, col. 1.]

Nilmoni Chowdhuri v. Basanta Kumar Banerjee, 29 Ind. Cas. 814; 19 C. W. N. 865, referred to.

Section 36 of the Provincial Insolvency Act is wider in its scope than section 53 of the Transfer of Property Act. The intent to defeat or delay creditors which is required to be proved under section 53 of the latter Act is not necessary in proceedings under section 36 of the former Act. Under section 36 all that is required is that the transfer must be made within two years of the adjudication of the insolvency of the debtor. [p. 686, col. 2.]

First appeal from an order of the District Judge, Allahabad.

Dr. S. M. Sulaiman, Dr. Surendra Nath Sen and Mr. Benode Behari, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru (with him Messrs. Yusuf Hason, Satya Narain and Muhammad Matin), for the Respondents.

JUDGMENT.—This appeal arises out of proceedings instituted under Act III of 1907. One Mushtaq Ahmad, who is a resident of Mauza Kara in the district of Allahabad, used to carry on business as a contractor and dealer in timber. He entered into a contract for the supply of a certain number of sleepers to one Habibullah, a merchant of Agra. He was not able to perform his part of the contract and Habibullah consequently brought a suit against him on the 15th of April 1913, for the recovery of a sum of Rs. 2,468 for the breach of the contract. The exact date on which the suit was filed is not noted on the copy of the plaint on the record, but the copy shows that it was verified by the plaintiff on the 15th of April 1913, which we take to be the date of the institution of the suit. Soon after the institution of the suit the plaintiff Habibullah applied for the attachment of a deposit held by a Bank, which is described as Jamal Ahmad Bank at Kara. The Court granted the application on the 15th of April 1913, and directed the issue of an injunction to Mushtaq Ahmad restraining him from drawing the deposit as also an order to the Bank restraining it from paying it off to Mushtaq Ahmad. Both these orders were handed over in a cover to one Ali Muhammad, who was a servant of Habibullah, to expedite the delivery to the

Civil Court at Allahabad for service on the persons concerned. It, however, appears that Mushtaq Ahmad was not found at his house in Kara and the injunction issued to him was affixed to his house and the Bank returned an answer that it had paid away the money before service of the injunction. A decree for the amount claimed was passed by the Agra Court in due course and transferred for execution to Bilaspur in the Central Provinces, where Mushtaq Ahmad had a stack of sleepers owned by him. The proceedings were taken to attach and bring to sale the sleepers at Bilaspur. Mushtaq Ahmad thereupon applied on 23rd December 1914 to the District Judge of Allahabad to be adjudicated an insolvent under Act III of 1907. In the schedule of creditors attached to the application the name of Habibullah stands first as a creditor for Rs. 2,500 under a decree in Suit No. 93 of 1913. This is the Agra suit to which reference has already been made. The next creditor set out is one Safdar Ali of Allahabad, who had a decree for Rs. 450 of the Court of Small Causes at Allahabad. The third creditor is Ashiq Husain, son of the insolvent, but who is described as son of Nabir-un-nissa, the first wife of the insolvent. The amount of the debt is said to be Rs. 4,100 due on a *ruqqa* on account of dower debt, which the insolvent had executed in the name of his son. The last creditor is one Saiyed-un-nissa, who is said to be the wife of a brother of the insolvent or some other near relative. The amount of debt is Rs. 300 under a *ruqqa*. It may be noted that Ashiq Husain, the son of the insolvent, is quite a young man who has attained majority. The insolvent in this case has admitted that his son has taken the *theke* of a jungle in the Central Provinces, and that he, Mushtaq Ahmad, is working on his behalf under a power-of-attorney executed by his son. The creditor Habibullah complains that this is a mere blind to defraud the creditors, the real *theke* being Mushtaq Ahmad himself who has used his son's name to protect the property. He also alleges that the debt alleged under the fourth item is also a bogus debt. In the schedule of property owned by the insolvent the stack of sleepers is mentioned as also a few trumpery articles of very little value. No *zamin-dari* or house property which is said to belong to the debtor is set out. The learned

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Judge on the 6th of March 1915 examined the insolvent. He was asked about the two transfers which he had made on the 23rd of May 1913 and the 30th of May 1913.

By the first of these transfers he had disposed of a valuable house and other property to his son, Ashiq Husain, and two other minor children he had by his first wife, for a sum of Rs. 900. He also disposed of another item of property said to be worth Rs 100 in favour of his second wife. The transfer is said to have been made to satisfy the claim for dower which the heirs of the first wife had against him as also the claim for the dower which the second wife had on the husband. The second document is for Rs. 400, which is said to be the balance of the dower debt due to the second wife. By these two documents he disposed of practically all his property and if these documents are upheld, the claims of the creditors will be defeated for all practical purposes. The learned Judge, therefore, in his order of 6th March 1915, directed that the sum of Rs. 4,100 said to be due to the insolvent's son, Ashiq Husain, should not be entered in the schedule without his special order, and he also further directed as follows: "April 16th will be fixed for the parties to adduce their evidence under section 36 of the Act as to whether the transfers in favour of the applicant's sons and wife should be set aside, and in case these transfers are found to be fraudulent to show cause why he should not be punished under section 43 of the Act." It is under this order that the proceedings from which this appeal has arisen were initiated.

Notice of these proceedings does not seem to have been given to the transferees but the matter is of no importance, as Babu Datti Lal appeared on their behalf on the 2nd of July 1915 and he was also present (as would appear from the order sheet) on the 24th of July 1915, the date on which the order appealed against was made. The learned Judge by his order of that date held that one of the transfers, namely that of the 30th of May 1913, was fraudulent, and he set it aside. But he held that the other transfer of the 23rd of April 1913 must be upheld. Habibullah, the creditor, has appealed to this Court against so much of the order as dismisses the claim in respect of the earlier transfer of the 23rd of April 1913. Dr. Tej

Bahadur Sapru on behalf of the transferees has preferred objections under rule 22 of Order XLI against so much of the order of the Court below as has set aside the second transfer of the 30th May 1913. Dr. Sen on behalf of the appellant has urged that the transfer was bad under section 53 of the Transfer of Property Act. The proceedings in the Court below were taken under section 36 of Act III of 1907. Dr. Tej Bahadur Sapru in reply has argued that the Court below had no jurisdiction to entertain the proceedings for setting aside the transfers except on grounds mentioned in sections 36 and 37 of the Act.

Provisions analogous to those contained in section 36 of the Act are to be found in section 47 of the English Bankruptcy Act of 1883 and Statute 13 Elizabeth Ch. V and 27 Elizabeth Ch. IV. The language of each of these Statutes is slightly different. Each case, therefore, must be considered in the language of the Statute concerned. In our opinion section 36 of Act III of 1907 is wider in its scope than section 53 of Act IV of 1882. Under the latter section transfers made with the intent to defeat or delay creditors or subsequent transferees are made voidable at the instance of the creditors so defrauded, or defeated, and it is also declared that where such transfers have the effect of defeating or delaying creditors they would be presumed to have been made with that intent, if they are made gratuitously or for grossly inadequate consideration. Under section 36 of the Act no such intent is necessary. All that is required is that it must be made within two years of the adjudication of the insolvency of the debtor. Under both these sections transferees in good faith and for valuable consideration are protected. Section 36 also protects transfers "made before and in consideration of marriage." We think it is, therefore, not necessary for Dr. Sen to avail himself of the provisions of section 53 of the Transfer of Property Act.

Neither of these transfers are transfers "made before and in consideration of marriage" within the meaning of these words as used in the section. No doubt in both these cases, as a part of the marriage contract, some dower is made payable to the wife, but the dower stands on the same footing as any

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ordinary debt. The transfers in these cases were made long after the marriage and not before or in consideration of the marriage. They were made to satisfy the dower debt long after the marriage had taken place. Dr. Tej Bahadur Sapru has again argued that the dower debt is like an ordinary debt and that such a debt is valuable consideration; and a transfer made to the wife to satisfy the claim for dower is a transfer for valuable consideration. He relied upon the case of *Suba Biñi v. Balgobind Das* (1). To enable us, however, to decide the point, it is necessary to ascertain the exact amount of the dower due to each lady. The first wife is said to have died in 1909. A suit for recovery of a dower debt must be filed within the time prescribed by Articles 103 and 104 of Schedule I of the Limitation Act. For the purpose of considering the application of these Articles the nature of the dower debt would be an important element for consideration. The application of section 7 of the said Act would also have to be considered as some of the heirs are still minors. In all these cases it is a matter for careful consideration whether a real transfer was intended by the transferor or whether it was merely fictitious and no transfer was intended. Another point for consideration would be whether the transfers were made in good faith. It is not, however, necessary to prove the absence of good faith in both the transfers on the part of the transferee. *Mackintosh v. Pogose* (2). The value of the property transferred would be another point for consideration. In this case it seems that the existing buildings have been altered by some party or other and it might be a question as to who has made these alterations, whether the transferee or transferor, and who has been realising the rents and profits of the property. All these and a number of other considerations will have a material bearing upon the question. The onus of proving the good faith of the transferee is upon him: *Nilmoni Chowdhuri v. Basanta Kumar Banerjee* (3). The Court below has not determined some of these points at all. There are no sufficient materials on the record to enable us

to dispose of these points satisfactorily. We have, therefore, no option but to remand the following issues for determination to the Court below under rule 25 of Order XLI of the Code. The issues for determination are:

(1). Are the two transfers impugned real and genuine transfers or are they fictitious transfers made to protect the property from the creditors?

(2). Was there any, and if so, what dower debt legally due to the heirs of the first wife and to the second wife respectively on the dates of the two transfers?

(3). What was the market value of the property conveyed in each case on the dates of the transfers?

(4). Were the transfers impugned made in good faith and for valuable consideration?

(5). If not, was there want of good faith on the part of the transferee?

We have, in our judgment, indicated generally the matters which the Court below should take into consideration in determining these issues. We have set them forth at some length, as we find that in many cases enquiries made under the Act are conducted rather summarily in the Courts below. It is scarcely necessary to say that enquiries under this section are no less important than enquiries in regular suits and should be made as thoroughly and fully as in those cases.

The parties will be permitted to adduce additional evidence. The findings together with the evidence taken will be returned to this Court and the usual ten days will be allowed for objections.

Issues remitted.

(1) 8 A. 178; A. W. N. (1886) 51; 4 Ind. Dec. (N. S.) 1149.

(2) (1895) 1 Ch. 505; 64 L. J. Ch. 274; 13 R. 254; 72 L. T. 251; 43 W. R. 247; 2 Manson 27.

(3) 29 Ind. Cas. 814; 19 C. W. N. 865.

SUBRAMANIA AIYAR v. VENKATACHALA VADHYAR.

MADRAS HIGH COURT.

APPEALS NOS. 385, 389 AND 406 OF 1914,

APPEAL NO. 46 OF 1915 AND

APPEAL AGAINST ORDER NOS. 37 AND 47
OF 1915.

August 11, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Srinivasa Aiyangar.

IN NO. 385 OF 1914

SIR S. SUBRAMANIA AIYAR AND ANOTHER
—PLAINTIFFS—APPELLANTS

versus

VENKATACHALA VADHYAR AND OTHERS
—DEFENDANTS NOS. 12 TO 23 —

RESPONDENTS.

IN NO. 389 OF 1914

VYTHINATHA PATTAR PATTAMALI
AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 6
—APPELLANTS

versus

SIR S. SUBRAMANIA AIYAR AND OTHERS
—PLAINTIFFS & DEFENDANTS NOS. 7 AND 25
—RESPONDENTS.

IN NO. 406 OF 1914

ANANTHAKRISHNA PATTAR AND OTHERS
—DEFENDANTS NOS. 8 TO 11—
APPELLANTS

versus

SIR S. SUBRAMANIA AIYAR AND OTHERS
—PLAINTIFFS & DEFENDANTS NOS. 1, 2,
4 TO 7 AND 25—RESPONDENTS.

IN NO. 46 OF 1915

SUBRAMANIA PATTAR AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

VYTHIANATHA PATTAR AND OTHERS—
DEFENDANTS NOS. 1, 2, 4 TO 15,
17 AND 16—RESPONDENTS.

IN NOS. 37 AND 47 OF 1915

ANANTHAKRISHNA PATTAR AND OTHERS
—APPELLANTS IN APPEAL AGAINST ORDER
NO. 37 OF 1915

VYTHINATHA PATTAR PATTAMALI
—APPELLANTS IN APPEAL AGAINST ORDER
NO. 47 OF 1915

versus

SIR S. SUBRAMANIA AIYAR AND ANOTHER
—RESPONDENTS IN BOTH.

*Civil Procedure Code (Act V of 1908), s. 92 and
Religious Endowments Act (XX of 1863), s. 14, scope of
—Public Trusts—Suit for removal of trustee of temple
—Sanction under latter Act, if necessary—Alienees from
trustees, joinder of—Alienations, decision as to nature
of, whether necessary in scheme suit—Decree, form of—
Public or private temple, question as to—Onus of proof
—Decision that temple public, whether binding on alienees.*

Sub-clause (2) of section 92, Civil Procedure Code (Act V of 1908), is intended to set at rest the doubts that were entertained in the construction of the old Code of 1882, whether a trustee could be removed and whether persons who had any special interest in the trust of a public charity could institute suits and ask for the reliefs specified in the section without sanction or whether persons interested in charities could bring representative suits under section 30 of the old Code in the ordinary Courts. [p. 690, col. 1.]

Giyana Sambandha Pandara Sannadhi v. Kandasami Tumbiran, 10 M. 375 at p. 505; 3 Ind. Dec. (N. S.) 1015; *Rangasami Naickan v. Varadappa Naickan*, 17 M. 462; 6 Ind. Dec. (N. S.) 321; *Ganapati Ayyan v. Savithri Ammal*, 21 M. 10; 7 Ind. Dec. (N. S.) 364; and *Budree Das Mukim v. Chooni Lal Johurry*, 33 C. 789; 10 C. W. N. 581, referred to.

Sub-clause (2) of section 92 is added to make it clear that the terms of the section are mandatory and that no suit could be brought for any of the reliefs specified in the section except under the conditions laid down therein; at the same time the special jurisdiction of the District Courts under the Religious Endowments Act was saved, so that a person desirous of suing for the removal of a trustee or for such other specific relief as can be given to him under that Act is at liberty to do so, and is not bound to comply with the provisions of section 92, Civil Procedure Code. [p. 690, cols. 1 & 2.]

No sanction, therefore, is required under section 14 of the Religious Endowments Act for the institution of a suit to remove a trustee or for any other relief comprised under section 92, Civil Procedure Code. [p. 690, col. 2.]

Ajapa Natesa Pandara Sannadhi v. Ramalingam Pillai, 20 Ind. Cas. 767, 24 M. L. J. 658; and *Nelatoom Venkatarangacharyulu v. Nedathur Krishnamacharyulu*, 20 Ind. Cas. 515; 37 M. 184; 24 M. L. J. 697; 14 M. L. T. 44, followed.

The joinder of alienees from the trustees of a temple in a suit to remove the latter from office under section 92, Civil Procedure Code, will not entail the dismissal of the whole suit because, in the suit as framed, no relief could be given against the alienees. The jurisdiction of a Court does not depend on its decision whether it can or will allow some of the reliefs asked for. [p. 691, col. 1.]

In a suit under section 92, Civil Procedure Code, the Courts cannot decide the question whether alienations by the trustee sought to be removed are binding on the institution and give appropriate reliefs against the alienees. [p. 692, col. 1.]

Asam Raghawalu Setty v. Pellati Sitamma, 25 Ind. Cas. 794, 27 M. L. J. 266, 16 M. L. T. 178, (1914) M. W. N. 692; *Rangayya Naidu v. Chinmasamy Iyer*, 28 Ind. Cas. 898; 28 M. L. J. 326, 17 M. L. T. 191, followed.

A decree, however, declaring the temple, whose trustee it is sought to remove, to be a public one is binding on the alienees, who will not be permitted to agitate that question in future proceedings where the binding nature of the alienations on the institution may be in question. The decree should make it clear that this declaration is binding on them also. [p. 692, col. 1.]

The onus of proving that a temple is a public one, in respect of which the reliefs are claimable under section 92, Civil Procedure Code, is on the plaintiffs. The fact that a predecessor of the trustee defendant

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made a statement that it was a public temple is not enough to shift the burden on to the defendant. [p. 691, col. 1.]

Where a temple is proved to be an ancient one with hereditary offices and emoluments fixed for services therein and the *utsavams* and *ubayams* are performed by public subscriptions and oaths are taken there under the Oaths Act and the public have a right to worship the temple deity, the temple must be regarded as a public one. [p. 691, col. 2.]

Appeals against the orders of the Court of the Temporary Subordinate Judge, Palghat at Calicut, on Civil Miscellaneous Petitions Nos. 339 and 211 of 1914, in Original Suit No. 12 of 1912.

A. S. No. 385 of 1914.

Mr. T. R. Ramachandra Aiyar (with him Messrs. P. R. Ganapathi Aiyar and K. V. Madhavan Nair), for the Appellants.

Messrs. C. Madhavan Nair, O. V. Anantha-krishna Aiyar, M. N. Krishna Aiyar and P. R. Ramakrishna Aiyar, for the Respondents.

A. S. No. 389 of 1914.

The Hon'ble Mr. T. Rungachariar (with him Messrs. G. S. Ramachandra Aiyar, M. N. Krishna Aiyar and P. R. Ramakrishna Aiyar), for the Appellants.

Messrs. T. R. Ramachandra Aiyar and P. R. Ganapathi Aiyar, for the Respondents.

A. S. No. 406 of 1914.

Messrs. T. R. Krishnaswami Aiyar and N. A. Krishna Aiyar, for the Appellants.

Mr. P. R. Ganapathi Aiyar, for the Respondents.

A. S. No. 46 of 1915.

Messrs. T. R. Ramachandra Aiyar and N. A. Krishna Aiyar, for the Appellants.

Messrs. M. N. Krishna Aiyar and P. R. Ramakrishna Aiyar, for the Respondents.

A. A. O. No. 37 of 1915.

Messrs. T. R. Krishnaswami Aiyar and N. A. Krishna Aiyar, for the Appellants.

Messrs. P. R. Ganapathi Aiyar and K. V. Madhavan Nair, for the Respondents.

A. A. O. No. 47 of 1915.

Messrs. G. S. Ramachandra Aiyar, M. N. Krishna Aiyar and P. R. Ramakrishna Aiyar, for the Appellants.

Messrs. T. R. Ramachandra Aiyar and P. R. Ganapathi Aiyar, for the Respondents.

These appeals coming on for hearing on the 9th August 1916 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

APPEALS NOS. 385, 339 AND 406 OF 1914.

These are appeals from the decree of the Temporary Subordinate Judge of Palghat at Calicut, by which he ordered the removal of defendants Nos. 1, 2, 4 to 7 and 25 from the trusteeship of the Parakkat Baghavathi Devaswam and directed a scheme to be framed for the management of the Devaswam. The suit was instituted by the President of the Dharma Rakshana Sabha and another under section 92 of the Code of Civil Procedure after obtaining the sanction of the Advocate-General. Their case is that the Devaswam is an ancient public religious institution, that defendants Nos. 1 to 7, who were in management of the temple and its properties at the time of the institution of the suit and their predecessors, were guilty of gross breaches of trust—they are specified in paragraph No. 8 of the plaint, and they concluded their plaint with prayers for reliefs specified in section 92 of the Code. Defendants Nos. 8 to 11 are members of the trustee family and claimed a share in the management of the Devaswam with defendants Nos. 1 to 7, which claim however the latter denied. Defendants Nos. 12 to 25 have obtained mortgages of the Devaswam properties from the trustee defendants in the years 1904, 1905, 1906 and 1903. These transactions are challenged as fraudulent by the plaintiffs, who say they are not binding on the Devaswam and pray for a declaration to that effect.

The main defence of all the defendants was that the plaint Devaswam was not a public temple at all but was a private temple belonging to the trustee family; the alienee defendants also pleaded that no relief could be given against them in a suit under section 92 and that they should be struck out of the record.

The Trial Judge, having held that the burden of proving that the Devaswam was a private one was on the defendants in consequence of a statement made by the predecessor of the trustee defendants as to the origin of the temple, came to the conclusion that they had not discharged that burden and therefore held that the temple was a public religious institution. He also

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held that defendants Nos. 1, 2 and 4 to 7—the 3rd defendant had died before the trial—were guilty of gross mismanagement, and removed them from the trusteeship and directed a scheme. He dismissed the suit against the alienee defendants on the ground that the suit was bad as against them for misjoinder of parties. The several parties have preferred appeals against the portions of the decree which are against them.

The main appeal (Appeal No. 389 of 1914) is that of the trustee defendants. Besides challenging the decree on the main ground that the suit temple was a private endowment, the learned Pleader raised two other points. *First*, he contended that the suit was incompetent as no sanction was obtained under the Religious Endowments Act for the removal of trustees and without such a sanction removal of trustees could not be ordered even though it is one of the reliefs which plaintiffs can ask under section 92 after obtaining the requisite sanction under that section. We think the language of sub-clause 2 of section 92 is quite clear and is against this contention. Under section 539 of the Old Code of Civil Procedure, corresponding to section 92 of the new, there was a difference of opinion as to whether a trustee could be removed, and whether persons who had any special interest in the trusts of a public charity could institute suits and ask for the reliefs specified in the section without sanction, or whether persons interested in charities could bring representative suits under section 30 of the old Code in the ordinary Courts. See *Giyana Sambandha Pandara Sannadhi v. Kandasami Lambiran* (1), *Rangasami Naickan v. Varadappa Naickan* (2), *Ganapati Ayyan v. Savithri Ammal* (3) and *Budree Das Mukim v. Chooni Lal Johurry* (4). The new section 92 was introduced to set at rest these doubts and sub-clause 2 was added in order to make it clear that the provisions of the section are mandatory and that no suit could be brought for any of the reliefs specified in the section except under the conditions laid down in the section; at the same time the special jurisdiction of the District Courts under the Religious

Endowments Act was saved, so that a person desirous of suing for the removal of a trustee, or for such other specific relief as can be given him under that Act is at liberty to do so, and is not bound to comply with the provisions of section 92. It is to be observed that a suit under section 92 may be instituted in the Court of a Subordinate Judge, while a suit under the Religious Endowments Act can only be instituted in the District Court. Under the old Code when suits under section 539 could only be instituted in the District Court it was usual for plaintiffs, who wanted the removal of trustees and also a scheme, to obtain sanction under section 14 of the Religious Endowments Act and from the Advocate-General or the Collector. It is obvious that this was a cumbrous and inconvenient procedure, more especially as the powers of the Court in dealing with a suit under the Religious Endowments Act were in some respects larger than in an ordinary suit; for example there can be compulsory arbitration in a suit under Act XX of 1863. Now under the new Code Subordinate Judges' Courts can be invested with jurisdiction under section 92. If the contention of Mr. Rangachariar is accepted, it would mean that in spite of the fact that the removal of a trustee is one of the reliefs specifically mentioned as one which can be granted under section 92, plaintiffs, who require such a relief along with others specified under section 92, must file two different suits one in the District Court under Act XX of 1863; and another under section 92—it may be in a different Court. This, we think, is an unreasonable construction of sub-clause 2 of section 92. In two cases in this Court [*Ajapa Natesa Pandara Sannadhi v. Ramalingam Pillai* (5), *Nelatooru Venkatarangacharyulu v. Nedathur Kristnamacharyulu* (6)], the view which we have taken was adopted and except for the strenuous arguments of Mr. Rangachariar, we would have rested content with simply following these cases.

The next point is this. The sanction of the Advocate-General was to the plaint as framed now, including reliefs against alienees.

(1) 10 M. 375 at p. 505; 3 Ind. Dec. (N. S.) 1015.

(2) 17 M. 462; 6 Ind. Dec. (N. S.) 321.

(3) 21 M. 10; 10 Ind. Dec. (N. S.) 364.

(4) 33 C. 789, 10 C. W. N. 581.

(5) 20 Ind. Cas. 757; 24 M. L. J. 658.

(6) 20 Ind. Cas. 515; 37 M. 134; 24 M. L. J. 697; 14 M. L. T. 44.

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Inasmuch as no relief could be given against the alienees declaring the alienations void, it is said the suit must be dismissed as the sanction was given on a misapprehension of the powers of the Court under section 92. We think there is nothing in the contention. The jurisdiction of the Court could not depend on the decision of the Court as to whether it can or will allow some of the reliefs asked for. There can be no doubt that the substantial reliefs asked for were those specified in the section. The cases cited by the learned Pleader for the appellants were those in which the action as brought was substantially different from that which was sanctioned.

Coming then to the substantial question in the appeal, *viz.*, whether the suit temple was a private or a public religious institution, we have come to the conclusion that the temple is a public temple. It is no doubt true that the burden was on the plaintiffs to show that the temple is a public temple; and we are unable to agree with the learned Judge in the Court below that the statement F, in which a predecessor of the trustee defendants stated that the temple was founded by Parasurama, the mythical founder of Kerala, in any way shifted the burden; nor are we able to attach any importance to a statement of that kind as affording any evidence of the origin of the temple. This mistake of the Judge and the nature of his finding on this issue has necessitated an examination of the evidence in the case on this question.

It is admitted that the temple is a very ancient temple and its origin or foundation is unknown. There are hereditary offices in the temple and the office-holders have a right to perform certain services and to receive the emoluments fixed therefor—defence 10th witness and Exhibit W. There is a flag-staff and a special Pooram festival is performed. Ubayams and Utsavams are performed by the public with subscriptions collected from the public—defence 2nd witness. Oaths are taken in the temple under the Oaths Act without any objection by the trustees—Exhibit K. A tank dug out of the temple funds was held to be a public tank—see Exhibits F, LXXIII, and LXXIII A. The Palghat Rajahs who were the sovereigns of the country at one

time asserted Melkoima rights over the suit temple and the predecessors of the trustee defendants have allowed that Melkoima rights in the temple did exist—Exhibits C and XXXIX. It is in evidence that the general public have a right to worship. It is not a single deity which is worshipped, but it appears that there are two temples attached to the main temple, one dedicated to Siva and the other to Vishnu. Even outcastes are allowed to worship from a distance near the idol of Kshettrapala or the guardian of the temple. The temple is admittedly outside the compound of the residence of the trustee defendants and of the ancient Nair family whose rights the Pattar family acquired by adverse possession. These facts clearly show that the temple is a public temple. As against this the appellants are able to rely only on general statements, that some of the indicia above set out are to be found in other institutions which are said to be private institutions or that there are no public temples in Malabar. We do not think that is sufficient. We, therefore, confirm the finding of the lower Court that the temple is a public religious institution.

The learned Pleader for the trustee appellants scarcely contended that if the institution was a public charitable trust, the order for their removal was wrong. There is enough in the admitted facts of the case to show that the present trustees are not persons with whom the management could safely be left. But the learned Judge in the Court below has also ordered the removal of the 25th defendant, the son of the 3rd defendant, who was introduced into the suit after the death of the 3rd defendant. There were no charges against him and he was not in fact in management. We must reverse the order of the lower Court in so far as it directs his removal.

Only one other question was argued in these appeals and that was in the appeal by the plaintiffs. The learned Judge by his decree, after having made a declaration that the properties in schedules A and B to the plaint were trust properties, ordered the dismissal of the action against the alienee defendants Nos. 12 to 23. The appellants contend that the decree is liable to be misunderstood, and construed as en-

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abling the alienee defendants in any future proceedings to contend that the properties are not trust properties. The learned Pleaders for the alienees agree that the decree may be so amended as to make it clear that this declaration was binding on them also. Mr. Ganapathi Aiyar on behalf of the plaintiffs also contended that the Court was bound to decide whether the alienations were binding on the institution and give appropriate reliefs against the alienees in this suit. The decisions of this Court in *Asam Raghavulu Setty v. Pellali Sitamma* (7) and *Rangayya Naidu v. Chinnasamy Iyer* (8) are against this contention and we are bound by them. We must, therefore, confirm the decree of the lower Court in so far as it declined to grant relief against defendants Nos. 12 to 23. The question whether the alienations are or are not binding on the institution and whether the right of the institution to challenge them is now barred by limitation, as pleaded by some of the alienees, can be tried in a suit by the trustee or trustees who may come in under the scheme.

APPEAL No. 46 of 1915.

Defendants Nos. 10 and 11 (in Original Suit No. 12 of 1912 on the file of the Court of the Temporary Subordinate Judge of Palghat at Calicut) instituted a suit against defendants Nos. 1 to 7 claiming a share in the management. They also said that the institution was a private endowment. Their suit was dismissed on the ground that as the institution is now found to be a public trust, their claim to a share on the footing that it was a private endowment was not maintainable. They appeal in Appeal Suit No. 46 of 1915. As they are parties to the suit under section 92 and as we agree that a scheme should be framed for the management of the trust in which the claims, if any, of the members of the family of the trustees may be recognized if it is possible to do so without prejudice to the interests of the institution, which of course is the primary thing to be considered, we dismiss the appeal.

(7) 25 Ind. Cas. 794; 27 M. L. J. 266; 16 M. L. T. 178; (1914) M. W. N. 692.

(8) 23 Ind. Cas. 898; 28 M. L. J. 326; 17 M. L. T. 191.

As the decree in Original Suit No. 12 of 1912 on the file of the Court of the Temporary Subordinate Judge of Palghat at Calicut is not as clear as it might be, and in view of the alterations suggested by us, we substitute the following decree:—

1. Declare that the Parakkat Baghavathi Devaswam is a public religious institution and that the properties described in schedules A and B attached to this decree are the properties of the Devaswam;

2. that defendants Nos. 1, 2 and 4 to 7 be and are hereby removed from the management of the Parakkat Baghavathi Devaswam and its properties;

3. that the Court of the Temporary Subordinate Judge of Palghat at Calicut do frame a scheme for the management of the Devaswam and its properties with due regard to the claims, if any, of the members of the family of defendants Nos. 1 to 7 and 8 to 11 other than the 'dismissed trustees';

4. that the plaintiffs' suit in other respects be dismissed.

[The judgment then makes provision for the costs of the appeal.—*Ed.*]

Decreed varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2087 of 1913.

August 8, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

AYIROOR SWAROOPATHINKAL
AYIROOR MALIKA KOVILAKATH
RANDAMAN KUNHUNNI *alias* RAVI
VARMA RAJAH AVERGAL AND OTHERS—
PLAINTIFFS Nos. 1 to 3, 6 and 8 to 15—

APPELLANTS

versus

KANNAMKULATH MADHATHIL
RAMASUBRAMANIA PATTAR
AND OTHERS—DEFENDANTS Nos. 12 to 15,
2, 3, 4, 7, 9 to 11 AND LEGAL REPRESENTATIVES
OF DEFENDANTS Nos. 5 and 6—

RESPONDENTS.

*Malabar Law—Private tarwad temple—Alienation by
karnavan of temple properties—Suit by successor-in-*

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office of alienor to cancel alienation—Compromise, binding nature of, on members—Good faith—Necessity—Trusts Act (II of 1882), ss. 42, 43—Onus of proof—Mortgage, modification of, by kaichit—Kaichit, whether requires registration—Transfer of Property Act (IV of 1882), s. 59—Contract Act (IX of 1872), ss. 62, 63.

A document merely effecting a modification of a pre-existing mortgage whereby the mortgagee gives up some of the benefits and reciting that the latter document is in full force, is not a new mortgage and does not require registration. The case is one of remission under section 63 and not of novation under section 62 of the Contract Act. [p. 694, col. 1.]

The junior members of a Malabar *tarwad* to which a private temple belongs can bring a suit to protect the Devaswam against alienation by a *karnavan* trustee. [p. 697, col. 2.]

Appu Pattar v. Kurumba Bhagwati, 11 Ind. Cas. 633; 21 M. L. J. 583, referred to
Eltisher, Edathil v. Pothera Kalloor, 26 Ind. Cas. 946; 2 L. W. 61, distinguished.

A compromise of a suit by the *karnavan* of a *tarwad* to set aside an alienation by his predecessor of the properties of a private Devaswam attached to the *tarwad* is not binding on the Devaswam, unless the compromise was entered into in good faith and for necessity and after due enquiries by the alienee. The decision as to good faith and necessity must be reached on a comprehensive survey of all the circumstances. It cannot be assumed that, because one party withdraws a large proportion of his original claim, the result is advantageous to the other, unless the prospects of the contest regarding the balance are considered and found unfavourable. The good faith and necessity for a compromise can, however, be upheld, though proof may be wanting that its terms represent those which would have been secured, had the matter been litigated fully. [p. 694, col. 2; p. 695, col. 1.]

The burden of proof regarding the propriety of the compromise is on the alienee.

Ervanni Revivarman v. Ittopu Revivarman, 1 M. 153; 1 Ind. Jur. 10; 1 Ind. Dec. (n. s.) 101, *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*, 2 M. 328; 5 Ind. Jur. 243; 1 Ind. Dec. (n. s.) 498, *Elayichanidathil. Komhi v. Kenatumkora Lakshmi Amma*, 5 M. 201; 2 Ind. Dec. (n. s.) 140; *Ramunni v. Kerala Varma Valia Raja*, 15 M. 166; 5 Ind. Dec. (n. s.) 465; *Bhogaraju Venkatarama Jogiraju v. Addepalli Seshayya*, 12 Ind. Cas. 123; 35 M. 563; 10 M. L. T. 179; *Timmaji Amma v. Subharaju*, 5 Ind. Cas. 640; 20 M. L. J. 204; 7 M. L. T. 340 and *Subbammal v. Arudaiyammal*, 30 M. 3, referred to.

Per *Sadasiva Aiyar, J.*—Though the Indian Trusts Act does not apply to any public or private religious endowments, the principles embodied in section 43 apply to a trustee or trustees acting on behalf of a private religious trust. The powers of a trustee embodied in that section are enunciated primarily to protect him when acting *bona fide* against suits for damages by the *cestui que trust* for loss caused by the exercise of such powers. But the question whether property alienated to a third party by the trustee through an alleged breach of trust can be pursued successfully by the *cestui que trust* depends on very similar considerations, viz., whether the third party acted *bona fide* without notice of the breach and whether he was an alienee for valuable consideration. [p. 698, col. 2.]

The analogy between the case of a Hindu widow representing her husband's estate and the case of a trustee of a religious institution is rather remote. [p. 699, col. 1.]

It is necessary for Courts in India to scrutinise alienations by compromise and awards out of Court made in reference to properties relating to religious and charitable trusts with very great care before they are accepted as valid against the trust. [p. 699, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, in Appeal Suit No. 571 of 1912, preferred against that of the District Munsif, Chowghat, in Original Suit No. 731 of 1910.

Mr. T. R. Ramachandra Aiyar, for the Appellants.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

This second appeal coming on for hearing on the 27th and 28th July 1916, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—This suit was brought by the plaintiffs-appellants, to recover property on behalf of a Devaswam alleged to be the property or to be under the management of themselves and defendants Nos. 9 to 11; and the main defence was that the property is held by the 1st defendant on a valid mortgage, which is still outstanding.

The facts are that the property was first mortgaged by the predecessor of the 9th defendant, the present *karnavan* of the Kovilagam, in 1905 under Exhibit I; and that 9th defendant compromised a suit, which he brought in 1903 to set Exhibit I aside on obtaining modifications of certain of its terms, which are embodied in Exhibit L. The first contention before us is that Exhibit L superseded the original mortgage Exhibit I, but created no fresh mortgage relation and that the property, thus freed, should, therefore, be restored to plaintiffs.

Exhibit L is executed only by the 1st defendant, the mortgagee; and, if it purported to supersede Exhibit I and were relied on as constituting the mortgage relation between the parties, section 59 of the

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Transfer of Property Act would no doubt negative the possibility of its doing so. But its terms preclude that argument. For they do not provide explicitly or implicitly for the supersession of Exhibit I, either entirely or by modification of any of its essential conditions.

First as to total supersession, some attempt has been made to show that the plaintiffs themselves assumed in their pleadings that Exhibit L was the only document, by which the suit property was bound. But this is unsustainable in view of the references to Exhibit I as well as Exhibit L in plaint paragraphs 5, 11 and 16. The arguments from the actual terms of Exhibit L rest on the verbatim translation of its recital that "the 1st defendant is now holding the mortgage properties, which he was holding under Exhibit I," the implication suggested being that he has ceased to hold them under it. But there is no direct reference to his holding in future under any new document or under Exhibit L. On the contrary Exhibit L is hardly intelligible except on the assumption that some earlier document is still in force; and it refers expressly to Exhibit I in connection with an acknowledgment regarding the extent of the mortgage period, which has yet to run. The terms moreover of the compromise petition, Exhibit IV, filed contemporaneously with the execution of Exhibit L, included nothing regarding the cancellation of Exhibit I and provided for the dismissal of the suit for that relief. All this indicates that, consistently with the evident intention of the parties, the portion of Exhibit L quoted above really provides for the 1st defendant still holding the properties, which he was holding under Exhibit I, and involves no suggestion that he has begun to hold under any other document.

Then as to the particular terms modified, the plaintiffs' argument fails, because the modifications do not amount to changes in the obligations of the mortgagor, to which his consent would be necessary, but only to an agreement by the mortgagee not to insist on his original rights in their entirety, the case being one of remission under section 63 not of novation under section 62 of the Indian Contract

Act. The modifications consist in (1) a reduction of the principal amount secured as repayable to the 1st defendant, (2) a reduction in the share of the annual produce, which he is entitled to retain, the *michavaram* payable to the mortgagor being enhanced, (3) the release of one item of the mortgaged property. The effect is, therefore, that the mortgagee foregoes rights for the mortgagor's benefit, not that the latter cancels an old or makes a new mortgage. Plaintiffs, therefore, must fail on this contention.

Their next argument is that the lower Appellate Court erred in dealing with their objections to the mortgage based on the absence of proved necessity for it and of good faith on the part of the 9th defendant and his predecessor or due enquiry by the 1st defendant, because it considered only the circumstances immediately connected with Exhibit L and not those connected with Exhibit I and the validity of the objections to it, which under the compromise were withdrawn. The circumstances in question certainly bulked largely in the judgment of the District Munsif; and the lower Appellate Court conceded that the compromise would bind the Deva-swam only, if it was made *bona fide*, and, finding that it was, did not deal with the question of the 1st defendant's enquiries. Its finding, however, was based on (1) the absence of evidence to prove the allegation of collusion and corruption, and (2) the terms of Exhibit L. It referred to the validity of Exhibit I in two connections only, with reference to (1) the giving up by the 1st defendant of a large sum due under Exhibit I, and (2) his failure to produce the original accounts, which would have supported the claim, in satisfaction of which Exhibit I is alleged to have been given.

This investigation of the good faith of and necessity for the compromise must be held inadequate. For it cannot be assumed that, because one party withdraws a large proportion of his original claim, the result is advantageous to the other, unless the prospects of the contest regarding the balance are considered and found unfavourable: and the reference to the 1st defendant's surrender of his accounts overlooked the facts that the burden of proof regarding

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the propriety of the compromise was on him and that the copies he produced as secondary evidence were subjected to severe criticism. Certainly the good faith of and necessity for a compromise can be upheld, although proof may be wanting that its terms represent those which would have been secured, had the matter been litigated fully. But the decision as to good faith and necessity must be reached, as it was the parties' duty to reach it, on a comprehensive survey of the circumstances. Such a survey the lower Appellate Court failed to make, since it attempted no conclusion as to the foundation of the whole dispute, the validity of Exhibit I or as to the 1st defendant's prudence in abandoning his claim for its cancellation *in toto*.

The foregoing disposes of the defendants' contention regarding the lower Appellate Court's decision as to the good faith of the compromise. They have further argued that the decision was unnecessary, because the 9th defendant and his predecessor were under no special obligation and the compromise must be upheld in the absence of proof of any of the reasons, for which contracts are ordinarily set aside. There is a question, to be dealt with later, as to the character in which the 9th defendant and his predecessor carried out these transactions, whether they did so as Uraller Trustees of the Devaswam, a public temple, or merely as *karnavans* of the Kovilagam, of which the temple was the private property. But it is unnecessary to decide at present in which capacity they acted, since the authorities show that a *karnavan's* transactions can be upheld in the absence of the consent of other members of the *tarwad*, only if they were effected in good faith and for necessity; and it is unnecessary to cite cases to show that as much must be proved, if trust property is in question. It is true that in *Eravanni Revivarmam v. Ittappu Revivarmam* (1) and in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (2), the Court refused to describe the *karnavan* as a trustee; but it fully recognised his special responsibility to other

members of the *tarwad*, in the one case comparing him with the father of a Hindu family and in the other reiterating his obligation to act in good faith. *Vide* also *Elayachaniduthil Kombi Achen v. Kenatumkora Lakshmi Amma* (3) and *Ramunni v. Kerala Varma Valia Raja* (4). Authority accordingly justifies the lower Appellate Court's opinion that proof of good faith and necessity on the part of the 9th defendant and his predecessor is necessary. It follows that in its absence the 1st defendant must prove that he made due enquiries. The case must, therefore, go back to the lower Appellate Court for re-hearing on this point.

Lastly the defendants support the lower Appellate Court's decision on the ground that the plaintiffs had no right to sue, because, the trust being of a public temple, they are not the Urallars; and they rely on *Appu Pattar v. Kurumba Bhagwati* (5) and *Ettisheril Edathil v. Pothera Kalloor* (6). The plaintiffs in reply allege that they never pleaded and do not admit the public character of the Devaswam. The facts are that in the plaint the establishment was described as a Devaswam without further qualification; and it might be a question whether that description is compatible with private ownership. Though, however, the 1st and the 9th defendants in paragraphs 14 and 3 of their respective written statements raised the objection now under consideration, no issue was framed and no argument on it was attempted in either of the lower Courts. The lower Appellate Court in fact made the first reference to the 9th defendant and his predecessor as Urallars in its judgment. In the circumstances, there is no reason for allowing defendants to rely for the first time at this stage on an objection, to substantiate which fresh evidence would be necessary.

The result is that the lower Appellate Court's decision must be set aside and it must be directed to re-hear the appeal in the light of the foregoing. It will in

(1) 1 M. 153; 1 Ind. Jur. 10; 1 Ind. Dec. (N. S.) 101.
(2) 2 M. 323; 5 Ind. Jur. 243; 1 Ind. Dec. (N. S.) 495.

(3) 5 M. 201; 2 Ind. Dec. (N. S.) 140.

(4) 15 M. 166; 5 Ind. Dec. (N. S.) 465.

(5) 11 Ind. Cas. 633; 21 M. L. J. 588.

(6) 26 Ind. Cas. 946; 2 L. W. 61.

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particular deal with the question whether the compromise between the 9th defendant and the 1st defendant can be sustained with reference, not only to Exhibit L and its immediate circumstances, but also to the validity of Exhibit I and the 9th defendant's prospects of success in his suit for its cancellation. If it finds that the 9th defendant and his predecessor acted in bad faith it will further decide whether the 1st defendant acted in good faith and after due enquiry in dealing with them.

Costs to date will abide the result of the further hearing and will be provided for in the decree to be passed.

SADASIVA AIYAR, J.—Twelve out of the fifteen plaintiffs are the appellants before us. It is necessary to set out the following facts to understand the points for decision.

The plaintiffs' *tarwad* owns a private family temple called Thichukavu Ayyappan Devaswam. The *karnavan* of the family was as usual the trustee of this private religious trust.

Eleven items of land belonging to this trust were mortgaged in September 1905 by the then *karnavan* to the 1st defendant under Exhibit I for Rs. 360 for a term of 24 years, it being mentioned in the document that Rs. 300 out of the consideration of Rs. 360 was the amount found due to the 1st defendant on a settlement of the account of the sums spent by the 1st defendant in managing the temple affairs as manager under the *karnavan*.

Soon after the death of that *karnavan*, the 9th defendant became the *karnavan* of the plaintiff's *tarwad* and the trustee of the temple. As such, he brought Original Suit No. 253 of 1908 to set aside the mortgage of 1905 as not binding on the Devaswam. But the 9th defendant and the 1st defendant compromised that suit of 1908 and filed a joint petition, Exhibit IV, in the District Munsif's Court to the following effect: "The plaintiff" (the present 9th defendant) "having now been convinced that the amount due under the suit mortgage-deed" (of 1905) "is really due, the parties" (the present 9th defendant and the present 1st defendant) "have settled the matter on the following terms," *viz.*—

(1) the defendant released item No. 10 of the 11 mortgaged items from the mortgage;

(2) the 9th defendant was to recover the same with arrears of rent, Rs. 8-7-0, from the 1st defendant;

(3) the remaining items were to be charged with a mortgage debt of Rs. 288-7-0 only instead of Rs. 360;

(4) the defendant was to hold them for the period mentioned in Exhibit I, the document of 1905;

(5) the *porappad*-rent, paddy and cash, were to be slightly increased;

(6) the 1st defendant was to give up his alleged *kuzhikanam* right to nine cocoanut trees standing inside the walls in item No. 1;

(7) the 1st defendant was to pay the 9th defendant interest at 12 per. cent. per annum on the arrears of rent;

(8) the 1st defendant was not to claim the value of improvements in respect of eighteen cocoanut trees belonging to the 9th defendant in item No 9;

(9) the 1st defendant was to execute a *kaichit* to the 9th defendant on the terms set forth above; and

(10) the Suit No. 258 of 1908 was to be dismissed as the parties had thus compromised their disputes.

On this petition, that suit was accordingly dismissed. The 1st defendant in accordance with the terms mentioned in the above petition, Exhibit IV, executed a registered *kaichit*, Exhibit L, in favour of the 9th defendant on the 12th October 1908, in which the 1st defendant acknowledged that only Rs. 288-7-0 was due to him as mortgagee, that he had to pay the higher *porappad* mentioned in the compromise and that he had to enjoy the property for the 21 years still remaining under the document, Exhibit I of 1905 (which mentioned a term of 24 years).

The present suit (Original Suit No. 731 of 1910) out of which this second appeal has risen was brought to set aside both the mortgage of September 1905 (Exhibit I) and the *kaichit*, Exhibit L, of 1908, on the contention that they were not binding on the plaintiffs' *tarwad*. The District Munsif decreed the suit substantially in plaintiffs' favour on the following findings:—

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(1) It is not proved that the Devaswam owed the 1st defendant Rs. 300 as mentioned in Exhibit I of 1905. Exhibit I is not a *bona fide* transaction, especially as the improvements belonging to the Devaswam on the date of Exhibit I are not specified in it.

(2) The compromise, Exhibit IV, and the *kaichit*, Exhibit L, are also not binding on the plaintiffs' Devaswam. (The District Munsif seems not to have kept the question of the binding nature of the first mortgage of 1905 and the question of the binding nature of the compromise and of the *kaichit* of 1908 distinct in his mind when he wrote his judgment. I also find that no separate issue was raised about the compromise and the *kaichit*. The first issue, *viz.*, "Is the mortgage in question not binding on the plaintiffs" was evidently treated in the District Munsif's Court as covering that question also).

On the 1st defendant's appeal from the decision of the District Munsif, the Court of the Temporary Subordinate Judge of Palghat reversed the District Munsif's decision and dismissed the suit on the following conclusions:—

(1) The compromise under Exhibit IV of the Suit No. 258 of 1908 made by the 9th defendant who was the then *karnavan*, is binding on the Devaswam because the compromise was *bona fide*.

(2) The plaintiffs are not entitled to bring the suit, because they are the junior members of their *tarwad* and because the 9th defendant alone is the *Urallan* of the Devaswam.

I think that the Subordinate Judge's decision on the 2nd point, on which also he based the dismissal of the plaintiffs' suit, cannot be supported. So long ago as in September 1893, Sir. T. Muthuswami Aiyar, J., and Mr. Justice Best assumed, without question, that the junior members of a *tarwad* to which a private temple belonged could bring a suit to protect the Devaswam against an alienation made by the *karnavan* trustee. See *Appu Pattar v. Kurumba Bhagwati* (5). The decision in *Ettisheril Edathil v. I'othera Kalloor* (6) relied on by the 1st defendant related to a public temple and as regards such a temple, the junior members belonging to the

tarwad of the trustee stand in no better position than any other member of the public and hence they cannot recover the properties on behalf of the public temple without bringing a suit under section 92 of the Code of Civil Procedure for removal of the trustee from his position as trustee and for the appointment of a new trustee, such new trustee so appointed being the proper person to be put in possession of the properties alienated by the previous trustee. That case, therefore, has no application to a private temple belonging to a particular *tarwad* or to particular *tarwads* alone.

As regards the first point, the learned Subordinate Judge held the compromise under Exhibit IV to be a *bona fide* one for the following reasons: (a) there was no evidence that the compromise was brought about by collusion between the defendants Nos. 1 and 9 or that the 9th defendant received any illegal gratification; (b) the *porappad* was increased; (c) a portion of the mortgage amount mentioned in the document of 1905 was given up by the 1st defendant; (d) the fact that the improvements belonging to the plaintiffs' *tarwad* are not specified in Exhibit L was not very material as it is not usual to insert all the improvements in such documents; (e) the fact that a new mortgage was not taken from all the adult male members and that the *kaichit* was executed by the 9th defendant alone is not against the *bona fides* of the compromise and the *kaichit*, because in the case of a Devaswam, the *karnavan* has the sole power and the Devaswam property was not *tarwad* property; (f) the defendants Nos. 10 and 11, the junior members of the *tarwad* who managed the Devaswam, have consented to and ratified the terms of Exhibit IV.

Mr. Ramachandra Aiyar for the Appellants (if I understood him aright) argued—

(1) That the compromise made by a trustee of a private Devaswam is not binding on the Devaswam even though the compromise was *bona fide*, unless it was also shown to be for the benefit of the trust.

(2) That the reasons given by the Subordinate Judge in support of the

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validity of the compromise are not legally sufficient;

(3) that the Subordinate Judge ought to have gone into the question whether the original mortgage of 1905 was binding upon the Devaswam, as a conclusion on that question was of cogent relevancy in arriving at a proper decision on the *bona fides* of the compromise, Exhibit IV.

Before considering these arguments, it would be convenient to dispose at once of another contention put forward by Mr. Ramachandra Aiyar, *viz.*, that raised in the second ground of appeal, as follows:—“The plaint mortgage, not being in writing registered and attested as required under the law, is invalid and the mortgagee could acquire no right under it.” By “the plaint mortgage,” Mr. Ramachandra Aiyar stated that the *kaichit* of October 1908 was intended. He argued that that *kaichit* was a fresh mortgage superseding the earlier mortgage of 1905 and that as it was not executed by the mortgagor (the plaintiffs’ *tarwad*), no new mortgage was legally created. He relied upon section 59 of the Transfer of Property Act, which says “that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.” I am at a loss to understand what benefit the appellants could hope to obtain even if this contention was upheld. If Exhibit L is invalid, then Exhibit I, the mortgage of 1905, which contains the more onerous conditions which were sought to be modified by Exhibit L, remains without any such modification. Further Exhibit L in my opinion is not a new mortgage at all. It is only a subsequent agreement by which the mortgagee, the 9th defendant, agreed to give up in favour of the mortgagors some of the benefits which he obtained under Exhibit I, leaving the terms of that mortgage in full force in other respects; in other words, the mortgage, Exhibit I, has not been cancelled by Exhibit L but only modified in favour of the mortgagor. A document effecting such a modification is not a new mortgage and hence section 59 does not apply.

Coming back then to the question of the *bona fides* of the compromise, Exhibit IV, and its validity against the *tarwad*, section 43 of the Trusts Act says that “Two

or more trustees acting together may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust” and that “The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorised to execute the trusts and powers thereof.” This section was evidently copied from section 30 of Lord Cranworth’s Act, which was re-enacted in the wider Statute 56 and 57 Victoria, Chapter 33 (see section 21). Though the Indian Trusts Act does not apply to public or private religious endowments (see section 1 of the Act), I think that the principles embodied in section 43 apply to a trustee or trustees acting on behalf of a private religious trust also. The powers of a trustee embodied in that section are enunciated primarily to protect him when acting *bona fide* against suits for damages by the *cestui que trust* for loss caused by the exercise of such powers. But the question whether property alienated to a third party by the trustee through an alleged breach of trust can be pursued successfully by the *cestui que trust* depends on very similar considerations, namely, whether the third party acted *bona fide* without notice of the breach and whether he was an alienee for valuable consideration. (See Lewin’s Law of Trusts, 12th Edition, page 1113.) Mr. Ramachandra Aiyar relied upon the case of *Bhojaraju Venkatrama Jogiraju v. Adapalli Seshayya* (7), decided by Benson and Sundara Aiyar, JJ, in support of his contention *contra*. The judgment in that case contains the following passages: “A decree passed against the holder of a woman’s estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract of compromise itself entered into by her would bind them. An adjudication against her by a Court, after a fair contest, with respect to a matter relating to the estate represented by her would no doubt be binding on the estate and all who succeed her as its owners: but a decree passed upon a com-

(7) 12 Ind. Cas. 123; 35 M. 560; 10 M. L. T. 179.

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promise into which she enters can have no higher effect against her successors than a contract entered into by her; *Timmaji Amma v. Subbaraju* (8), *Subbammal v. Avudaiyammal* (9), *Roy Radha Kissen v. Nruratan Lall* (10), Appeal No. 193 of 1907 decided by this Bench." Speaking for myself, I think that the powers of a Hindu widow to compromise litigation launched against her as representative of her husband's estate so as to bind the contingent reversioners have been rather too narrowly enunciated in the above passages. *Subbammal v. Avudaiyammal* (9) was not the case of a compromise but was the case of a decree obtained against the widow without contest. I do not see how that case supports the view that a compromise decree is not valid against the reversioners or that there should be a fair contest by the widow before an adjudication against her is binding on the reversioners. I am inclined to hold that if the widow is sued as representative of the estate and if she *bona fide* enters into a compromise of that litigation, that compromise is binding on the reversioners. However, that decision does not directly govern the present case and the analogy between the case of a Hindu widow representing her husband's estate and the case of a trustee of a religious institution is rather remote.

In Tudor on Charities and Mortmain (4th Edition, page 378), it is laid down generally "A question relating to the interests of a charity may be compromised. Thus in several cases a compromise of the question whether a charitable gift is good.....has been confirmed by the Court." But it is said at page 379, *ib.*: "The Court will not act in accordance with an award in charity cases without the consent of the Attorney-General." In England, charitable trusts are mostly governed by the provisions of the numerous Charitable Trust Acts (enacted between 1853 and 1894) and the Attorney-General has large powers of advice and control and

in the initiation of Court proceedings in the matter of charitable trusts. Similar provisions have not been enacted by the Indian Legislature and it is, therefore, necessary for Courts in India to scrutinise alienations by compromise and awards out of Court made in reference to properties relating to religious and charitable trusts with very great care, before they are accepted as valid against the trust. In the present case, the good faith of the 1st defendant and of the deceased trustee in the matter of the execution of Exhibit I and the good faith of the 1st and 9th defendants in entering into the compromise Exhibit IV are in question, and I agree with my learned brother that the case must go back to the lower Appellate Court for a fresh decision and I agree also in his order as to the costs incurred up-to-date.

Appeal allowed; Case sent back.

MADRAS HIGH COURT.

CIVIL SUIT No. 200 of 1916.

October 10, 1916.

Present:—Mr. Justice Coutts Trotter.

T. NUMBERUMAL CHETTY—PLAINTIFF
versus

M. P. NARASIMHACHARI—DEFENDANT.

Madras High Court Original Side Rules, 1902, rule 533—High Courts Act, 1861 (24 & 25 Vic. C. 104), ss. 8, 9, 11, 15—Letters Patent, (Mad.), 1866, ss. 9, 10, 37, 44—Vakils, Attorneys, right of audience of, on Original Side—Rule 533, whether ultra vires of Letters Patent—Legal Practitioners Act (XVIII of 1879), s. 4, proviso, s. 27, construction of, whether contains a legislative prohibition of audience to Vakils.

Rule 533 of the Original Side Rules of the Madras High Court, 1902, which gives the right of audience to Vakils and withholds it from the attorneys on the Original Side of the High Court is not *ultra vires* of the Letters Patent of 1866, and is binding on practitioners. [p. 704, col. 2; p. 707, col. 1.]

In the matter of the petition of the Attorneys, 1 M. 24; 11 Mad. Jur. 92; 1 Ind. Dec. (N. S.) 15, followed.

The proviso to section 4 of the Legal Practitioners Act (XVIII of 1879) cannot be construed as a variation by the Indian Legislature, under clause 44 of

(8) 5 Ind. Cas. 640; 20 M. L. J. 204; 7 M. L. T. 340; 33 M. 472.

(9) 30 M. 3.

(10) 6 C. L. J. 490.

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the Letters Patent, of the rule giving to Vakils the rights of audience on the Original Side, or as, by implication, preventing a Vakil from appearing on the Original Side. The words in the proviso 'under this section' govern the whole section. [p. 705, col. 2; p. 706, col. 1.]

Nor can such a prohibition be inferred from the absence in section 27 of any reference to the fees payable to Vakils appearing on the Original Side. [p. 706, col. 2.]

Act XVIII of 1879, which was passed after the privilege of audience on the Original Side had been enjoyed by the Vakils for 16 years, cannot be construed as taking it away, unless it says so in plain terms or by necessary implication. [p. 706, col. 2.]

History of the legislation on the subject traced and reviewed.

In the matter of the right of audience of Vakils and Attorneys on the Original Side of the High Court.

Messrs. *M. Venkata Subba Row* and *Radhakrishnayya*, for the Plaintiff.

Mr. *M. K. Ramaswami Aiyar*, for the Defendant.

Mr. *Nugent Grant*, for the Bar Association.

Mr. *C. P. Ramaswami Aiyar*, for the Vakils' Association.

Dr. *Pandalai*, for the Attorneys' Association.

JUDGMENT.—When this case first came on for hearing the defendant was represented by Mr. *M. K. Ramaswami Iyer*, Attorney-at-Law, and the plaintiff by Mr. *Venkatasubba Row*, Vakil. Mr. *M. K. Ramaswami Iyer* applied for an adjournment and on this being opposed, he claimed the right, as an Attorney-at-Law, to conduct his client's case in the suit and to have a right of audience. Mr. *Venkatasubba Row* opposed this and maintained that an Attorney-at-Law has no right of audience in the trial of a suit on the Original Side. To this, Mr. *M. K. Ramaswami Iyer* replied that he was prepared to show not only that he himself as an Attorney-at-Law had a right of audience but that Mr. *Venkatasubba Row*, a Vakil, had none. I was informed that the question was one which had arisen in this Court before; but as the parties informed me that it was desired to make this a test case to go before the ultimate Tribunal and as I was quite ignorant of what had been said or decided when it was discussed before, I thought it better that notice should go to the Barristers', Attorneys' and Vakils' Associations respectively that I would hear their representatives if they desired to be heard as *amici curiæ*. Ultimately, the matter was argued on the 20th and 21st instant, when

Mr. *Nugent Grant*, Barrister-at-Law, appeared for the Barristers, Dr. *Pandalai*, Barrister-at-Law for the Attorneys and Mr. *C. P. Ramaswami Iyer* for the Vakils. Having heard these gentlemen as well as Mr. *M. K. Ramaswami Iyer* and Mr. *Venkatasubba Row* who originally raised the question, I reserved judgment.

The precise form which the matter takes is the question as to whether rule 533 of the Original Side Rules of the Madras High Court of 1902 is or is not *intra vires*. If it is, it is conceded that it disposes of the matter adversely to both of Mr. *M. K. Ramaswami Iyer's* contentions; for its terms are perfectly clear and it runs as follows:—

"An Advocate may appear and plead upon all proceedings in Court or in Chambers; provided that the taxing officer shall not, between party and party, allow any fee in respect of his attendance at Chambers or at the first hearing of a suit unless the Judge certifies that the case is a proper one for the attendance of an Advocate.

"An Attorney may appear, plead and act upon all proceedings; provided that he shall not be allowed to appear or plead upon a hearing in Court.

"A Vakil may appear, plead and act upon all proceedings, whether in Court or in Chambers."

I have come to the conclusion that the clearest way of dealing with the subject is the chronological one. In order to understand the bearing and effect of the various Statutes and rules and decisions, one must see what the position was, before the passing of 13 Geo. III, Ch. 63. Under the Company's rule, civil justice was administered in local Courts, known as Zillah Courts. These had existed throughout India for a period going back centuries beyond the existence of the Company. In them, the litigants were represented by a body of persons called Vakils, a *Hindustani* word meaning "Agents"; and from time immemorial, the Vakil was paid by a percentage of the amount in suit. The Court or the native administration concerned determined who should be allowed to appear as Vakils in a given Zillah Court. When the Company organised the system of justice within India, they preserved the Zillah Courts, retaining in their own hands the appointment of the Judges in those Courts and the licensing of Vakils to plead;

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and the appeal system having developed, there grew up, at large centres of population, Courts of Appeal known as Sadder or "Superior" Courts presided over by the Chief Judicial Officers of the Company. These Courts, in each presidency, had a complete appellate jurisdiction over all inferior Courts of the Presidency and Vakils appearing in them for the parties were remunerated on the traditional system of a percentage of the amount in suit. No special Tribunal existed either for the presidency towns or for any special class of the population outside the Company's system of Zillah and Sadder Courts. The Sadder Courts were divided into two great branches, the Dewany Adawlut trying revenue matters and civil cases and Sadder Nizamut Adawlut or Fowjdari Adawlut which dealt with criminal matters. In 1774, steps were taken to permit of the establishment, for the Presidency of Bengal, by Charter or Letters Patent, of a Supreme Court. The jurisdiction was to be over all British subjects in the Presidency subject to an appeal to His Majesty in Council. We need not further pursue the history of the matter in Bengal since in 1800, similar steps were taken with regard to the Madras Presidency, by the Charter Act of that year. Following on this came the Letters Patent of the 26th December 1800, establishing the Supreme Court of Fort St. George. The jurisdiction of that Court was over British subjects throughout the Presidency and over all persons within the Municipal limits of what would now be called the Presidency Town of Madras; and it was provided that the Court should have a jurisdiction similar to that of the Court of King's Bench in England. The Court was further "authorised and empowered to approve, admit and enrol such and so many of the persons, being *bona fide* practitioners of the Law in the said Court of Recorder of Madras (this was the Royal Court which preceded the Supreme Court established by Charter) or having been admitted Barristers in England or Ireland or having been admitted Attorneys or Solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall, for that purpose, make and declare, to act as well in the character of Advocates as of Attorneys in the said Court,

which persons so approved, admitted and enrolled as aforesaid, shall be and are hereby authorised to appear and plead and act for the suitors in the said Court. And we do declare that no other persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them." Another clause of the Charter of 1800 runs as follows: "We do hereby further authorise and empower the said Supreme Court of Judicature at Madras, to settle a table of fees, to be allowed to such Sheriff, Attorneys and all others, the clerks and other officers aforesaid, for all and every part of the business to be done by them respectively, which fees, when approved by the Governor of Fort St. George-in-Council (to whom we hereby give authority to review the same), the said Sheriff, Attorneys, clerks, and other officers, shall and may lawfully demand and receive." The clear effect of the first of these clauses was to confine the right of acting in the character of Advocates and Attorneys respectively in the Supreme Court to such persons as should be appointed and enrolled as such Advocates or Attorneys by the Court; and it is clear that under that Charter, the Court could have no jurisdiction to give the right of audience in the Supreme Court to any one who had not been enrolled as an Advocate or the right of acting for a party to any one who had not been enrolled as an Attorney. The Letters Patent of Bombay, some twenty years later, confined the right of appearing in the Supreme Court to Barristers and of acting to Solicitors and it was held by the Privy Council in *Morgan v. Leech* (1) that the Supreme Court had no power to admit as an Attorney any one who did not possess the qualifications indicated by the Letters Patent. Applying the principle of this decision, it is clear that under the Letters Patent of 1800, the Supreme Court at Madras could have no power to allow the right of audience or of acting in the Supreme Court to any person not duly enrolled as an Advocate or Attorney of that Court, as the case might be.

It is pointed out that under the Letters

(1) 2 M. L. A. 428; 3 Moo. P. C. 368; 1 Sar. P. C. J. 216; 18 E. R. 362; 13 E. R. 149.

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Patent, the only legal practitioners for whom a table of fees is to be drawn up are Attorneys. A Barrister or an Advocate has no legal right to his fees which, in contemplation of law, are a mere gratuitous honorarium. In practice, of course, they are always charged at a more or less definite rate. But they are paid by the Solicitor or Attorney and figure in his bill delivered to his client and there is no contractual relation between the Barrister and the lay client. A Vakil, on the other hand, can sue for his fees and can recover them directly from the lay client, just as a Solicitor can sue for his professional costs. It is clear, therefore, that the only Advocates whose remuneration the Letters Patent of 1800 contemplated being provided for are the Barristers or Advocates retained and paid through Solicitors or Attorneys. There was no place in those Letters Patent for a Vakil. While the right of audience was thus restricted in the Supreme Court, Barristers, Advocates and Attorneys were admitted to practice in the Company's Courts; but, in so far as they did so, they appeared practically on the same footing as Vakils; their fees were taxed on the *ad valorem* scale in force in these Courts, and they were allowed to have direct relations with the lay client. In this state of things was passed the High Courts Act of 1861, 24 and 25 Vict., Ch. 104. The Act enabled Her Majesty by Letters Patent to establish High Courts at Calcutta, Bombay and Madras; and section 8 provides, with regard to Madras, that upon the establishment of such High Court in the Presidency of Madras, the Supreme Court and the Court of Sadar Adawlut and Fowjdari Adawlut in the same Presidency shall be abolished. Section 11 provides that upon the establishment of the High Court, all provisions, then in force in India, of Acts of Parliament or of any order of Her Majesty-in-Council or Charters or of any Acts of the Legislature of India applicable to the Supreme Courts shall be taken to be applicable to the High Courts so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, subject to the Legislative powers of the Governor-General of India in Council. Section 15 provides

that such High Court shall have superintendence over all Courts subject to its appellate jurisdiction and is to have power to settle tables of fees to be allowed to the Attorneys, no mention being made of fees allowable to Advocates on the one hand or Vakils on the other. Summing up the effect of the Statute as bearing upon the matters I have to decide, it seems to me that the following points emerge:— (1) The new High Court is a substitution for the Supreme Court and the Sadar Courts, and on its establishment, they cease, as such, to exist. Whatever historical analogies may exist, it is, I think, legally quite inaccurate to say that the Original Side of the High Court is the old Supreme Court or that the Appellate Side of the High Court is the old Sadar Court or Courts; (2) the existing provisions applicable to the Supreme Court are to apply to the High Court in so far as they are consistent with the Act and with the new Letters Patent to be framed thereunder; and (3) the only legal practitioners to whom tables of fees can be made applicable are Attorneys.

I now pass to the Letters Patent of the 26th June 1862. Clauses 7 to 10 deal with the powers of the High Court in admitting Advocates, Vakils and Attorneys to practice. These are their terms. Clause 7:—"We do hereby authorise and empower the said High Court of Judicature at Madras to approve, admit and enrol such and so many Advocates as to the said High Court shall seem meet, who shall be and are hereby authorised to appear and plead for the suitors of the said High Court, subject to the rules and directions of such Court."

Clause 8:—"We do, further, authorise and empower the said High Court of Judicature at Madras to approve, admit and enrol such and so many Vakils as to the said High Court shall seem meet, who shall be and are hereby authorised to appear, plead and act for the suitors of the said High Court subject to the rules and directions of such Court."

Clause 9:—"We do, further, authorise and empower the said High Court of Judicature at Madras to approve, admit and enrol such and so many Attorneys-at-Law as to the said

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High Court shall seem meet, who shall be and are hereby authorised to appear and act for the suitors of the said High Court, subject to the rules and directions of such Court."

Clause 10:—"We do hereby ordain that the said High Court shall have power to make rules for the qualification and admission of proper persons, to be Advocates, Vakils and Attorneys-at-Law of the said High Court and shall be empowered to remove, on reasonable cause, the said Advocates, Vakils and Attorneys-at-Law and no person whatsoever but such Advocates or Vakils shall be allowed to plead for, or on behalf of any suitor in the said High Court; and no person or persons whatsoever but such Vakils or Attorneys-at-Law shall be allowed to act for any suitor in the said High Court."

Clauses 11 to 27 deal with the jurisdiction of the High Court and establish a distinction in civil and criminal matters respectively between the original and appellate jurisdiction of the High Court, though the expression "Original and Appellate Side" of the High Court is not used. By clause 44, it is enacted that so much of the Letters Patent of 1800 as is inconsistent with 24 and 25 Vict. Ch. 104, and the present Letters Patent shall cease and determine and be utterly void.

Under the authority of the Letters Patent of 1862, rules were passed by the High Court of Madras of which the material ones are as follows:—

By rule 4, Advocates and Attorneys of the Supreme Court who, at the time of its abolition, had been permitted to practise as Pleaders in the Sudder Court were empowered to apply to be enrolled as Vakils of the High Court; but as such Vakils, they were forbidden to appear, plead or act in matters of Extraordinary Original Civil Jurisdiction. By rules 7 and 8, Vakils were forbidden to appear, plead or act in any matter of Ordinary Original Jurisdiction of the High Court, Civil or Criminal. The position defined by these rules is quite unmistakable. The person who is to appear before the High Court in its Appellate Jurisdiction is the Vakil with the traditional remuneration, *ad valorem*. Barristers and Attorneys have a right of audience in the appel-

late business and for purposes of that business only may enrol themselves as Vakils. I am not quite clear as to whether the idea was that they must necessarily enrol themselves as Vakils, if they wished to appear on the Appellate Side; and I do not feel sure that an Advocate could not have appeared, instructed by an Attorney, and claimed to be heard as an Advocate and not as a Vakil. This, however, is quite certain that the only remuneration that could have been claimed either from the client or from the other party, would have been the single *ad valorem* fee. The client could only with his consent have been charged with the ordinary bill of costs including separate items of remuneration to the Attorney and the Advocate.

On the 1st October 1863, the High Court issued two sets of new rules, the first being headed "Rules providing for the qualification and admission of Advocates, Vakils and Attorneys of the High Court". They laid down certain qualifications with which we are not now concerned. But in Rule 7, one qualification is that of having studied for six months with "a Vakil entitled as such to practise on both the Original and Appellate Sides of the High Court". This, so far as I know, is the first mention of a Vakil entitled to practise on the Original Side. I do not think it is of much importance to enquire whether, on that date, any Vakil did or did not practise on the Original Side. At any rate no one had been able to point out any rule which empowered him to do so, and by the rules of 28th August of 1862 he was clearly prohibited from so doing. I think it more probable that the rule had reference to the future, for, on the same day, 1st October 1863, it is clearly contemplated that Vakils shall practise on the Original Side, because there is an elaborate series of provisions regarding Vakils' fees on the Original Side, though nowhere, in terms, is it directly said that he shall have a right of audience. On the one side it is contended that the rules of 1862, on the other that the rules of 1863 were *ultra vires* the Charter, and, of course, a third view is possible and that both were *intra vires* and that it was at the option of the High Court as to

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whether or no, it should give a right of audience to Vakils, an option which it exercised in one way on the earlier date and in another on the later.

But it is not necessary to go into that matter, because, within 3 years, the Letters Patent of 1862 were superseded by the Letters Patent of 28th December 1865. The only clauses that I need refer to are 9 and 10 (relating to the admission of Advocates, Vakils and Attorneys), 37 and 41. Clauses 9 and 10 are so important that they must be set out in full.

Clause 9:—"We do hereby authorise and empower the said High Court to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall seem meet; and the said Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court and to plead and act for the said suitors according as the said High Court may, by its rules and directions, determine and subject to such rules and directions."

Clause 10:—"We do hereby ordain that the said High Court shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law, of the said High Court, and shall be empowered to remove or suspend, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or plead for or on behalf of, any suitor in the said High Court."

Clause 37 makes it lawful for the High Court, from time to time, to make rules and orders for the purpose of regulating all proceedings in Civil Cases which may be brought before the said High Court; and in doing so, is to be guided, as far as possible, by the provisions of the Code of Civil Procedure; Clause 44 makes all the provisions of the Letters Patent subject to the powers of the Indian Legislature which is empowered to amend and alter them.

On the 5th July 1866, new rules were passed by the High Court relating to Advocates, Vakils and Attorneys and by the 5th of those rules, Vakils admitted under the rules of 1st October 1853 may appear, plead and act and

Attorneys may appear and act for the suitors in all matters over which the Court has any jurisdiction. It is clear and it is not contested that by that rule, the High Court definitely purported to give a right of audience to Vakils on the Original Side of the High Court, and the right conferred by that rule was no less explicit and no more restricted than the right conveyed by the Rules of 1902, now in force.

In this state of things, in 1875, the matter was brought before the Full Bench of four Judges, Sir W. Morgan, C. J., Innes, Kerran and Kindersley, J.J., on a petition by the Attorneys to have it declared that Rule 5 of 1866 was *ultra vires* and that the Court has no power to authorise Vakils to appear on the final hearing of a case on the Original Side. A good many arguments *ab inconvenienti* were addressed to that Court with which, however relevant they might be on the hearing of a petition (though, as a matter of fact, the Court decided that they were not relevant), I clearly have no concern. The legal arguments were much the same as those addressed to me and I may say at once that, whatever my own view might be, I must clearly hold myself bound by that Full Bench decision, and I am of opinion that that decision precludes me finally from holding that so much of Rule 533 of 1902 as gives a right of audience to Vakils on the Original Side is *ultra vires* the Letters Patent. For the sake of clearness, I will just re-state what the chief contention was. It was based on section 9 of 24 and 25 Vict., Ch. 104, which, in its concluding words, says:—"The High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of the last mentioned Courts. The argument is that there has been vested in the High Court only such power regulating the admission of the various classes of legal practitioners as were vested in the abolished Courts, and that those powers did not include the power to extend or contract the right of audience theretofore existing, but only to determine what qualifications should enable a person to be

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an Advocate or a Vakil, as the case might be. The High Court can say, for instance, that a person with a degree of Master of Laws of an Indian University should be entitled to be enrolled as an Advocate or that a person with a degree of Bachelor of Laws should be entitled to be enrolled as a Vakil; but it had no power to extend the functions and the right of audience of an Advocate or a Vakil beyond the powers enjoyed by the abolished Courts. This argument also involves the contention that if the rule was in accordance with the Letters Patent the Letters Patent were void and *ultra vires*, in so far as they exceeded the powers conferred by the Act, 24 and 25 Vict., Ch. 104, under which the Letters Patent purported to be promulgated. That contention was rejected by the Full Bench and I only wish to add this to what was said by the Full Bench, that the argument involves yet another step, which, to say the least of it, is one of difficulty. The reasoning is apparently this: the old Supreme Court had no power to give a right of audience to Vakils, though the old Sudder Court had and exercised the power to allow Advocates and Attorneys to appear before it as well as Vakils; when it is dealing with Original Jurisdiction, the High Court is the inheritor only of the powers of the old Supreme Court, and, as such, has no jurisdiction to give a right of audience to any practitioner to whom the old Supreme Court could not have given such a right; as the inheritor of the powers of the Sudder Court, it can give the right of audience to Vakils, but only in respect to the subject-matter with which the Sudder Court was concerned, namely, the Appellate Jurisdiction of the High Court which it took over from the Sudder Court. It is a very forcible argument and a very logical one and presents the view of the powers of the High Court in this matter which has clearly been adopted in Calcutta and Bombay. The difficulty of it is, as it seems to me, that it preserves and continues into the constitution of the High Court the cleavage between what I may call its Supreme Court functions and its Sudder Court functions, which is not only not warranted by 24 and 25 Vict., Ch. 104, but is expressly forbidden by section 8 of that Act. The answer made, and the

only answer that can be made is, of course, that the Act only abolished the Sudder Court and the Supreme Court as such and that there is nothing obnoxious to the provisions of the Act in supposing a cleavage to persist between the two kinds of jurisdiction exercised by the High Court typified by the separation and distinct distribution of its work between the Original and the Appellate Sides. I have thought it right to state the contention of the parties, as I understand it, on this subject, though, as I have said, for me the matter is concluded by authority.

I now pass to another contention in which I clearly am not concluded by authority. I have already pointed out that Clause 44 of the Letters Patent expressly preserves the right of the Indian Legislature to vary and override the provisions of the Letters Patent. It is contended that Act XVIII of 1879 of the Indian Legislature, by necessary implication, takes away the right of audience of Vakils on the Original Side even if they be deemed to have it under the Letters Patent. If this contention as to the effect of the Act of 1879 is sound, it will do away with the authority of *In the matter of the petition of Attorneys* (2), because it is obvious that if the Indian Act can vary the Letters Patent themselves, it can *a fortiori* overrule the authority of any case purporting to put a particular construction on the Letters Patent. The Act is entitled "The Legal Practitioners Act of 1879." It did not, in its inception, apply to Madras but it was an adoptive Act and was extended to this Presidency, by adoption, by the Local Government in 1882. Section 4 of that Act provides that an "Advocate or Vakil on the roll of any High Court may practise in all the Courts subordinate to the Court on the roll of which he is entered or with the permission of the Court, in any High Court on whose roll he is not entered, provided that no such Vakil shall be entitled to practise under this section before a Judge of the High Court, Division Court or High Court exercising Original Jurisdiction in a Presidency town." It is argued that this, by implication, prevents a Vakil from appearing on the Original Side of a High Court. I think this argument is unsound, because the governing words of the section

(2) 1 M. 24; 11 Mad. Jur. 92; 1 Ind. Dec. (N. S.) 15

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appear to me to be the words "under this section." At the time when this Act was passed, Vakils had no right of audience on the Original Side of the High Courts of Calcutta and Bombay and without the words, the section would authorise a Judge of the Bombay High Court to allow a Vakil enrolled at Calcutta to appear on the Original Side of the High Court of Bombay and thus enjoy a privilege denied to all Vakils enrolled in the Court of Bombay itself.

A further argument was addressed to me on the construction of section 27 of the Act, which runs as follows:—The High Court shall, from time to time, fix and regulate the fees payable by any party in respect of the fees of his adversary's Advocate, Pleader, Vakil, Mukhtear or Attorney upon all proceedings (a) on the Appellate Side of such Court, (b) in the case of a High Court not established by Royal Charter, on its Original Side and (c) in Subordinate Courts. The argument is a subtle one and is to this effect; this section must be declaratory and exhaustively declaratory of the powers of the High Court to award fees of the nature of party and party costs, except in so far as there may be an express provision of the Letters Patent not directly in conflict with it. The Letters Patent contain a provision that the High Court shall regulate and make rules for the fees of Attorneys. There is nothing in that inconsistent with the power of the High Court to make provision for the fees of Attorneys on the Original Side, because that is a matter left untouched by the section which only deals with Attorneys' fees on the Appellate Side. But with regard to fees of Vakils, the Letters Patent are silent. Accordingly, the only jurisdiction that the High Court can have to make provision for the fees of Vakils as between party and party is contained in the Legal Practitioners Act, and section 27 expressly confines the High Court's power to make such regulations to the Appellate Side of the High Court. It is urged that if Vakils were to be supposed to have a right of audience on the Original Side, the absurd result will follow that the successful party cannot recover the fee he has paid to his Vakils, because the Court has no power to make any rule to fix what that fee may be. It is pointed out that Indian Courts have no inherent powers in these matters

but only such as they derive from Statutes or from the Letters Patent issued under statutory authority. I am not called upon to decide whether there is power for a successful party to recover his Vakil's fees on the Original Side or not, and I do not propose to do so. The argument advanced is that the absurdity of supposing that the Legislature allowed a right of audience to exist without the right of recovering fees paid to the Vakil as party and party costs, is so great that the Legislature must be taken, by necessary implication, to have denied the right of audience on the Original Side to Vakils. I am bound by *In the matter of the Petition of Attorneys* (2) to hold that at the date of the passing of this Act, Vakils had, under the Charter and under valid rules of this Court, a right of audience on the Original Side. I cannot construe an Act passed after the privilege has been enjoyed for 16 years as taking it away, unless it says so in plain terms or by an absolutely necessary implication. A mere anomaly or inconvenience created *per incuriam* or by bad draftsmanship is not, in my opinion, enough. I am not, of course, deciding whether or no the suggested anomaly does exist. But even if it did, it would not, in my opinion, be sufficient to allow me to read into the Act a deprivation of the right of audience which is not clearly to be found in it. I, therefore, come to the conclusion that I must hold that Vakils have a right of audience on the Original Side of this Court.

It remains for me to decide whether Attorneys have such a right. My decision on the first point involves holding that the High Court is one and indivisible, that the old barriers between the Supreme Court and the Sudder Court are broken down and if an Advocate has the right of audience in one side of the High Court, he has necessarily on the other. I do not think that because the High Court is held to have the power to admit a practitioner to plead on both sides of the Court, it must necessarily, when it grants the right of audience on one side, be held to grant it, *ipso facto*, on the other. I have already said that I think it would be quite competent to this Court to follow the example of the High Courts of Bombay and Calcutta and exclude Vakils from practising on its Original Side. Conversely, it may

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well be that the High Court would have been within its powers in admitting Attorneys to plead on the Original Side as well as the Appellate Side. From the fact that it may exclude Vakils, I have held that it does not follow that it must. Similarly, from the fact that it may include Attorneys, it does not follow that it must. What it has done by rules is to give the right of audience, on the Original Side, to Vakils and withhold it from Attorneys. I am not prepared to hold that the one is not as much within its powers as the other.

I have been much assisted in this case by the extremely able and learned argument of Mr. M. K. Ramaswami Iyer, and I have to express my obligation also to Mr. Grant and Mr. C. P. Ramaswami Iyer for their equally able and learned arguments and especially for their readiness to assist the Court as *amici curiæ*. I hold, in the result, that I can hear Mr. Venkatasubba Rao for the plaintiff and that I am precluded from hearing Mr. M. K. Ramaswami Iyer for the defendant. The actual hearing of the suit has been postponed for a week in order to enable Mr. M. K. Ramaswami Iyer to instruct Counsel, which, in obedience to my decision, he has expressed his readiness to do until a higher Court decides otherwise.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 79 OF 1915.
April 14, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe,
Kt., and Justice Sir Asutosh Mookerjee, Kt.
LALIT MOHUN NUNDY—DEFENDANT NO. 2

—APPELLANT

versus

HARIDAS MUKHERJEE—PLAINTIFF—
RESPONDENT.

Contract Act (IX of 1872), ss. 76, 178—Certificates of shares, whether 'goods' or 'documents of title' to goods—Pleadings—Fraud, allegations of—Proof.

Certificates of shares are neither 'goods' nor 'documents of title' to goods within the meaning of section 178 of the Contract Act. [p. 711, col. 1; p. 714, col. 1.]

Sethna, R. D. v. National Bank of India, 8 Ind. Cas. 183; 12 Bom. L. R. 870, not followed.

When the plaintiff sets up a charge of fraud against the defendant, the nature and particulars of the fraud should be specifically stated and the fraud so alleged must be established beyond doubt. [p. 712, col. 1; p. 714, col. 2.]

The definition of 'goods' in section 76 of the Contract Act should not be extended to the term as used in section 178. [p. 711, col. 2; p. 714, col. 1.]

Appeal against the following decision of Mr. Justice Imam, sitting on the Original Side, dated the 14th June 1915:—

"The plaintiff in this suit sues the two defendants for the recovery of Rs. 2,500 lent and advanced to the first defendant Nikkamull Khetry on deposit of certain coal shares, for a declaration that the said shares are charged with the repayment of the debt, for recovery of the shares on the ground that they had been obtained by the 1st defendant from the plaintiff fraudulently, and for the sale of the said shares to satisfy the debt due to the plaintiff. The case of the plaintiff may be shortly stated here. On the 27th of March 1913 the plaintiff sold to the 1st defendant 200 Baraboni coal shares for a sum of Rs. 3,000 and as Nikkamull the 1st defendant was not able to pay the entire consideration money, he paid a sum of Rs. 500 by cheque on that date and pledged 100 Equitable Coal shares for the balance, namely Rs. 2,500. The plaintiff was assured that the sum of Rs. 2,500 would soon be paid to him and, therefore, he allowed that money to remain with the defendant No. 1 without any interest. On the 2nd April 1913 the defendant No. 1 represented to the plaintiff that he had negotiated the sale of the 100 Equitable Coal shares, that had been pledged, with the 2nd defendant Lalit Mohun Nundy, who was prepared to pay the consideration for all the shares to the defendant No. 1 and believing this assurance to be true, the plaintiff was induced to return the 100 Equitable Coal shares to Nikkamull defendant No. 1, on receiving from him a cheque for Rs. 2,500, the amount that was due to the plaintiff.

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The plaintiff in his deposition in Court has stated that he was told that he would not have any occasion to present the cheque for encashment, inasmuch as the money would be paid to him that evening and he would then have to return the cheque to Nikkamull. The plaintiff to satisfy himself as regards the truth of the assurance approached Lalit Mohun Nundy and learnt from him that the transaction was as it had been stated by Nikkamull. The plaintiff accordingly returned the 100 Equitable shares and received the cheque. The payment of Rs. 2,500 was, however, not made in the evening and the plaintiff had the cheque presented to the Bank for encashment the next day, i. e., 3rd April 1913 and on its being dishonoured he instituted criminal proceedings against the 1st defendant. We are not concerned with the result of the criminal proceedings, as the same does not affect the considerations of this case. Nikkamull, on some allegations which it is not necessary to relate here, also instituted criminal proceedings against Lalit Mohun Nundy, the 2nd defendant. The result of those criminal proceedings also does not touch this case in this Court. The 1st defendant has not entered appearance and the suit has been contested by the 2nd defendant only. It is admitted that the 1st defendant on the 2nd April 1913 made over the 100 Equitable shares along with 1,100 other shares to the 2nd defendant and the latter's case is that he received the 1,200 shares in part satisfaction of debt due to him from the 1st defendant, and further the 2nd defendant states that at no time did he promise either Nikkamull or the plaintiff to pay to Nikkamull either the whole or any portion of the consideration for the 1,200 shares. His contention is that he received the 100 Equitable shares as well as the 1,100 shares in the course of a *bona fide* transaction and that he was not liable either to Nikkamull or to the plaintiff for payment in cash of any portion of the consideration of the 1,200 shares.

There are only two issues in this case that require to be considered. (1) Whether Nikkamull had pledged the 100 shares to the plaintiff, and (2) whether the plaintiff has any right, title, or interest to or in the shares in suit against the

defendant Lalit Mohun Nundy. The suit, so far as the 1st defendant is concerned, has to be decreed *ex parte*. The first issue does not appear to me to have been seriously contested by the second defendant. He has offered no evidence to disprove the statement of the plaintiff as regards the pledge of the 100 Equitable shares and the production by the plaintiff of the original cheque for Rs. 2,500 is a strong corroborative evidence on his side to support his case. The 1st issue, therefore, has to be decided in favour of the plaintiff. The principal issue really is the second issue and on the evidence I am disposed to hold in favour of the plaintiff on that issue also. It is admitted by the defendant No. 2 that on the 2nd April the 100 Equitable shares in question came into his possession from the defendant No. 1. It is further admitted by him that he made no cash payment for the shares in question to the defendant No. 1. The question then is, whether Lalit Mohun Nundy received the shares in question on payment of any immediate consideration or in satisfaction of any existing debt or he received them in the manner alleged by the plaintiff. His case as further explained in his evidence is that out of the 1,200 shares 450 shares formed part of 2,750 shares that had been purchased for him by Nikkamull and 200 (of which 100 were the Equitable shares and 100 Baradhemu shares) were a part of the margin of 1,300 shares that had been left by Lalit Mohun Nundy with Nikkamull on the transaction of the purchase of 2,750 shares, and the remaining 550 shares out of the 1,200 were new shares that were handed over to Lalit Mohun Nundy by Nikkamull. Even on his own case Lalit Mohun Nundy shows that in exercise of some right the 100 shares in question had been kept by the defendant No. 1, and even if they belonged to Lalit Mohun Nundy they were subject to some liability, the exact nature of which has not been explained in this case. A letter dated 3rd March 1913 has been produced in this case and both parties in support of their respective contentions rely on the contents of that document. That document shows the purchase of 2,750 shares by Nikkamull for Lalit Mohun Nundy and the retention by him of 1,300

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shares on account of margin, it being apprehended by him that there would be a difference between the market value of 2,750 shares and the price actually paid. So long as the value of 2,750 shares remained unsettled, there is no denying that Nikkamull was entitled to retain as margin the 1,300 shares. Lalit Mohun Nundy has produced a number of entries to show that a large sum was due to him from Nikkamull and that he was entitled to take the 1,300 shares in part satisfaction of the debt due to him, and the accounts seem to me to be so confused that it is impossible for me on the strength of them to declare that Lalit Mohun Nundy has succeeded in showing that anything was due to him from Nikkamull; it may be that he was entitled to receive something, big or small, from Nikkamull, but the evidence before me is not satisfactory enough to induce me to hold in Lalit Mohun Nundy's favour. But even if it be granted that money was due to Lalit Mohun Nundy from Nikkamull, a transfer by Nikkamull of property belonging to another in order to satisfy a debt could confer no title on the transferee, when the consideration for the transfer was not the payment of immediate cash but the mere satisfaction of an existing debt. It cannot be said that Lalit Mohun Nundy on account of the 100 shares parted with any money in favour of Nikkamull, what he did was that he had transactions with Nikkamull for a long time which resulted in a large balance in his favour and in order to satisfy the balance due to him he chose to accept from Nikkamull what was the property of a third person. In this view it seems to me that there was no transference of title though there was transference of physical possession. The plaintiff's case, however, is that Lalit Mohun Nundy had knowledge of the circumstances under which he the plaintiff parted with 100 shares in favour of Nikkamull. On this point the contentions of the parties are supported by their respective statements without corroboration from any witnesses, and I am left to decide the question on the credence that I can give to the evidence of one party or the other. I give preference to the statement of the plaintiff as his manner

in the witness-box impressed me more favourably than that of Lalit Mohun Nundy, but apart from this, it seems to me that the probabilities of the case lie equally with the plaintiff. On the 27th March he certainly did not consider Nikkamull worthy of so much confidence as to have been allowed to retain the plaintiff's Rs. 2,500 on a mere verbal assurance to pay the same and the plaintiff had as security for his debt the 100 Equitable shares from him. Nothing happened during the 27th March and the 2nd April to alter the state of mind of the plaintiff and to engender in him any greater confidence in Nikkamull than he had on the 27th of March. On the 2nd April the plaintiff parted with the pledged shares in favour of Nikkamull on receiving from him a cheque for Rs. 2,500 with no certainty as to its encashment. There is no doubt on the evidence that the plaintiff was assured that Nikkamull was negotiating with Lalit Mohun Nundy for the sale of some shares including the 100 shares in question, and as the parties transact their business in the same neighbourhood and have frequent opportunities of meeting each other, the plaintiff must have ascertained from Lalit Mohun Nundy as to the negotiations that Nikkamull was having with him. To part with the pledged shares on receipt of a mere cheque without any certainty of its encashment would have been an act of indiscretion on the part of the plaintiff, which I do not believe he committed. It has been pointed out on behalf of Lalit Mohun Nundy that the case made by the plaintiff in this Court was not that that he had any talk with Lalit Mohun Nundy as regards the negotiations of Nikkamull with him, but that the plaintiff was merely informed that Nikkamull in collusion with another had defrauded people of their shares by giving a number of cheques without having credit at the Bank for their encashment. The passage on which this argument is based deals with not merely the case of fraud practised on the plaintiff but also of frauds alleged to have been committed on others by Nikkamull. As regards the others the plaintiff could not but say that he had informations. As regards his not mentioning the name of Lalit Mohun Nundy

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initially in the proceedings in this Court, the explanation has been given that the plaintiff had been advised by his Pleader not to start a case against Lalit Mohun Nundy. I am not concerned with the wisdom of the advice, but I believe the advice was so given, and I accept the statement of the plaintiff on this point. The result is that this suit is decreed not only against the defendant No. 1 but against the defendant No. 2 also. The plaintiff will get costs of this suit on scale No. 2 from the defendant No. 2 and on scale No. 1 from the defendant No. 1. The plaintiff will also get reserved costs, if any. I declare that the shares in question are charged with the payment of Rs. 2,500. The plaintiff is entitled to interest on Rs. 2,500 at 6 per cent. from the date of the decree from the defendant No. 1 only. The shares will be sold by the Registrar and the proceeds applied towards the payment of Rs. 2,500, interest and costs, and the balance, if any, will be made over to Lalit Mohun Nundy. If the sale-proceeds are not sufficient to satisfy the decretal amount for the balance, the plaintiff will have a personal decree against the defendant No. 1."

Messrs. N. Sircar and I. B. Sen, for the Appellant.

Messrs. A. P. Sen and B. K. Ghose, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case the action was brought by the plaintiff claiming the sum of Rs. 2,500 and interest, and also for a declaration that the shares, which have been called in this case the "Equitable" shares, should be charged with the repayment of the said sum of Rs. 2,500 and also for the recovery of the said shares. The action was brought against Nikkamull Khetry the 1st defendant who did not appear, and, therefore, the case proceeded, so far as he was concerned, *ex parte*. The other defendant was Lalit Mohun Nundy, and he is the defendant who has appealed against the decision of the learned Judge.

The learned Judge has directed that as far as this defendant (the 2nd defendant) is

concerned, the shares in question are charged with the repayment of Rs. 2,500.

It is to be noticed in the first instance that the claim put forward by the plaintiff was that he had but advanced the said sum of Rs. 2,500 to Nikkamull Khetry on the 27th of March 1913. It turns out upon the evidence being given that he had not lent or advanced Rs. 2,500 in the ordinary sense of the words, but had sold 200 Baraboni shares to Nikkamull at Rs. 15 per share amounting to Rs. 3,000, and Nikkamull had given him a cheque for Rs. 500 which had been cashed, and, therefore, there remained a balance of the purchase-money, Rs. 2,500 owing by Nikkamull to the plaintiff. In respect of that Nikkamull deposited with the plaintiff this certificate in respect of the 100 Equitable shares. The certificate is in the ordinary form, whereby it is certified that Mr. L. Rogers is "the registered proprietor of 100 of the above-mentioned ordinary shares" and so on. The certificate was signed by somebody, whose name I cannot read, on behalf of Macneill & Co., who are the managing agents, and then apparently it was transferred in the name of a man called Mr. Macnaghten, and then it was transferred in blank and signed by the Attorney of Mr. Macnaghten. This certificate and blank transfer were deposited by Nikkamull with the plaintiff on the 27th of March 1913 as security for the payment of the Rs. 2,500.

Now, it appears that the shares which were represented by this certificate had been deposited by the defendant Nundy with Nikkamull early in March. The learned Counsel for the respondent argued that there was nothing to show that the shares, the certificate for which the plaintiff held, were the same shares as those which had been deposited with Nikkamull by the defendant Nundy. I do not think that point was raised in the trial, and I think there was evidence given that they were the identical shares. As I have said, these shares were deposited with Nikkamull early in March as margin in respect of certain speculations which were going on between Nikkamull and Nundy; and, the letter of the 3rd of March shows the terms under which Nikkamull held these particular shares. They are: "In consideration that you (Nikkamull) hold in trust

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the undermentioned coal shares, with you on my (Lalit Mohun Nundy's) account, at the rates affixed thereto, I gave you and you received from me, some other coal shares as margin thereof at the rate of Rs. 25 per cent. of the value of those shares which are expressly stated below as such. You shall not be able to dispose of, to sell or to deliver to any one else except me any of these shares of mine, without my written instruction for the same." Then there is a provision in the end of the letter with reference to the margin being short, to which the learned Counsel has referred.

Now, those being the conditions under which Nikkamull held the shares, it is urged that even though he had no authority to deal with those shares, still the plaintiff obtained a good title to them, because he did not know anything about the limit of Nikkamull's authority; and, inasmuch as he took them without notice and *bona fide* he is protected by section 178 of the Indian Contract Act, and it has been urged that this certificate comes within the meaning of that section. Section 178 runs as follows, "A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly: Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud." Reading those words without reference to any authorities, I have no doubt in my mind that the word "goods" does not include such a certificate as that now before us: nor does it include, speaking more generally, *shares*. I think it is obvious from the phraseology of the section that it was intended to refer to "goods" in the ordinary meaning of the word. We know perfectly well what a bill of lading is,—it is a document of title to goods shipped on board of a vessel, what a dock-warrant is,—which is a document of title relating to goods which are lying in a dock, and so the other documents which are referred to in the sec-

tion, such as a warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods—all documents of title to goods, which are perfectly well known not only in the legal world but also in the commercial world, and they cannot be extended by any stretch of language to such a document that is now before us. I, therefore, do not think that this certificate comes within the meaning of the word "goods." I am confirmed in that opinion by reference to the section (section 76) which defines the word "goods." In that section it means "Every kind of moveable property." But it is expressly provided in that section that that meaning shall only be applied to the word "goods" as far as that chapter is concerned, namely Chapter VII. If it had been intended that that extended meaning should be given to the word "goods" in Chapter IX in which section 178 occurs, I think that the Statute would have said so. Therefore, in my opinion section 178 does not apply to this case. What then is the position? We have the letter of the 3rd of March before us, in which it is distinctly stated that Nikkamull was not entitled to part with these shares without the express authority in writing of the other defendant Nundy. There was no evidence given to show that he had such authority. Therefore, the matter stands thus, that Nikkamull was holding these shares with no power to dispose of them and with no power to pledge them without express authority in writing. He did pledge them to the plaintiff, but he could not pass to the plaintiff any better title than he had himself.

At the time of the trial the shares had got back into the possession of the defendant Nundy. I do not understand how the plaintiff can make out any case against the defendant Nundy, unless he can prove a case of fraud against him. If he could have satisfied the Court that Nundy had been a party to a subterfuge or any fraudulent transaction by means of which either by himself or together with Nikkamull he had deprived the plaintiff of the special property which he had in the certificate as pledge, then two things would have resulted: It would have been right to infer, *first* of all, that Nundy had authorized Nikkamull to pledge the certificate, or, at all events, that

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he knew of the pledging of the certificate, and *secondly*, that he had been a party to the fraud by means of which the plaintiff was deprived of the pledge. But, in my opinion, the plaintiff has not succeeded in proving that there was any fraud on the part of Nundy by means of which the plaintiff was deprived of the possession of the certificate—I am not going into the evidence, which was referred to in detail in the course of the argument, because the matter was discussed fully, while the learned Counsel was arguing. But I should like to point out first of all that the plaint does not make any such charge of fraud as is now attempted to be made against Nundy, *viz*, that he, Nundy, fraudulently represented that he had undertaken to purchase the shares from Nikkamull and that he would provide the money in the evening. It is quite true that in the pleadings the plaintiff alleged that Nundy and Nikkamull have acted in collusion with regard to certain Police proceedings for the purpose of getting the shares out of the custody of the Police Court, and it is quite true that he also stated that the defendant Nundy was aware of the fraud which the plaintiff alleged Nikkamull had perpetrated upon him, but he did not suggest in his pleadings that it was by reason of fraudulent representation on the part of Nundy that the plaintiff was induced to part with those shares. In my opinion, it is necessary, when the plaintiff is going to set up a charge of fraud against the defendant, to state in the plaint, clearly and specifically what the fraud consists of, the nature of the fraud, and the particulars thereof, which he says has been committed, and, when he has pleaded that, it should be shown by strict proof that such fraud has in fact been committed. In this case not only did he not set up the fraud which is now alleged, but no sufficient evidence was given at the trial to support the allegation now made.

For this reason I think the learned Judge's judgment cannot be supported. He has not found a charge of fraud against the defendant Nundy, but has dealt with this matter, looking at the case from the point of view of title, and his judgment cannot be upheld.

Therefore, this appeal is allowed with costs and the suit as against the appellant-defendant Lalit Mohun Nundy dismissed with costs.

WOODROFFE, J.—The learned Judge has not, I think, dealt with this case from the right point of view.

For the purpose of this judgment I will assume that there was a debt owing by Nikkamull Khetry to the plaintiff, that that debt was secured by a pledge of the shares in question, that by fraud Nikkamull Khetry got back the shares without paying the debt and that he subsequently made them over to the defendant Lalit Mohun Nundy. Now, if, as the plaintiff alleges, Lalit Mohun Nundy was a party to the fraud set up, then the plaintiff would succeed. The learned Judge has not found this; and the fraud which is by no means clearly set forth has not been made out.

We must proceed then on the assumption that the fraud is not proved, and we have to determine who is entitled to these shares as between the plaintiff and defendant Nundy who, on the hypothesis I have stated, is assumed to be an honest holder of them.

The first question which is raised is whether section 178 of the Contract Act applies to the case. I am not prepared without further consideration to say that it does. The learned Judge who expressed his opinion in *Sethna, R. D. v. National Bank of India* (1) did not himself do so without doubt. But it is unnecessary for me to determine this question, because assuming for the sake of argument that section 178 does apply, that section makes no difference to the findings at which I have arrived; for, if that section be applied to the plaintiff, it must equally be applicable to the case of Nundy defendant. We have then this case. The shares clearly belonged originally to the defendant Nundy and were made over by him to Nikkamull Khetry as security for margin of shares carried by him on the express terms that he, Nikkamull Khetry, would not make them over to a third person. Notwithstanding, and I will assume in fraud of Nundy, Khetry pledged them on his own account to the plaintiff. Let me assume that the plaintiff having no knowledge of the true facts took a valid pledge of the shares. Then Nikkamull Khetry, we will assume, in fraud of the plaintiff got back the shares without paying his debts and made them over to their lawful owner. Defendant

(1) 8 Ind. Cas. 183; 12 Bom. L. R. 870.

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Nundy took them without notice of anything which had previously happened. It is conceded that if Nandy had got them back, on payment of cash his title would have prevailed against the plaintiff. But it is said that it does not because Nundy, it is alleged, did not pay cash, but took them in payment of an antecedent debt due by Khetry to him on general account. It is not clear what the transaction was, but it is certain, whatever it was, that Nundy was getting back his own property. He was not, as the learned Judge has found, accepting property of a third person.

Mr. Sen says that Nundy was not entitled to get the property back except in terms of the letter Exhibit (1A). But assuming that he did not receive it in accordance with such terms, that is no affair of the plaintiff, but a matter between the defendants. It was open to Nikkamull to release the shares to their owner in any way he liked provided that the transaction was not, as I assume, fraudulent. The result is that whether the plaintiff had a valid pledge or not, the shares are now in the possession of their original rightful owner unaffected by notice of any fraud and he is entitled to retain the shares against the plaintiff. The relief, to which the plaintiff is in such circumstances entitled, is against the defendant Nikkamull Khetry who is said to have defrauded him. He had got this relief in the decree which the learned Judge has made. The suit against the second defendant should, in my opinion, be dismissed.

As for the argument that the evidence discloses a guarantee by the second defendant that the cheque would be honoured, that case was not made in the plaint or in the issues. There was no necessity in such a case to plead fraud. The case would have been a simple one of the receipt of a cheque in payment of a debt on the guarantee of a third party that he would be responsible if the cheque was not honoured.

Moreover as Mr. Sircar argued this story is quite inconsistent with what happened in the Police Court proceedings in which a charge of fraud was made against defendant Nikkamull, in which no such charge was preferred against defendant Lalit Mohun Nundy. If, as Mr. Sircar pointed out, the evidence given by the plaintiff be true then it would go to

exculpate the first defendant who said, "what shall I do, Lalit Mohun Nundy did not pay me any money", when the plaintiff made a complaint to him that his cheque has been dishonoured. On the contrary if the evidence is true that Nundy was present, then a case might have been put forward (with what success I need not consider) against him.

The appeal, in my opinion, succeeds and should be decreed with costs. The suit as against the appealing defendant should be dismissed with costs.

MOOKERJEE, J.—I agree that this appeal must be allowed, notwithstanding the earnest endeavour made by Mr. Sen to support the decree which has been made in favour of the respondent by Mr. Justice Imam.

The cardinal question in controversy is, whether the plaintiff-respondent has acquired a valid lien on the shares in dispute. These shares were owned by the appellant Lalit Mohun Nundy, who on the 3rd March 1912 deposited them with Nikkamull Khetry as margin in connection with certain speculative transactions. The terms of the agreement of deposit are before the Court; and show conclusively that the bailee had no authority to deal with the shares. It is stated expressly that "the bailee will not be able to dispose of, to sell or to deliver to any one else, except the bailor, any of these shares without any written instruction for the same." Notwithstanding this clear instruction, the bailee dealt with the shares and pledged them with the plaintiff as security for a loan. *Prima facie*, the plaintiff did not acquire a valid title to the shares on the basis of this transaction, for the pledger could not confer on the plaintiff a title better than what he himself possessed. The plaintiff is consequently driven to rely on section 178 of the Indian Contract Act, which deals with cases of pledge by possessors of goods or documentary titles to goods, and lays down that a person who is in possession of any goods or documents of title to goods, may make a valid pledge of such goods or documents, provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly. This section cannot avail the respondent.

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ent, unless he is able to establish that the documents, which are certificates of shares, were either goods or documents of title to goods. It has not been and cannot be contended that they were documents of title to goods; but, on the authority of the decision of the Bombay High Court in *Sethna, R. D. v. National Bank of India* (1), the argument has been advanced that these certificates were goods within the meaning of section 178 of the Indian Contract Act. I am not prepared to accept this contention as well founded. Reference was made to the very comprehensive definition of the term 'goods' given in section 76 of the Indian Contract Act, which lays down that in Chapter VII the word 'goods' means and includes every kind of moveable property. As section 178 is in Chapter IX, it would plainly be not right to extend the definition given in section 76 to the term 'goods' as used in sections not comprised in Chapter VII. If the Legislature had intended that the definition given in section 76 should have a wider application, we would have expected to find it in section 2, which is the interpretation clause of the Statute. Our attention has also been drawn to section 103, the provisions whereof are similar to those of section 178. But this is of no assistance to the respondent, because, section 108 finds a place in Chapter VII whereas section 178 finds a place in Chapter IX. Notwithstanding the decision of the Bombay High Court, I must consequently hold that the documents now before us are not 'goods' within the meaning of section 178.

If then section 178 does not apply, as I hold it does not, what is the position of the plaintiff? The defendant, at the time of the institution of the suit, was in possession of the disputed shares. What had happened was that Nikkamull had obtained the shares from the plaintiff in return for a cheque which was later on dishonoured. The shares were subsequently made over by Nikkamull to the defendant Nundy, the rightful owner, who is thus now in possession of the shares. Can the shares be pursued in his hand by the plaintiff? The answer must be in the negative. The plaintiff might have a remedy against the appellant if he could establish that the latter obtained possession of the shares by

means of fraud. But no fraud was specifically charged as against him in the plaint, though fraud was charged against Nikkamull Khetry. In these circumstances, the elementary rule applies that fraud must be specifically alleged in the plaint in order that the plaintiff may succeed on the strength thereof against the defendant and the fraud so specifically alleged must be established beyond doubt. The appellant cannot properly be charged with fraud at this stage of the proceedings. But even if we concede for a moment that the plaintiff-respondent is entitled to succeed on the ground of fraud now brought against the appellant, what is the position? What is the fraud now charged? As I read his deposition, the allegation is that on the 2nd April the appellant made a false representation to the respondent that he had agreed to purchase shares for cash and would pay in the evening, fraudulently implying thereby that if, in the circumstances, the plaintiff accepted a cheque from Nikkamull Khetry, that cheque would be honoured. The statement made by the plaintiff, however, in his deposition does not bear out this allegation of fraud, and it must be considerably amplified and supplemented in order that this case may be supported. But the respondent is in a position of further embarrassment, if we remember that this specific case of fraud was not put to the appellant when he went into the witness-box. The substance of the matter then is that there was no specific charge of fraud against the appellant in the plaint, the fraud which is now alleged is not established by the deposition of the plaintiff, and was never put to the defendant when he was cross-examined. In these circumstances, it would clearly be wrong to allow the plaintiff to succeed against the appellant on the ground of fraud.

I agree that this appeal must be allowed and the suit as against the appellant dismissed with costs.

Appeal allowed.

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ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 119 OF 1913.

March 13, 1916.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

MR. J. B. HEARSEY—PLAINTIFF—

APPELLANT

versus

Sardar KARAM SINGH—DEFENDANT—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I. Art. 142—Possession, physical and constructive, nature of—Boundary pillars, erection of, whether amounts to possession—Trespasser, possession of, nature of—Land covered by water at certain intervals, effect of—Dispossession, what amounts to—Local inspection—Remarks by presiding officer, value of—Evidence.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute of Limitation, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. [p. 721, col. 2.]

Trustees, Executors and Agency Co., Limited v Short, (1888) 18 A. C. 798; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 32, followed.

The Limitation Act applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute. [p. 721, col. 2.]

Smith v. Lloyd, (1854) 9 W. H. & G. (Ex.) 562; 156 E. R. 240; 2 C. L. R. 1009; 2 W. R. 271; 23 L. J. Ex. 194; 22 L. T. (o. s.) 289, 96 R. R. 837.

A mere erection of boundary pillars on the extreme edge of a disputed area is not an act of physical possession. [p. 719, col. 2.]

Ram Bhandhu v. Kusu Bhattu, 5 C. L. R. 481, explained.

The rightful owner sued a trespasser for possession of a tract of land, which lay on a river-side, was exposed to the risk of temporary flooding, was covered with jungle, and was unhealthy and malarious. It could only be utilized for the purpose of grazing animals or for collection of forest produce. It contained heights as well as hollows, and when rain fell it settled in the hollows. When the river rose high portions of the land remained under water. During the rainy season people abandoned it and it could not be utilized; but it was not established that the land had ever during the period of the trespasser's possession been actually submerged under water or was permitted to remain derelict. The trespasser simply waited for the water to subside before he resumed his acts of ownership.

Held, that under the above circumstances the rightful owner could not be presumed to have been in constructive possession of the tract of land every rainy season when some portions of it were covered with water. [p. 724, col. 1.]

Secretary of State v. Krishnamoni Gupta, 29 C.

518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 263; *Brijraj Singh v. Ganga Bakhsh Singh*, 28 Ind. Cas. 855; 18 O. C. 43; 2 O. L. J. 346; and *Loknath v. Manorath Ram*, 18 Ind. Cas. 613; 11 A. L. J. 68, distinguished from.

Where in a case before a Court the presiding officer makes a local inspection and puts on the record some remarks about his observations, they cannot be considered as evidence in the case. [p. 725, col. 2.]

Appeal from the decree of the Subordinate Judge, Tahsil Biswan, dated the 21st August 1913.

Babu Sita Ram, for the Appellant.

Mr. Mohammad Nasim, for the Respondent.

JUDGMENT.—The facts of the suit against the decree in which the present appeal is preferred are as follows:—

The river Kauriala forms the western boundary of the Bahraich District and separates that district from the districts of Kheri, Sitapur and Bara Banki. At the junction of the Bahraich, Kheri and Sitapur districts at a place called Kataighat the river's name is changed to that of the Ghagra: it is generally known by the latter designation. Towards the north-west of the Bahraich District, as shown in the map of the Gazetteer, Volume 45 of the District Gazetteers of the United Provinces of Agra and Oudh published in 1903, will be found the village of Chahlua which lies in a bend of the Kauriala. East of Chahlua lies the village of Barkharia and east of Barkharia is the village Sujauli. The Kauriala at this point takes a course from west to east and at Sujauli diverges due south. On the other side of the river in the Kheri District is the village known as Grant Gularia, which is bounded on the north by the river Kauriala. It is necessary to make it clear that there are three villages on the other side of the river from Grant Gularia. Barkharia is not the only village on the other side. The river Kauriala like other rivers in this portion of Oudh scours its banks, and causes a loss by erosion, which sometimes is and sometimes is not thrown up on the opposite side. It does not follow, because a village on one side of the river loses a quantity of land, that a village in the immediate vicinity will receive an accretion equivalent in extent to the amount eroded. What one village loses by diluvion may be gained by another village lower down through alluvion, or that land may be lost entirely under water,

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There may be an increase by alluvion from soil brought from the upper reaches of the river in the Bhabar and Tarai of the Nepal State. There may be losses by diluvion which will never be found to have accreted by alluvion anywhere within a discoverable distance. This is clear from pages 4 and 5 of the Bahraich Gazetteer and can be traced from an examination of the documentary evidence upon the record of this case. The river Kauriala is also liable to change its course. The result is, that considerable changes take place in the areas of the villages on both sides of the stream, these changes being caused sometimes by alluvial and diluvial action on the part of the river and sometimes by a change of the course. The river may in one year move from the old main channel to a new channel half a mile distant. Thus there can be no assumption, when a change is made in the area of a village adjoining the river, that it has been caused either by alluvial and diluvial action, or by shifting of the main channel, or by both. In each case the reason for the change can only be discovered by a careful examination of the facts.

Grant Gularia was conferred by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh with effect from 24th December 1876 on Captain Andrew Hearsey. The grant was contained in a *sanad* dated the 28th March 1879 (Exhibit 2). Captain Andrew Hearsey died and was succeeded eventually by Lionel Hearsey, who is now represented by J. B. Hearsey, the plaintiff-appellant before the Court.

Mr. Hearsey's case, as set forth in the plaint, is that the Kauriala suddenly changed its course in the years 1892 and 1894 and took a broad sweep to the south, and that by so doing it left to the north some 850 acres of land belonging to Grant Gularia. The plaintiff thus avers that from the year 1892 onwards the Kauriala cut off 850 acres of land belonging to the grant towards the north from the remainder of the grant in the south. He continues that, in spite of this severance, his predecessor-in-title retained possession over the tract in question. It is further asserted that in 1905 an officer in the Government Survey Department, by name

Captain Coldstream, demarcated a boundary north of the river as the boundary between Grant Gularia and Barkharia and that he indicated this boundary by placing pillars thereon and by digging a ditch, that in 1906 Mr. Lionel Hearsey applied to the Deputy Commissioner of Kheri to have the map of Grant Gularia corrected, but that Mr. Fremantle, the Deputy Commissioner, refused to take action. He further averred that on 23rd March 1907 he himself as representative of Mr. Lionel Hearsey was opposed, while in possession of the tract in question, by the servants of the defendant who is the proprietor of Barkharia, that a serious riot took place, and that after this riot proceedings were taken in Bahraich under section 145 of the Code of Criminal Procedure, which terminated in an order by which not he but the defendant was declared to be in possession of that tract. That order is dated the 31st December 1907. It was passed by a Deputy Magistrate to whom the District Magistrate had transferred the proceedings. In paragraph 8 of the plaint the tract in question is described as a tract locally known by the name of Jhakua Gaurhi. The name has some importance, as will be shown later. The plaint concludes by asking for possession of the tract called Jhakua Gaurhi and for mesne profits. The suit was filed at the beginning of 1911. At that time Mr. Hearsey's estate was under the management of the Court of Wards who filed the plaint on his behalf.

The defendant replied that the whole of the tract of Jhakua Gaurhi was owned by him. It is not clear from his written statement whether he avers that only a portion of it had accreted to Barkharia by alluvion or that the whole had accreted to Barkharia in that manner. He suggests in paragraph 16 of his written reply, that at least a portion had so accreted. His case was that in any circumstances the *dhardhura* custom prevailed in Barkharia and Grant Gularia, that according to that custom the midstream of the main channel marks the boundary, and that thus he is entitled to any land lying north of the river. He also set up possession, but he further contested the plaintiff's suit on the point that the plaintiff was suing for possession of immoveable property which on his own showing had

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formerly been in the possession of his predecessor-in-title and from which his predecessor-in-title had been dispossessed. The defendant set up that the plaintiff had not been in possession within a period of twelve years from the date of the institution of the suit, and he pleaded that the suit of the plaintiff was, therefore, time-barred under the provisions of Article 142, Schedule I, Act IX of 1908.

The case was filed in the Court of the Subordinate Judge of Kheri. It took a considerable time to decide and during the course of proceedings the presiding officer changed three times. The hearing of the suit commenced before Mr. A. G. Shirreff, I. C. S. It continued before Mr. G. C. Badhwar, I. C. S., and was concluded by Mr. Ram Prasad who decided it on 21st August 1913. A large number of issues were framed. Only two issues were decided. The first issue decided runs, "Whether the river Kauriala suddenly changed its course in the years 1892 and 1894 towards the south, and whether the land referred to in paragraph 4 of the plaint was cut off, as alleged by the plaintiff?" The learned Subordinate Judge decided that the land in suit was cut off by the sudden action of the river between 1892 and 1897. The second issue decided runs, "Whether the plaintiff was the owner of the land so cut off and whether the plaintiff continued to be in possession of this land after the change in the course of the river?" This issue was found against the plaintiff. The learned Subordinate Judge apparently meant that the plaintiff had title to the land so cut off at the time that it was cut off but that he had failed to prove possession within twelve years preceding the date of the suit. He dismissed the suit without deciding the remaining issues. The present appeal was preferred. The appeal was filed by the Court of Wards on behalf of Mr. J. B. Hearsey. Since the institution of the appeal the Court of Wards has relinquished charge of the estate. Mr. Hearsey is now the appellant on his own behalf.

It has been noted above that the land in dispute is known locally as Jhakua Gaurhi. The word "*gaurhi*" has been

interpreted to us by the learned Counsel for the appellant as meaning an enclosure used for the tethering of cattle. It is said to have the following local meaning in the part of Oudh in which the land in suit is situated. In the north-western portion of the Bahraich district and the adjoining part of Kheri there is little cultivation and much tamarisk jungle and grazing ground. Certain graziers (Ahirs or others) take over tracts of such grazing ground and construct thereon enclosures which are fenced by thorn hedges or palisades. Such enclosures are called *gaurhis*. Large numbers of cattle are brought to the grazing grounds during the day-time. They graze over the tracts outside the *gaurhi* and at night are driven within the enclosure to protect them from attacks of wild animals and to prevent straying. In the morning they are driven out again to the grazing grounds. It appears to be a practice for certain individuals to construct these *gaurhis* at their own expense, taking permission from the proprietor of the village. The man who has made the *gaurhi* then takes in other people's cattle and charges fees for grazing them. The word "Jhakua" is the name of a sub-caste of Ahirs and "Jhakua Gaurhi" would mean the *gaurhi* founded by the Jhakua. Many other *gaurhis* are referred to by the witnesses as being in the neighbourhood. We find by examining the record at random a Tiloki Gaurhi—apparently a *gaurhi* founded by a certain Tilok (page 151 of the printed record) and a more careful search will discover the names of others.

There is on the record the translation of an application made to the Deputy Commissioner of Kheri filed by Mr. Licnel Hearsey in the Bahraich Court in connection with the section 145 proceedings (Exhibit A 34). This application was filed on 17th June 1907. Here Mr. Hearsey refers to the land in question as Jhakua Gaurhi.

The first point for determination in this appeal is whether the learned Subordinate Judge rightly dismissed the suit as time-barred. According to the plaintiff's averments in paragraph 4 of the plaint, 350 acres of Grant Gularia were cut off by a

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change in the river channel in 1892 and in 1894, and another 500 acres were cut off by a further change in the channel. Thus according to his own showing his predecessor-in-title was separated from the whole of the area in dispute known as Jhakua Gaurhi at the latest in 1894. He has alleged that in spite of the fact that the main stream ran between Jhakua Gaurhi and the remainder of Grant Gularia, his predecessor-in-title nevertheless retained possession continuously from 1894 till the 31st December 1907. The learned Subordinate Judge has found on the facts that this statement is without foundation. His grounds for this decision are as follows:—

Reference has already been made to a serious riot which took place in 1907 on the disputed land between the present plaintiff and his servants on the one side and the servants of the defendant on the other side. In that case certain of the servants of the defendant were prosecuted in the Criminal Courts of the Bahraich district. The present plaintiff gave evidence in that case and copies of his depositions before the District Magistrate who committed the case for trial, and before the Sessions Judge who tried the case, are on the record. They are filed as Exhibits A 80, A 81, and A 79. Before the Sessions Judge (Exhibit A 79) the present plaintiff deposed, "I have been managing my father's grant in Gularia from 1905 to the present time..... In 1905 we got possession of some land which had been demarcated by Captain Coldstream. This is a piece of land north of the Kauriala Nadi and is the scene of the riot. I gave out contract for hides, grass, bazar, fishing in respect of this piece of land" (page 125 of the printed record). Later on he stated, "The land in question had by the action of the river gone out of our possession..... After Captain Coldstream had demarcated we took possession of the land. We paid the whole or part of the cost of the pillars. They were put up by Government" (page 129 of the printed record). He further stated (page 133), "There was a little cultivation at Jhakua Gaurhi in the area in dispute. After

taking possession I collected rent for it. The rest is jhau and grass. I was not in possession till 1905." In Exhibit 81 he stated, "I have been managing the Gularia grant since 1898." Mr. Hearsey was called as a witness in the present case and was examined as P.W. No. 23. He commenced by stating that he had been managing Grant Gularia from 1905 to 1907, that he collected grazing dues, and gave the contract for grass and hides. In his examination-in-chief which consisted only of a few lines, he made no statement suggesting that his predecessor-in-title had been in possession between 1894 and 1905, but when he was cross-examined on the averment in the plaint to the effect that possession had never been lost between 1894 and 1905 and when his attention was drawn to his statement in the Sessions Court, he stated that if he had said in the Sessions Court that the land had gone out of his father's possession what he stated must have been correct. But he added, "The land had not gone out of our possession so far as I know." In the face of Mr. Hearsey's statement in the Sessions Court the insertion of the averment in the fourth paragraph of the plaint, "But the possession of Mr. Hearsey all along continued over the land thus cut off", appears extraordinary. It is even more extraordinary that the learned Counsel for the appellant has before us refused to give up the point that his client was in physical possession between 1894 and 1905. He refers us to the evidence of certain cultivators, herdsmen, and others who have been produced to depose that the Hearsey family as a matter of fact were in possession during that period. The learned Subordinate Judge has disbelieved the evidence of these witnesses and rightly disbelieved it. It is perfectly clear that the Hearsey family on the plaintiff's own showing had no sort of physical possession from 1894 till 1905.

It remains to be seen whether they had any physical possession afterwards.

The learned Counsel for the appellant has based his case to prove possession between 1894 and 1905 on three sets of circumstances. He urges in the first place that the placing of boundary pillars by

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Captain Coldstream on the north of the disputed land is a physical act of ownership. He argues in the second place that the evidence that Mr. Hearsey collected grazing dues, dues for the rights of fishing and for the collection of tamarisk which the learned Subordinate Judge disbelieved, ought to have been believed. He argues in the third place that the evidence in connection with the riot shows that Mr. Hearsey was in possession at the time that the riot took place.

We take up these three points separately.

It is first to be noted that there is very little evidence beyond the evidence of Mr. Hearsey that any boundary pillars were ever placed on the disputed land by Captain Coldstream. Captain Coldstream was not called as a witness. It is not proved that at the time that the suit was instituted in 1911 Captain Coldstream was not available as a witness and it is difficult to understand why the Court of Wards, who were conducting the appellant's case, should have failed to call this important witness if they intended to rely on the incident of the boundary pillars. This much may be said that the Commissioner's report shows that there are boundary pillars on the north of the disputed land, and that reference is made to these boundary pillars as having been erected under Captain Coldstream's orders in the proceedings of Mr. Fremantle (Exhibits A 31 and A 32). Mr. Fremantle, it is to be noted, observes in those proceedings that if Captain Coldstream laid down such a boundary he did so without any authority from any one. The evidence upon the point is, however, far from clear and is in the main confined to the statement of the plaintiff himself. It is not plain in what capacity Captain Coldstream who, we understand, is an officer employed in the Government Trigonometrical Survey, came to these parts, and why he was deputed to make a survey in the neighbourhood. It is perfectly clear that if Captain Coldstream erected these pillars on his own initiative and not as an agent or on behalf of the plaintiff's predecessor-in-title, and if he acted as a Government official either with or without authority, and not on behalf of the Hearsey family, the laying down of this boundary cannot be considered as

an act asserting the ownership of Mr. Lionel Hearsey. But, even if it be held that Captain Coldstream laid down this boundary as Mr. Hearsey's agent, can it be said that the erection of pillars on the extreme edge of a disputed area is an act of physical ownership? The learned Counsel for the appellant has referred us to a decision of the Calcutta High Court of 1878 in *Ram Bhandhu v. Kusu Bhattu* (1). At page 483, Garth, C. J., observes: "As long as reliable evidence of acts of ownership is forthcoming, there is no difference between the proof of possession in the case of jungle or uncultivated lands and that in the case of cultivated lands, and such proof is oftentimes forthcoming, as in the cutting down of trees, or grazing of cattle, or putting up boundary marks,...and the like." The statement therein contained is unassailable as a statement of law. But it does not cover the point. The putting up of boundary marks may be a very effective assertion of title. In the case of staking out a claim it would be a most effective assertion, but in a case such as this it does not indicate physical possession. At the highest the plaintiff's father went to a disputed tract and laid boundary marks outside it on its extreme edge. If such an act conveyed possession, it would be the simplest thing for a person asserting title to any tract of country, however enormous, to obtain the valuable factum of possession by indicating a line around the circumference, and the act in question palpably does not constitute an act of physical possession.

We now come to the next point. The assertion of the plaintiff is that he enjoyed the profits of Jhakua Gaurhi between 1905 and 1907 by collecting grazing dues, giving contracts for grass and hides as he stated in the present suit, and, as he stated before the Sessions Judge in Exhibit A 79, by collecting also *bazar* dues and farming and fishing rights. Various witnesses were called to support the collection of grazing dues and other dues. The evidence of these witnesses has been discussed in detail by the learned Subordinate Judge. He found their evidence unworthy of belief. We have been taken through

(1) 5 C. L. R. 481.

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the whole of the evidence produced by the plaintiff on this point. We agree with the learned Subordinate Judge that the evidence is unworthy of belief. The documentary evidence, such as it is, does not convince us that the plaintiff or his predecessor-in-title ever collected anything in the village or exercised any act of physical ownership between the years 1905 and 1907.

The last point is with reference to the riot, and here the statement of the plaintiff himself made in the Sessions Court makes the point clear. It provides an additional reason for finding that the plaintiff never obtained possession over this disputed tract at any time. After Mr. Fremantle had refused to make a boundary in accordance with the line alleged to have been drawn by Captain Coldstream, and after Mr. Saunders the Commissioner had upheld Mr. Fremantle's order (Exhibit A 33), we find that a contract was given by the Hearsey family to a certain Mardan Singh of Sujauli to fish in a spill-channel of the Kauriala within the area in dispute. We find that the Hearsey family had failed to obtain possession over the disputed area and that the exercise of fishing rights by Mardan Singh was intended to supply the necessary ingredient of possession which was wanting. Mr. Hearsey's deposition before the Sessions Judge indicates clearly to us that Mardan Singh had not been permitted by the other side to fish in this water at all. In Exhibit A 79 at page 126 of the printed record we find Mr. Hearsey stating in one place that Mardan Singh's men had caught one fish and in other place that they had been unable to get into the water as it was too cold, and from this statement we find that although Mardan Singh attempted to fish in this water, his attempt to fish was repelled by a resistance which resulted in the death of one man and brought his assailants within the reach of the criminal law. Thus we find that he did not fish in the channel and that the attempt to take possession was frustrated. We have not before us the judgment of the Criminal Court that decided the case; it cannot be inferred that the Criminal Court decided that the defendant's servants were not in possession of the disputed area. Whatever the Criminal Court may have decided upon the subject it will be open

to us to decide the point anew. But there is nothing to show that the Criminal Court ever decided the point. It is obvious that even if the defendant's servants had been exercising the right of private defence of property, they could have been criminally convicted for having exceeded that right by having caused the death of a man on the opposite side. We thus find that no physical acts of ownership were ever exercised by the plaintiff or his predecessor-in-title from the year 1894 up till the 31st December 1907, when he was found not to be in possession. It is admitted that no physical acts of ownership have been exercised between the 31st December 1907 and the date of the bringing of the suit.

The learned Counsel for the appellant has, however, urged that his client was in constructive possession of the land in dispute. His argument is that his client having proved his title and it being established on the evidence on the record that the land in dispute was covered with water at certain intervals, a presumption of constructive possession arises in his favour. He urges that, as soon as the water covered any portion of the disputed area, the title of his client revived. We must first arrive at some conclusions before we discuss this proposition. The title of the plaintiff to the disputed area has not, in our opinion, been established and could not be established until the remaining issues are decided, which the learned Subordinate Judge did not consider it necessary to decide. Thus if we found that owing to the nature of the land in dispute such a presumption as that set up would arise, we should further have to consider the question of the appellant's title. But as we find that the nature of the land in dispute would in no circumstances cause such a presumption to arise we can proceed to determine the point. The evidence on the record shows that this land is exposed to the risk of temporary flooding. It shows this characteristic with all other lands anywhere in the world, possibly with the exception of precipitous hill-sides. Even precipitous hill-sides can be covered temporarily by sheets of water. This land is covered with jungle, is unhealthy and malarious. It contains heights, it contains hollows, and when rain falls it settles in the hollows.

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When the river is high portions of the soil must be under water. But, while it is established that during the rainy season people abandon Jhakua Gaurhi, it is not established that the land is ever permitted to remain derelict or that during the period in suit it has ever been submerged under water.

The law on the subject of revival of the title of the true owner in derelict land will be found first in a decision of their Lordships of the Privy Council in an appeal from the Supreme Court of New South Wales—*Trustees, Executors and Agency Company, Limited v. Short*, generally known as *Trustees of Agency Company v. Short* (2). In that case the holder of a good title was ousted from possession by a trespasser. Before that trespasser's title had ripened by prescription into an effective title he abandoned the land which became derelict and was in no person's physical possession.

The Court of New South Wales held that, once the Statute of Limitation began to run against the true owner it continued to run until he regained physical possession. Their Lordships of the Privy Council considered this a wrong exposition of the law on the subject and laid down that no presumption of ownership can be made for the benefit of a holder of an imperfect title. Thus a trespasser whose title has not become perfected by adverse possession cannot tack on to his period of possession the period during which the land has remained derelict. A presumption of ownership would exist in favour of the holder of a perfect title during the period that the land remained derelict. The distinction arises in cases in which no act of effective ownership is exercised or can be exercised over the land. In such a case if the last holder had obtained a perfect title a presumption of ownership is made in his favour, but if the last holder has only an imperfect title no presumption of ownership is made in his favour, and a subsequent trespasser cannot tack the period during which a prior trespasser was holding under a different trespass on to the period of his subsequent trespass as against the holder

(2) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

of the good title. This is all that their Lordships laid down in that decision. The most important portions are the passages at pages 798 and 799 commencing—"They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant," and the reference to the decision of Parke, B., in the case of *Smith v. Lloyd* (3)—"We are clearly of opinion that that Statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute."

The doctrine was carried further in a decision of their Lordships of the Privy Council in an Indian case—*Secretary of State for India v. Krishnamoni Gupta* (4). The facts of that case were as follows:—The Government had held a portion of certain land continuously for more than twelve years. The land was alluvial land which had formerly been part of the plaintiffs' permanently settled estate but subsequently in 1854 after diluvion and reformation had been adjudged to be an accretion to Government

(3) (1854) 9 W. H. & G. (Ex.) 562; 156 E. R. 240; 2 Q. L. R. 1009; 2 W. R. 271; 23 L. J. Ex. 194; 22 L. T. (o. s.) 289; 96 R. R. 837.

(4) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260.

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land. The plaintiffs had taken from the Government *ijaras* of such land and accretions. The possession of the Government was held to be adverse to the plaintiffs during the period. They were, as *ijaradars*, estopped from denying the landlord's title, as the Government held this portion of the land continuously for more than twelve years, the plaintiffs' suit was held barred by limitation. But with regard to the remaining portion of the land the Government were held to have no title. This portion of the judgment should be given in their Lordships' own language—pages 534 and 535.

"As regards the northern portion of the disputed lands, other considerations apply. The Government have never had actual possession of the land through their *ijaradars* for a continuous period of twelve years, because the lands became submerged prior to the year 1869, and remained so (it is found by the High Court) until within ten years of the commencement of the suit. But it is urged on behalf of the Government that, having been in possession through their tenants when the lands became submerged, their possession must be deemed to have continued in law while the lands were under water and to have revived on their being re-formed, and reliance is placed on a case of *Kally Churn Sahoo v. Secretary of State* (5) decided by the High Court in 1881. For the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossession of the rightful owners, and in the opinion of their Lordships it would be contrary both to principle and authority to imply such constructive possession in favour of a wrong doer, so as to enable him to obtain thereby a title by limitation. In order to sustain a claim to land by limitation under the Indian Act, there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him. The possession of the Government was in fact determined by the submergence of the land which then became derelict, and so long as it remained in that state, no title could be acquired

against the true owner. Sir R. Garth, however, seems to have thought that in such a case the possession of the trespasser would continue, until the true owner resumed possession.

"Their Lordships cannot agree in this view. On the contrary, they think that on the dispossession of the Government by the *vis major* of the floods, the constructive possession of the land was (if anywhere) in the true owners. In the case of *Trustees, Executors, and Agency Company, Limited v. Short* (2), it was laid down by this Board, that 'if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the Statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place.' And the opinion of Parke, B., is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute.

"Their Lordships think that for this purpose dispossession by *vis major* has the same effect as voluntary abandonment, and they are of opinion that the case of *Kally Churn Sahoo v. Secretary of State* (5) was wrongly decided and ought to be overruled."

The suit had been instituted in 1894. Thus it will be seen that the lands became submerged prior to the year 1869 and remained submerged until 1884, that is to say, the lands remained submerged for fifteen years.

The point came before the Judicial Commissioner in a case tried by him singly—*Erijraj Singh v. Ganga Bakhsh Singh* (6). The facts in that case were as follows:—Certain persons had title to some tank land. This land was in ordinary circumstances submerged. It emerged from time to time during thirty years and during that period was cultivated by trespassers. Here the land was usually under water completely submerged, and derelict. It emerged from the water on rare occasions. Mr. Lindsay decided that so long as the land was under water the title was with

(5) 6 C. 725; 8 C. L. R. 90; 4 Shome L. R. 95; 3 Ind. Dec. (N. S.) 470.

(6) 28 Ind. Cas. 855; 18 O. C. 43; 2 O. L. J. 346.

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the rightful owners. At page 47* he says: "It is an axiom of the law relating to possession that where possession in fact is undetermined, possession in law follows the right to possess: in other words possession follows title. Applying this principle to the case before us it follows that while the land in suit was under water possession in law was with the plaintiffs whose title or right to possess is acknowledged. And if it is shown, as I think it has been, that the land was under water during twelve years before suit the presumption as to possession must be in favour of the plaintiffs. It was for the defendants to rebut that presumption and in my opinion they failed to do so. It was not sufficient for them to show that on isolated occasions when the land emerged they successfully asserted their physical possession. Being trespassers their possession would be recognised only for so long as they could successfully assert it. It cannot be presumed in their favour that their possession continued after submergence. No presumption of possession can be raised in favour of a trespasser. So once their actual possession ceased by reason of the lands going under water possession in law must have necessarily reverted to the rightful owner—that is the person who has the right to possess. I cannot agree with the learned Judge in holding that possession in law can remain in abeyance in a case of this nature. If possession is not with the trespasser it must be with the person who has the right to possess. The learned Judge remarks in the latter portion of his judgment that the real truth appears to be that the land was not in the actual possession of either party during these intervals, meaning I take it the intervals of submergence. That no doubt is true, but possession, that is, possession in law must during those periods be presumed to have been with the plaintiffs."

It is to be observed that in that case and in the case in *Secretary of State v. Krishnamom Gupta* (4), the land was derelict. It was absolutely abandoned for long periods and during those periods no one attempted to wait for its re-appearance and utilize it as soon as the water had subsided. Before the principle laid down

by their Lordships of the Privy Council in *Secretary of State v. Krishnamoni Gupta* (4), and followed by Mr. Lindsay in *Brijraj Singh v. Ganga Bakhsh Singh* (6), can be applied it is necessary to establish that the land has become absolutely derelict, abandoned, and incapable of use. To us it would appear that such a principle cannot be applied in a case like the present in which there has been no actual submergence in the proper sense of the term and no abandonment, and in which it has only been the case that the land has been flooded in parts by temporary floods which interfered for short periods with the use to which it could be put. As we have stated in more than one place the land in suit can only be utilized by the owner for the purpose of grazing animals, or for the collection of forest produce. It is clear that while the water was over the land it would be difficult to graze animals thereon or to collect jungle produce. The evidence goes to show that the land consists of heights and hollows, and although the hollows would be filled with water in the rainy season, and the low lying parts of the land would be liable to inundation by temporary floods, there is nothing to show that the land was ever abandoned or remained derelict during the period that the defendant has been in occupation of the same. In the rainy season the use would have been interfered with not only by the fact that the water was on the land but by the prevalence of malarial fever, and it would appear that when the land was unsuitable for occupation or when malarial fever was prevalent the graziers and herdsmen and collectors of forest produce discontinued their avocations, which they commenced to follow as soon as the water had subsided. Exactly the same interference with avocations would occur in any land, agricultural or non-agricultural, to a less or greater degree. Any heavy shower of rain will flood land to a certain extent and prevent its being utilized for some hours or for some days. But it would be impossible to our minds to lay down a doctrine that during such periods of temporary discontinuance the possession of the last owner ceases when he is simply waiting for the water to subside before he resumes his acts of ownership.

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A different view to this was possibly taken in a single Judge case of the Allahabad High Court. *Loknath v. Manorath Ram* (7). There, however, Tudball, J., found that the land was submerged every year during the rains. He considered that the decision in *Secretary of State v. Krishnamoni Gupta* (4), laid down that during such submersion the title reverted to the true owner. In the present case we consider that there was not actual submersion, but we are not disposed to consider submersion the necessary factor. The requisite factor to our minds is the factor of abandonment, and the question to be asked is did the land remain or did it not remain derelict? If it remained derelict the possession during such period as found by their Lordships of the Privy Council undoubtedly is presumed to be with the true owner. But it is necessary to prove actual abandonment. It cannot possibly be said that the defendant in this case ever abandoned the land from the period that it passed into his possession. Thus we are unable to accept the view pressed upon us by the learned Counsel for the appellant that this suit is within time because his client must be presumed to have been in possession of the lands in dispute every rainy season when some portion of them was covered with water. It is also to be noted that their Lordships of the Privy Council in *Secretary of State v. Krishnamoni Gupta* (4), were dealing with an asserted title by adverse possession. Here the case is different. It is not for the defendant to establish his title by adverse possession. It is for the plaintiff to establish possession within twelve years. For the above reasons we find that the suit is barred under the law of limitation. In view of our decision on the question of limitation it is not really necessary to decide the remaining points raised in the suit. The learned Counsel for the respondent has, however, pressed upon us certain arguments as his client is anxious to show that his position in the case is not of a wrong doer who is taking advantage of the omission of the rightful owner to bring a suit within the period allowed by law but of a man with an honest title which he is rightly

enforcing. The learned Subordinate Judge apparently found that the title was with the plaintiff. We say that he found this apparently as it is clear that he did not try out the question completely. His view would appear to be that the provisions of Bengal Regulation XI of 1825 had application, that the lands had not been gained by gradual accession from the recess of a river but had been left on the defendant's side of the main stream by a sudden change of the river-bed. Now it does not follow that the provisions of Regulation XI of 1825 would have any application. The defendant had asserted not only that the lands had been gained by gradual accession but also that the custom of *dhardhura* had application, that is to say that the mid channel of the deep stream wherever the deep stream might be, determined ownership in the village of Barkharra, and that even if the river had changed its course he was entitled to hold the land in suit as it was on his side of the river. The learned Subordinate Judge did not decide whether the custom *dhardhura* had or had not application and thus his finding on the question of title is necessarily imperfect. But apart from that fact we consider that his finding that the river had changed its course suddenly is not a correct conclusion from the evidence on the record. The old Settlement maps of Barkharra and Grant Gularia (Exhibits Nos. 3 and 17) which were prepared in the Settlement of 1867 prove clearly enough when compared with the Commissioner's map (Exhibit 1) that the river ran in 1867 not where it runs now but to the north. It may be taken that the main stream of the river is now very much further south than it was in 1837. But it does not follow from that fact that there has been a sudden change of the river-bed. The change may have been a gradual change. Land may have been silted up on the left bank towards the north gradually year by year and the river channel may have been forced in the same way gradually year by year towards the south. The river may have had at one period a very much wider channel and that channel may have become gradually narrowed by the accumulation of alluvial land towards the north. No inference can be drawn in favour of a conclusion that land has been cut off from Grant Gularia and thrown into Barkharra

(7) 18 Ind. Cas. 618; 11 A. L. J. 68.

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from the facts that the area of the former has diminished and the area of the latter has increased during the past thirty years. It is true that they are on opposite sides of the river, but it does not follow that land that was cut off from Grant Gularia has been thrown up on the opposite bank. It may well have been washed further south. It may have gone to increase the area of village Sujauli or of other villages or it may have disappeared. Similarly accretions to Barkharia need not necessarily have come from the village on the opposite side. They may have been formed from land washed from the north, that is to say from Nepal. It is impossible to make conjectures in a case of this kind. Clear proof is wanted, not guess-work, and the reasons which inclined the learned Subordinate Judge to the view which he took are based on guess-work and not on proof. He did not believe the plaintiff's evidence but he was ready to find in the plaintiff's favour on certain inferences that he drew from entries in the revenue papers and from facts proved as to the growth of trees which do not, in our opinion, justify the conclusions that were based upon them. He attached great weight to the observations made by his two predecessors who had visited the spot. Now these observations, valuable as they may have been as directing the attention of the officers who made them towards the salient points of the case, are of little or no value to persons other than the observers. For example, we find that Mr. Badhwar noted (*vide* pages 216, 217 of the printed record) that there was a large *shisham* tree on a portion of the land in dispute. The defendant told him on the spot that the tree had grown after the river had receded. The tree in question was a very old tree. The plaintiff said that the tree stood there in 1867. He also noted that certain other trees were standing and he considered that if the whole of the land was alluvial land there had not been time for the trees in question to grow. Then he says that the appearance of the land shows that it is flooded in the rains but that it has not been cut away by the action of the river, and he points out that he saw two depressions one of which was said to be the bed of the river

in 1892 and the other the bed of the river in 1894. The learned Counsel for the appellant has laid great stress on the remarks of Mr. Badhwar. Now it is perfectly clear that these remarks in themselves cannot be considered as evidence. We find for example with regard to the tree that Mr. Badhwar saw that that tree stood north of the northern boundary of the land claimed. The value of Mr. Badhwar's observations as to flooding in the rains can certainly not be great as he made his inspection in the middle of the cold weather, and there is nothing to show that he had any expert knowledge which would enable him to decide from the appearance of the land whether it was flooded in the rains, or whether it was or was not land formed by the action of the river. His remarks as to the alleged old river-beds of course are not intended to show that he was able to locate the site of the old river bed. But in any circumstances remarks of this kind can only be valuable if they are contained in sworn evidence which has been subjected to cross-examination. The main reason why the learned Subordinate Judge found that there had been a sudden change in the river channel was because there were certain trees found on the land in dispute which certain forest officers deposed to be of varying ages. The argument is this. If such old trees stood on the land the land must have been unaffected by the river for many years. The trees could not have risen to that height if there had been a gradual alluvial action. The land on which those trees stand must have been in the same condition for twenty, thirty, or a larger number of years, and in those circumstances it must be held that there has been a sudden change in the river-channel. This argument does not exhaust all the possibilities of the situation.

From the evidence of Mr. Latifullah Khan, the Commissioner, who surveyed the area in question and prepared the map, Exhibit 1, and submitted the report, Exhibit X 3, it appears that the land is of varying heights. It is true that in his report he says: "There is no old and high land here. The entire land is new and low." But in his deposition he refers to the traces of channels. He says he found some three

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large channels. He did not take any levels, but from his evidence it is clear that the levels vary. Now it is not uncommon to see in a river such as the Kauriala small islands on which trees grow.

Trees can, of course, also stand on the uplands. Now if there were uplands on which the trees were standing or if there were islands on which the trees were standing and alluvial land was formed on the north bank pushing the river-bed gradually further and further down from the north towards the south, an observer would find trees of twenty, thirty and forty years' growth standing amongst the new alluvial land although there had been no sudden change in the course of the river channel. The fallacy in the argument of the learned Subordinate Judge appears to be this. He assumes that the existence of old trees is incompatible with conditions other than a sudden change in the course of the river-channel. Of course if there had been a sudden change in the course of the river-channel the land lying between the old channel and the new would remain unaffected and the old trees would stand as they had always been. But it does not necessarily follow that, because there are old trees standing on the land, there has been a sudden change in the course of the river-bed. The evidence of Mr. Latifullah Khan is clearly of value. He no doubt has drawn wrong conclusions and deductions in places, but his observations are nevertheless the most valuable observations of any person who has examined the land. He is a trained surveyor who had been surveying land for thirty-six years before he gave his evidence. He has frequently surveyed land subject to fluvial action. He states that the whole of the disputed land is land formed by gradual accretions, in other words that it is alluvial land, and that the soil is chiefly loam with a large admixture of sand. In places he finds stiff loam. Such places might well be islands or lands left amongst the new alluvial land. Nearer to the north bank of the present channel there is a larger admixture of sand. Now if there had been a sudden change in the bed of the river the land would not have possessed such a distinctly alluvial character.

The case for the appellant is that the

river was on the northern boundary of the disputed land in 1867, and that in 1892-1894 it made a sudden change cutting off the whole of the disputed land from his village. If such were the case, the disputed land would not be of a strongly marked alluvial description. It would be towards the south of a slightly alluvial description and towards the north not of an alluvial description at all, and in the old bed of the river as it was in 1867 it would bear traces still of a recently abandoned river-channel. So far from this being the case the land is found to be of the same quality—more alluvial towards the south, less alluvial towards the north, but of a marked alluvial character everywhere except in some places which would apparently be islands or uplands. We do not make these comments by way of a decision. We find it impossible to decide the point exactly owing to the absence of evidence. But it is to be remembered that the burden of proof was on the appellant, that it was for him to discharge this burden of proof, and that the evidence which he has given has not discharged it. We need not in these circumstances go into many of the other points or touch any of the other points in great detail. It is, however, remarkable that Barkharia has always been described as an alluvial *mahal*. We find from Exhibit A9 that in 1893 the Deputy Commissioner of Bahraich ordered the Tahsildar of Nanpara to make a full inquiry as to the letting value of an area of 323 acres which had been added to that village by alluvion, and in Exhibit A10 it is ordered that as the assets are less than ten per cent. no action is required. On 28th February 1895 (Exhibit A12) a map was prepared and the case was put up for assessment of revenue. Exhibit A13 is the summary Settlement of Barkharia. We find the area is given as 322 acres which was assessed to Rs. 40 land revenue and Rs. 3-15-10 cesses. Then we find Exhibit A14 the *kishtwar khasra* of the newly thrown out *mahal* of Barkharia which was prepared on 10th September 1895. On 9th March 1895 the Deputy Collector passed an order recommending an assessment (Exhibit A15). This was sanctioned by the Commissioner on 10th September 1895 (Exhibit A16), a *kabuliyat* having been previously executed

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(Exhibit A 17) by Rani Narain Devi *talukdar* of the village. There was another Summary Settlement on 27th January 1899 (Exhibit A 15) and a fresh *kabuliyat* was executed. In all these proceedings the land was treated as alluvial land and not a word is said as to any sudden change in the course of the river.

We have now to note the peculiarity with regard to the name. We find in the *kishtwar khasra* (Exhibit A14) No. 27 recorded as a *gaurhi* constructed by Pragi Jhakua, that is to say the name Jhakua Gaurhi appears for the first time on the papers that have been produced before us in the proceedings that ended in 1895. So at sometime prior to 10th September 1895 there was a *gaurhi* constructed by a Jhakua on the land. This paper shows that the name of that Jhakua was Pragi. The defendant called a witness Mathura (D. W. No. 32) who deposed that he was a son of the Pragi Jhakua who had made the *gaurhi* and that Pragi had died about 1905. Pragi was a Sujauli man. This witness's evidence is corroborated by the evidence of other witnesses and the plaintiff's Counsel has practically admitted that the *gaurhi* in question was called after Pragi Jhakua and was founded by him. Thus we have it that the man who founded the *gaurhi* was a man who lived on the Bahraich side of the river. How is this compatible with the plaintiff's case? If the land were as he asserts his own land which had been cut away from him by an action of the river that took place according to his plaint between 1892 and 1894, how is it that in proceedings terminating in 1895 the land was already known as the *gaurhi* made by a man who did not live on the Kheri side of the river? The only answer that can be given is that Pragi Jhakua pounced upon the land the moment it had come to the Bahraich side. But this answer is nullified by some of the oral evidence. We have had to go through the oral evidence and on the whole it is the most unsatisfactory. The plaintiff's witnesses are unsatisfactory. They have deposed to anything that will suit the plaintiff's case with regard to the question of possession. The defendant's witnesses are in many instances as bad as the plaintiff's but here and there is a witness of the defendant whose evidence deserves to

be treated with consideration. We are unable to find that there are many witnesses called by the plaintiff whose evidence deserves consideration. Prag Dutt (D. W. No 15) is a retired Supervisor Kanungo. He appears to us to be a respectable and reliable witness. He was Supervisor Kanungo of Pargana Dharmapur from July 1887 to 1901. He has deposed that ever since he knew the land in suit it was in the possession of the defendant and that the land had gradually accreted. He prepared Exhibit A13 in which Jhakua Gaurhi is shown and he has deposed that he knew Pragi Jhakua, that Jhakua Gaurhi existed two years before and that by error it was not entered in the previous *khasra kishtwar* Exhibit A 7. Now if this witness is believed Pragi Jhakua had founded the *gaurhi* at a period prior to the period when the plaintiff asserts that the river changed its course. We can see no reason for disbelieving him. The learned Subordinate Judge apparently believed him, for he remarks that the defendant's evidence on the question of possession is far superior to the plaintiff's evidence. If it is far superior to the plaintiff's evidence and reliable, as the learned Subordinate Judge appears to find, the evidence of Prag Dutt is reliable on the question of title also.

For the above reasons we find that the appellant has failed to prove that the river changed its course suddenly and thus our decision on the question of title also is against him. We thus find that he failed upon every point and in the circumstances dismiss his appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

SIDDICK T. MAHOMED HUSSAIN.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 14 OF 1916.

August 28, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Seshagiri Aiyar.

Hajee SIDDICK Hajee SUMAR SAIT AND ANOTHER—DEFENDANTS NOS. 1 & 2—APPELLANTS

versus

MAHOMED HUSSAIN SAIT, MINOR,

BY HIS NEXT FRIEND ZACCHARIA

ISMAIL SAIT—PLAINTIFF—

RESPONDENT.

Muhammadian Law—Hindu Law—Kutchi Memons, law applicable to—Minor—Settlement by de facto guardian, validity of—Partnership—Relationship between heirs of deceased partner and surviving partners—Right of deceased's heirs to claim profits—Settlement, if and when can be re-opened—Estoppel—Contract Act (IX of 1872), s. 241—Trusts Act (II of 1882), s. 86, ill. (f), construction of.

Kutchi Memons are governed by the Hindu Law in matters relating to succession and kindred questions and by the Muhammadan Law in matters of guardianship. [p. 729, col. 2.]

In cases of urgent and imperative necessity, or where a transaction from its nature must necessarily be beneficial to a minor, a *de facto* guardian can alienate the property of the minor, whether moveable or immovable. [p. 730, col. 1.]

Mata Din v. Ahmad Ali, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338 (P. C.); 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49, explained.

Hyderman Kutti v. Syed Ali, 15 Ind. Cas. 576; 37 M. 514; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889; *Abdul Hussain Rowthan v. Mahomad Ibrahim Rowthar*, 35 Ind. Cas. 243; 3 L. W. 379; 19 M. L. T. 346 and *Abid Ali v. Imam Ali*, 32 Ind. Cas. 177; 38 A. 92; 14 A. L. J. 18, followed.

A settlement of accounts arrived at by the *de facto* guardian of a Muhammadan minor, as representing the amount due to him for his deceased father's share in a partnership, is binding on the minor if it is fair and is made *bona fide* and in the best interests of the minor and as the result of independent advice. [p. 730, cols. 1.]

The minor is only entitled to either the stipulated or a fair rate of interest on the amount found to be due to him at the settlement. [p. 731, col. 1.]

A settlement once arrived at is final and in the absence of fraud or substantial errors the accounts cannot be re-opened or profits claimed on the ground that they were unduly large and the amount payable under the settlement or the interest thereon bore no proportion to it, especially where the settlement was long acted upon. [p. 731, col. 1.]

Plaintiff's father and the defendants, all belonging to the class of *Kutchi Memon* Muhammadans, were trading as partners till October 1907, when plaintiff's father died. In November, accounts were taken of the amount due to plaintiff, then a minor one year old,

and a settlement arrived at that Rs. 16,000 was due to him. This amount was left in the hands of defendants who were to pay interest at 7½ per cent. The mother and maternal grandfather of plaintiff and two other respectable gentlemen were parties to the settlement, which was registered. The interest amounting to Rs. 100 a month was regularly paid by defendants to the plaintiff's maternal uncle, who now brought this suit as his next friend, for accounts and for a share of profits, since plaintiff's father's death. Mr. Justice Bakewell, on the Original Side, held that the settlement was void, as the plaintiff was properly represented, his mother not being his legal guardian, and decreed the suit, without even giving credit to sums regularly paid after the death of plaintiff's father. In appeal:

Held, reversing the decree of Mr. Justice Bakewell, that plaintiff was not entitled to maintain this suit and ask for an account. [p. 731, col. 2.]

Per *Seshagiri Aiyar, J.*—A minor who is entitled to claim the assets of his deceased father in a partnership is not entitled to claim as of right a share in the profits of the concern. There is nothing in the Indian Contract Act to that effect. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more. [p. 732, col. 1.]

It is always a very difficult process to find out to what exactly the profits earned in the trade are due, whether to the capital left by the deceased, or to the capital brought in by the other partners or to other things. Therefore, there are innumerable difficulties in the way of an account being taken. Discretion must be left in the Court in such matters to act on behalf of the minor. [p. 732, col. 2.]

Abid Ali v. Imam Ali, 32 Ind. Cas. 177; 38 A. 92; 14 A. L. J. 18, referred to.

Illustration (f) to section 88 of the Indian Trusts Act goes further than the operative portion of the section itself, and, if it is to be regarded as laying down that in every case where after the death of a partner the money is left outstanding in that partnership the legal representative of the deceased partner is entitled to a share of the profits, it is not sound law. [p. 733, col. 1.]

Appeal from the judgment of Mr. Justice Bakewell, dated the 5th January 1916, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 247 of 1915.

Messrs. *T. Narasimha Aiyangar* and *T. Arumainatham Pillai*, for the Defendant No. 1 Appellant.

Mr. *M. K. Ramaswami Aiyar*, for the Defendant No. 2 Appellant.

Messrs. *Short Bewes & Co.*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—The suit in which this appeal has arisen, was instituted

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by the plaintiff through his next friend, his maternal uncle, Zaccharia Ismail Sait.

The facts of the case are, the plaintiff's father and the defendants in the suit, were partners carrying on business in piece goods. The partnership commenced on 16th June 1901, and it appears that the accounts used to be settled from time to time. The last settlement of accounts in the lifetime of the plaintiff's father was in February 1907. The plaintiff's father died on 5th October 1907. The suit is now brought for an account to be taken of the share of the plaintiff's father in the business and for recovery of what may be found due. The shares of the different partners were fixed, the plaintiff's father's share being one-half of the profits. He contributed Rs. 7,500, to the capital; 1st defendant contributed a similar amount, the 2nd defendant bringing in no capital. It also appears that in addition to the capital found by the plaintiff's father he also contributed his labour and skill to the business. The defence to the suit is that after the plaintiff's father died on the 13th November 1907 an account was taken of what was due to the representatives of the deceased on account of his share and two gentlemen of respectable position belonging to the same community as the parties to the suit took accounts on behalf of the plaintiff's mother who was acting as his *de facto* guardian; and it was ascertained that a sum of Rs. 16,000, in round figures was due on the date of settlement. I might mention that the plaintiff at the date of his father's death was only one year old and he had no paternal relatives, so far as can be gathered from the record, of a near degree. A formal deed of release was drawn up reciting that Rs. 16,000 were due to the estate of the plaintiff's father and, pending investment of the money in immoveable properties, it should remain in the business in the hands of the defendant and that the amount was to carry interest at the rate of $7\frac{1}{2}$ per cent. The settlement was arrived at, not only with the help of two independent men of respectable position in the community but of the maternal grandfather of the plaintiff. Interest at $7\frac{1}{2}$ per cent. amounted to Rs. 100 a month and it is admitted by Mr. Barton, the learned Counsel for the respondent, that this amount

was regularly paid until about April 1915. The plaintiff is still under age and the suit, as I have stated, was instituted by a maternal uncle of his, who, according to the evidence of the plaintiff's mother herself, used to receive the interest payable on Rs. 16,000, every month and make over the amounts to the mother. It is stated by the mother in her evidence that she was receiving the interest on Rs. 16,000 and that it was utilized for her and the minor's maintenance. The last time that payment was received according to the settlement was a few months before the institution of the suit. The suit is instituted on the allegation that very large profits have been earned in the business carried on by the defendants since the plaintiff's father's death and, therefore, it is alleged that if an account be taken of the profits so earned and of what was attributable to the plaintiff's father's share in the assets at the time of his death, it will be found that a very large sum is payable to the plaintiff. The defendants paid the whole of Rs. 16,000 into Court, while the appeal was pending and they claim that all that the plaintiff is entitled to is interest at $7\frac{1}{2}$ per cent. on this amount as arranged under the settlement.

Mr. Justice Bakewell who tried the suits has held that under the Muhammadan Law which governs the question, as to who is the legal guardian of the minor in this suit, the mother is not such guardian, therefore, the so called settlement is of no effect in law, and is not binding upon the minor. He, therefore, held that an account must be taken from the date of the last settlement during the lifetime of the plaintiff's father of the profits earned in the business and that the defendants are liable to pay what has been earned by the user of the amount due on account of the share of the plaintiff's father. As regards the Rs. 100, which the plaintiff's mother has been receiving from month to month he refused even to give credit for them because the maternal uncle or the maternal grandfather had no power in law to grant receipts, that is to say, they did not properly represent the minor.

The parties are *Kutchi Memons* and so far as succession and kindred questions are concerned they are governed by the Hindu Law. But with reference to guardianship it is the Muhammadan Law that applies to them. No doubt under that law the mother

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of an infant is not the legal guardian. The learned Judge held on the authority of *Mata Din v. Ahmad Ali* (1) that a mother is not a legal guardian and, therefore, any act which she purports to do on behalf of the minor is of no legal effect although such act might be purely for the benefit of such minor and necessary in his interests. I do not think, however, that the ruling of the Judicial Committee goes so far as that. The whole question was fully considered by Mr. Justice Ayling and myself in a case reported in *Hyderman Kutti v. Syed Ali* (2) in which all the rulings on the subject including *Mata Din v. Ahmad Ali* (1) and also the original authorities of Muhammadan Law have been discussed. Nothing has been urged to-day which would make me doubt the correctness of the proposition of law laid down there. What is laid down is:—"In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a *de facto* guardian can alienate the property of the minor whether moveable or immoveable." And it was also held that other acts of a *de facto* guardian, if of a similar nature, are binding. This case has been followed in this Court in *Abdul Hussain Rowthan v. Mahomad Ibrahim Rowthan* (3). The rule of law as enunciated above was also recognised by the Allahabad High Court in *Abid Ali v. Imam Ali* (4).

Now the position of affairs on the plaintiff's father's death was this. The plaintiff who was only one year old, had no paternal relatives of any near degree. He had no other property and, so far as it appears, his mother also had no means of subsistence. All the property which the minor inherited from his father was his share of the assets of this business. Therefore it was absolutely necessary that whatever was

due to the plaintiff from the defendant's firm should be available to him at once for his maintenance as well as for the maintenance of his mother. The mother was entitled under the Hindu Law, which governs her rights in this respect, to maintenance from the property inherited by her son. It does not appear that she had the wherewithal to institute a suit and even if she had, the law does not say that she was bound to institute a suit if she could recover the money due to her infant son by means other than a suit. Under the circumstances she acted not only in the best interests of her infant child and herself but was compelled by necessity to have the matter settled out of Court if possible. She sought the advice of her own father and, I suppose, also of her brother, and with the help of men of commanding position and influence in the community, an account was taken up of what was due to the estate of her deceased husband. It will be seen that the plaint entirely ignores the settlement though the settlement is evidenced by a registered deed and though the next friend who has taken upon himself the responsibility of instituting the suit has been for years receiving the moneys due under the settlement and must have been fully cognizant of it. It is not alleged that the men who acted as arbitrators did not discharge their duties fairly and properly. In fact as I have stated the whole settlement is ignored. Even at the trial no definite issue was raised questioning the conduct of the arbitrators or suggesting that more was due to the estate of the deceased than what was arrived at, at the settlement. The learned Judge has set aside the settlement merely holding on the question of law, that the mother was not the legal guardian and, therefore, has no authority to come to a settlement in this matter. That view of the law, in my opinion, is quite erroneous and as there is really no allegation that the settlement was not *bona fide* or that the account so settled is impeachable because of any substantial errors, I see no reason why the settlement should not be held binding. If that is so, no further question really arises.

It was argued by Mr. Barton that 7½

(1) 13 Ind. Cas. 976; 34 A. 213; 16 O. W. N. 338 (P. C.); 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49.

(2) 15 Ind. Cas. 576; 37 M. 514; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 839.

(3) 35 Ind. Cas. 243; 3 L. W. 379; 19 M. L. T. 346.

(4) 32 Ind. Cas. 177; 35 A. 92; 14 A. L. J. 18.

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per cent. interest was not good enough and that another partner received 9 per cent. on what he lent to the firm. But if the settlement arrived at was a *bona fide* one, and advantageous to the minor, it is no ground for impeaching it that greater advantage might possibly have been secured to the plaintiff. The plaintiff asks that the whole account be re-opened, that a fresh account be taken of whatever profits accrued to the business and that what may be found to be due on account of the assets of the deceased partner should be awarded to the plaintiff. It may or may not be that the business which was continued after the plaintiff's father's death brought in more profits than what would be represented by interest at $7\frac{1}{2}$ per cent. I am, however, satisfied that the suit instituted by the next friend of the plaintiff is not *bona fide*. He was fully cognizant of the settlement for all these years and never thought of questioning it; he received interest from time to time and that has not been denied by the learned Counsel for the plaintiff. In a case of this nature, even if we could hold that the settlement ought to be re-opened, I should be unwilling to grant a decree for an account. Accounts for a number of years would have to be examined and in a business such as this it would be difficult to ascertain how much of the profits was due to the user of the deceased partner's assets and how much to the labour and skill of the defendants. It might very well be that if an account was taken—and it is sure to be very costly—the minor would be a loser and I have not been convinced that in a case such as this the Court would be bound to order an account at the instance of the plaintiff's next friend. The defendants were, I may mention, always willing to hand over the money that was in their hands and have been regularly paying the stipulated interest. The minor's next friend or the minor's mother has yet taken no steps for the appointment of a guardian. It seems to me an untenable position that, the settlement having been accepted and acted upon for so many years by the minor's mother, and his maternal grandfather and by the plaintiff's next friend himself, the next friend should now be

allowed to turn round and say that it was unauthorised and, therefore, should be set aside, without even alleging that the settlement was not fair and *bona fide* or that it was liable to be opened on account of errors.

I would, therefore, set aside the decree passed by the learned Judge. There will be a decree instead for Rs. 16,000 and for interest at the rate of $7\frac{1}{2}$ per cent. for the months during which interest has not been paid. It is conceded that interest should cease from the date on which the money was deposited in Court, i.e., 11th February 1916. Interest at Rs. 100 a month will, therefore, be payable from 1st April 1915 to 11th February 1916.

As regards costs, we find that the defendants alleged that the plaintiff's mother had been appointed guardian. That plea they were unable to make good. On the other hand, the suit was clearly ill-advised and the responsibility for it lies with the plaintiff's next friend. The order will be that each party should bear his own costs throughout and the costs of the minor plaintiff be borne by his next friend.

SESHAGIRI AIYAR, J.—I entirely agree, but I wish to say a very few words in addition to what has been said by the learned Officiating Chief Justice. It was conceded that those who acted on behalf of the minor were justified in seeking a settlement of accounts after the death of the minor's father. There is no allegation in the plaint that any undue advantage was taken of those that acted on behalf of the minor; and having regard to the fact that persons most interested in the welfare of the minor took part in the settlement, I am of opinion that the settlement should not be re-opened. Upon another ground also I am of opinion that the decree of the learned Judge should be set aside. The amount settled by the father before his death, in February 1907, was Rs. 13,777. In the settlement in November of that year, six months after, a sum of nearly Rs. 2,000 was added to the settlement and the total of Rs. 16,000 was arrived at. *Prima facie* it looks as if that was the correct amount due to the minor on the date of the settlement. As I said before, inasmuch as there is no allegation

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that this settlement was not come to after careful scrutiny of the accounts there is no reason to doubt that this sum did not represent the actual amount due to the minor on the date of the settlement. Granting for a moment that the mother of the minor and his maternal grandfather were not competent legally to settle the affairs of the minor, if I am correct in thinking that Rs 16,000 represented the amount actually due to the minor on the death of his father, I see no reason why plaintiff should be given a share in the profits of the concern which, by law, was dissolved on the death of the father of the minor.

Mr. Barton contended that an option should be given to the minor either to accept a share of the profits proportionate to the amount utilised by the surviving partners or to claim interest, whichever may be profitable to him. In my opinion there is no absolute rule that a minor who is entitled to the assets of his deceased father in the partnership, is entitled to claim as of right a share in the profits of the concern. There is nothing in the Indian Contract Act to that effect. In a case decided by the House of Lords, *Knorr v. Gye* (5), Lord Westbury points out that there is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. It is a case of pure contract in which a legal relationship is substituted on the death of the deceased partner. The learned Lord seems to suggest that the amount due to the deceased partner is a loan and nothing more. In section 43 of the English Partnership Act of 1890, this is how the law is stated, "Subject to any agreement between the partners, the amount due from the surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death." Sir Frederick Pollock in commenting upon this section says "The claim of the representatives against the surviving partner is in the nature of a simple contract debt and is subject to the Statute of Limitations, which runs from the deceased partner's death." If we look at section 241

of the Indian Contract Act, the same idea seems to underlie the provision in that section. I am, therefore, of opinion that, even assuming that there was no legal settlement of accounts, if the sum of Rs. 16,000 represents what is due to the minor and if that was left in the hands of the surviving partners, it is only a debt upon which the minor will be entitled to a proper rate of interest, but in regard to which the minor is not entitled to claim, as of right, a share in the profits of the concern. As pointed out by Wigram, V. C., in *Willett v. Blanford* (6), there are innumerable difficulties in the way of an account being taken as regards the share of the profits due on the amount left by the deceased partner and which has been utilised for purposes of the trade. The learned Vice Chancellor says "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties." To these considerations may be added the fixing a value on the skill and labour employed by each of the partners in making the concern a successful one. Under these circumstances it must always be a very difficult process to find out to what exactly are the profits earned in the trade due, whether it is to the capital left by the deceased partner or to the capital brought in by the partners who continue the trade or whether these are negligible considerations as compared with other circumstances. I, therefore, think that the discretion must be in the Courts in such matters to see whether under all the circumstances it is not desirable to fix a rate of interest on the minor's share in the property. That, I understand is the principle acted on by the Judicial Committee in the case of *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji* (7). The learned Counsel who appeared for the respondent in that case said that the Courts below exercised their discretion properly in awarding a

(6) (1842) 1 Hare 253 at p. 272; 66 E. R. 1027; 6 Jur. 274; 1 L. J. Ch. 18; 58 R. R. 58.

(7) 28 Ind. Cas. 710, 42 C. 9 4; 19 C. W. N. 449; 17 M. L. T. 312; 2 L. W. 377; 2 C. L. J. 419; 13 A. L. J. 540; 17 Bom. L. R. 432, 23 M. L. J. 70; (1915) M. W. N. 435; 42 I. A. 91.

(5) (1872) 5 H. L. 656; 42 L. J. Ch. 234.

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rate of interest instead of a share of the profits. And in another case to which Mr. Barton drew our attention, namely the case on the Original Side, Mr. Justice Wallis (as he then was) fixed a particular rate of interest instead of a share of the profits of the concern. Under these circumstances I am of opinion that where the amount due to a minor has been ascertained, the proper course in the interests of the minor would ordinarily be to fix a rate of interest and not to direct the accounts to be taken.

Considerable reliance was placed by the respondent upon illustration (f) to section 88 of the Trusts Act. The first observation that occurs to me in connection with that illustration is that it goes further than the operative portion of the section itself. Under the section, there must be some act on the part of the person which is unauthorised and which aims at gaining an advantage to himself at the expense of the minor. The illustration is "A and B are partners. A dies. B, instead of winding-up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital." It may be that the illustration contemplates cases where the partner acts manifestly to his own advantage and with a view not to benefit the minor. But if the illustration, as it stands is regarded as laying down that, in every case where after the death of a partner the money is left outstanding in that partnership the legal representative of the deceased partner is entitled to a share of the profits, I am not prepared as at present advised to accept it as sound law, especially having regard to the observations of Lord Westbury already referred to, that there is no fiduciary relationship between the parties.

I have some little doubt as to whether in this case interest at 9 per cent. should not be given to the minor. I have, in mind, the fact that one of the partners who was allowed to bring in capital was himself given 9 per cent. interest. But having regard to the fact that the mother and the maternal grandfather and two members of the community to which the

parties belong, have considered that 7½ per cent. would be a fair and reasonable rate of interest, I see no justification for varying that rate of interest and awarding 9 per cent.

I, therefore, agree with the Officiating Chief Justice in the order proposed.

Appeal allowed.

V.R.P.

MADRAS HIGH COURT.

APPEAL NO. 306 OF 1914.

August 3, 1916.

Present:—Sir William Ayling, Kt., and Mr. Justice Srinivasa Aiyangar.

NEELAKANTA RAO AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

NARAYANASWAMI AIYAR AND OTHERS
DEFENDANTS NOS. 4, 5, 6 AND 8 TO 12

—RESPONDENTS.

Limitation Act IX of 1871, Arts. 142, 145—Act XV of 1877 and Act IX of 1908, Art. 144—Alienation by Hindu widow—Suit by reversioner—Intervention of daughter's estate—Possession, adverse to daughter, whether adverse to reversioner—Hindu Law—Reversioner, nature of rights of.

Reversioners, under Hindu Law, are not persons claiming from or through a female heir so as to make possession adverse to her adverse to them. Adverse possession against reversioners begins only from the time when they become entitled to possession. [p. 737, col. 2.]

Kunchordas Vandravandas v. Parvatibai, 23 B. 725 25 I. A. 71; 1 Bom. L. R. 607; 3 C. W. N. 624; 7 Sar P. C. J. 543; 12 Ind. Dec. (N. S.) 485; *Srinath Kur v. Prosunno Kumar Ghose*, 9 C. 934; 13 C. L. R. 372; 4 Ind. Dec. (N. S.) 1273; *Kokilmoni Dassia v. Manick Chundia Joaddar*, 11 C. 791; 5 Ind. Dec. (N. S.) 1287; *Braja Lal Sen v. Jiban Krishna Roy*, 26 C. 285; 13 Ind. Dec. (N. S.) 787; *Kancharla Venkataratnam v. Koganti Venkataramiah*, 25 Ind. Cas 692; 27 M. L. J. 569; 16 M. L. T. 435; *Sambasiva v. Ragava*, 13 M. 512; 4 Ind. Dec. (N. S.) 1069, referred to.

Pydigantam Jagannadha Row v. Rama Doss Patnaik, 28 M. 197, distinguished.

Adverse possession against the ultimate reversioner does not begin till he is entitled to possession. [p. 738, col. 1.]

J., a Hindu widow, sold properties of her husband. She died on 21st April 1865. Her daughter S., who succeeded her, died on 27th June 1901. Her reversioners instituted a suit on 7th December 1912 to recover the properties alienated by her. It was contended by the alienees that as the 12 years' period of limitation under Act IX of 1871 within which S. could have sued for possession expired before the coming into force of Act XV of 1877, which enlarged the scope of Article 142 of the former Act, the present suit by the reversioners was barred:

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Held, that as adverse possession commenced against the plaintiffs only on the death of S., the suit was not barred. [p. 737, col. 2]

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 56 of 1912.

Mr. T. R. Ramachandra Aiyar (with him Mr. T. R. Krishnaswami Aiyar), for the Appellants.

Mr. S. Muthiah Mudaliar, for the Respondents.

This appeal coming on for hearing on the 21st and 24th July 1916, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The plaintiffs as reversionary heirs of one Ramachandra Ekanadha brought this action to recover certain immoveable property, the subject of this appeal, sold by Jamna Boi, the widow of the last male owner. Ramachandra Ekanadha, the last male owner, died in 1833 leaving his widow Jamna Boi and a daughter Soma Boi, then an infant of two years or thereabouts. The sale was made to six persons in equal shares by six separate sale-deeds on the 4th October 1860. The 10th defendant, the principal contesting defendant (whom we shall hereafter call the defendant) has now acquired the whole of the properties now in dispute through several intermediate sales from the alienees of the widow. The learned Subordinate Judge in the Court below has dismissed the plaintiffs' suit in respect of these items on the ground that the sales were made by the widow to get money to pay debts borrowed by her for the expenses of the marriage of her daughter and for the cultivation expenses of some of her lands which had been affected by floods. The plaintiffs appeal and the principal question now is whether the finding of the Subordinate Judge on this matter is correct. The evidence as to the necessity for the sales is that of defendants' witnesses Nos. 6, 13 and 15 who were all examined before a Commissioner, 16th witness for the defendants being one of the original alienees. As they were all examined on commission we are in as good a position as the Trial Judge to decide on their credibility and

we have come to the conclusion that the evidence does not satisfactorily prove that the sales were made for the purposes found by the lower Court.

Before dealing with that evidence it is we think necessary to refer to the written statement of the 10th defendant as that suggests that he himself had really no knowledge of the purpose for which the sales were made. In paragraph 7 he stated that these items of property had passed out of the hands of the original family before the year 1850. He does not even say that the properties were sold by the widow though in his evidence he admits that he was aware of the sales before he filed his statement. In paragraph 8 he stated that if there was a sale of these properties, which evidently he did not admit, it must have been for the purpose of procuring money for the marriage of the daughter. The learned Pleader for the appellants laid some stress on these two paragraphs of the written statement and argued with considerable force that the defendant who must necessarily have known that these lands were sold in 1860 deliberately put forward a false case to enable him to plead that if there was a sale it must have been made to discharge debts contracted for the daughter's marriage; and that if the plaintiffs were unable to prove an alienation by the widow, to plead that title to the property had been extinguished by 12 years' possession under the Limitation Act of 1859. It will be observed that the daughter was about 2 years of age at the time of Ekanadha's death in 1833 and the Inam Register shows that the daughter must have been about 29 or 30 at the time of these sales. The suit properties were inam lands and the sale-deeds executed by Jamna Boi were produced before the Inam Commissioners. She must have been married in the early forties, a number of years before the sales and we think that was the reason why the defendant put the sales as near to the date of the marriage as he could. Not merely did the defendant plead that the alienations were before 1850 but he examined a considerable number of witnesses, about 10, (including the three who gave evidence as to the

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purpose) before the Commissioner, for the purpose of proving that the sales, took place in the year 1853 or before, that is before the Parithapi storm of March 1853. At the time when the defendant led this evidence plaintiffs had not produced the *Inam* Register which showed that the sales were made on the 4th October 1860. It is only after the plaintiffs had produced the *Inam* Register that the defendant through a witness produced two of the original sale-deeds, Exhibits XIII and XIV, which we have reason to suspect were in the hands of the defendant himself.

The defendant, therefore, started with a case which was obviously false and sought to support it by evidence of witnesses among whom the principal ones are the three on whose evidence he depends to prove the necessity for the sales. The most important of these witnesses is Gopala Aiyar one of the original vendees from Jamna Boi. The sales as we have stated above were to six persons including Gopala Aiyar who were all inhabitants of a place called Villianallur. The principal person who negotiated the sales was one Seethapathi Aiyar: the oldest among them. It appears from the evidence of Gopala Aiyar himself that he was then a boy of about 17 and that his affairs were managed by his brother-in-law one Panchanada Aiyar. It appears to us doubtful whether this Gopala Aiyar was present at all at the sale. At any rate there can be no doubt that he took no part in the negotiation or the obtaining of the sales, but it was Seethapathi Aiyar that arranged the whole thing on behalf of himself and his co-vendees. This witness deliberately put the date of sale in the Parithapi year, *i. e.*, 1852-1853 in order that his evidence may accord with the statement already filed by the 10th defendant. In order to make the year of sale tally with his age then, which he says was seventeen, he gives his present age as 77, in which case he would have been about 24 years of age and not 17 at the time of the sale. We think that these statements were deliberately made and were not due to any lapse of memory. He also says that with the price two debt bonds were paid off, and the bonds handed over to him:

which again is scarcely likely, considering that he was a boy in his teens, while the negotiations were conducted and completed by Seethapathi Iyer. The two debt bonds which he says were handed over to him are not produced and it is said they were eaten up by white ants and destroyed. One curious difference may be noted between his evidence and that of Chockalingam Pillai, the defendants' 6th witness, who is said to have been present at the sale. While Chockalinga says that the debt bonds were in *cadjan* this witness is positive that they were in paper. He speaks to a number of details which it is scarcely likely he could have remembered at this distance of time. We are not, therefore, prepared to place any reliance upon this man's story.

The next witness on whom reliance is placed is Chockalingam Pillai defendants' 6th witness. He purchased a portion of the lands from Gopala Iyer which he in his turn sold to the father of the 10th defendant. He gives his age as 78, states that he was present at the time of the sale along with his father and is clear that his father attested these sale-deeds. He also starts with the statement, which is not true, that the sale took place four or five years prior to the Parithapi storm. He gives no satisfactory explanation for his presence at the time of the sale to the Villianallur people. In cross-examination he stated that at the time when the Brahmins of Villianallur who finally purchased the property went to Tanjore for this purpose, he and his father also went with them, but lower down he stated that, as the sale had been completed to the Brahmins of Villianallur, Jamna Boi said that she could not sell to him and his father. From the latter statement one would infer that he and his father went there for the purpose of obtaining the sale in competition with the Villianallur people, but were too late, while his previous statement in the same cross-examination leads one to infer that they all went together. According to him the sale had been settled to the Villianallur people, but he and his father stayed on although it had been so settled, and though they had no further business

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to detain them there. He stated that his father attested the document but in Exhibit XIII there is no such attestation. Exhibit XIV the other sale-deed is too badly torn to be read. It is obvious that the witness is speaking of things about which he knew nothing and in two material particulars, namely, as to the date of the sales and the attestation of his father, his evidence is proved to be untrue. It must be remembered that at the time when he gave his evidence the date of the sales had not been proved by the production of the *Inam* Register, and Exhibit XIII which would have disproved his statement as to the attestation by his father had not been produced and the defendant had probably no idea of producing it. The witness goes further and states that the sale-deeds were registered at Thiruvidadamarudur, which again is not true.

The only other witness who speaks about the purpose is the defendants' 15th witness who again puts the sale before the Parithapi year. He is a resident of Neppukovil and the reason which he gives for being present at Tanjore is far from satisfactory. According to him while he was passing along the street Thyagaraja Pillai, the father of Chokalinga, who was sitting on the pial of the house of Jamna Boi called him and that the Villianallur Brahmins requested that he should remain with them and complete the sales. But he did not stay and nothing was done that day. He went to the house the next day after the sales had been completed; somebody, however, was good enough to read the sale-deeds to him, and he came to know of the purpose as it was mentioned in the sale-deed. No purpose is mentioned in Exhibit X II and it is not pretended that the terms of the other sale-deeds were different. We have already shown that in all probability, neither Chokalingam Pillai nor Thyagaraja Pillai his father, were there at the time of the sale. It is again difficult to see why he was asked to remain with the Brahmins.

These are the only three witnesses who speak about the necessity for the sale and it is impossible to place any reliance on

their evidence. Wherever their evidence could be tested they are found to be speaking an untruth.

The only other piece of evidence which remains to be dealt with in connection with this matter is the alleged attestation of the sale-deeds by the plaintiffs' father. The only evidence as to this attestation is that of defendants' 3rd witness. That that witness could not have been acquainted with the plaintiffs' father's signature is obvious on his own statements. His opportunity for seeing the signature of the plaintiffs' father was that that man was signing some account in a grocery shop in which the witness also had an account. It appears to us that that story of his is palpably false. Again we find no warrant for the assumption of the learned Judge that Siva Pandithar the person who purchased the stamp paper for the sales is the father of the plaintiffs.

The sales no doubt took place a very long time ago; but making all allowance for the meagreness of the evidence owing to the long lapse of time and for lapse of memory of old men who are called as witnesses we are not satisfied that the 10th defendant on whom the burden lay has proved that the sales were made for purposes binding on the estate. We must hold that the sales are not binding on the reversioners.

The learned Pleader for the respondents, however, sought to sustain the judgment of the lower Court, on a new ground which was not raised in the lower Court, viz., that the plaintiffs' suit for the recovery of items the subject of appeal is barred by limitation. To make the point clear it is necessary to state a few dates. The widow Jamna Boi who sold the property died on the 21st April 1865, the daughter Soma Boi who succeeded her died on the 27th June 1901, and this suit was instituted on the 7th December 1912. It is clear that so long as the widow was alive there can be no question of limitation for a suit by the reversioner. But it is said that on her death in 1865 the possession of the alienees became adverse to the daughter Soma Boi and as 12 years elapsed before the coming into force of Act XV of 1877, which for the first

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time enacted a special Article for the institution of a suit by a Hindu after the death of a Hindu female, enlarging the scope of Article 142 of Act IX of 1871, which provided for a suit on the death of a Hindu widow only, the adverse possession against Soma Boi must be taken to have been adverse to the reversioners also. It is argued that although twelve years had not elapsed from the death of the widow when Act IX of 1871 came into force, as that Act provided a special period of limitation only for a suit to be instituted by a Hindu on the death of a Hindu widow, and as Soma Boi who would have been entitled to sue the alienees had allowed her right to become barred, the right of the present plaintiffs must be taken to have been extinguished along with the title of the daughter, as she represented the inheritance. We cannot agree with this contention. It is no doubt true that if the twelve years' period had run out, before Act IX of 1871 came into force, not merely the daughter but also the reversioners would have been barred under Act XIV of 1859, *Sreenivasa Rogavochariar v. Sambasiva Pillai* (1) [overruling on review *Sambasiva v. Rogava* (2)]. But the scheme of the previous Limitation Act was altogether changed when Act IX of 1871 was passed. Even if Article 142 of Act IX of 1871 did not apply to reversioners in the position of the present plaintiffs, the Article which would be applicable to a suit by the reversioners, in the absence of a special Article, would be Article 145 of Act IX of 1871, corresponding to Article 144 of the later Acts, which gives twelve years from the time when the possession of the defendants became adverse to the plaintiffs. The contention for the respondents is that the possession of the defendants, which was adverse to Soma Boi the daughter, was necessarily adverse to the reversioners, as Soma Boi represented the inheritance, and that the reversioners must be deemed to be persons claiming from or through Soma Boi. The question then is whether the plaintiffs claim from or through Soma

Boi. The Privy Council in *Runchordus Vandravandas v. Parvatibai* (3) distinctly laid down that reversioners are not persons claiming from or through a female heir so as to make possession adverse to her adverse to the reversioners and that adverse possession against reversioners began only from the time when they became entitled to possession. The exact question now raised came up for decision before the Calcutta High Court in *Srinath Kur v. Prosunno Kumar Ghose* (4), and a Full Bench of that Court had no hesitation in holding that reversioners were not barred. See also *Kokilmoni Dossia v. Manick Chandra Joddar* (5) and *Brāja Lal Sen v. Jiban Krishna Roy* (6). It has been held by this Court in *Kancharla Venkataratnam v. Koganti Venkatarao* (7) that the time allowed for an action by an adopted son to recover possession of immoveable property held adversely to his adopting mother was twelve years from the date of his adoption. There is no specific Article in the Limitation Acts of 1871, 1877 or 1908 for a suit by an adopted son and the Article applicable is the residuary Article 144. The learned Judges had no hesitation in holding that the adverse possession of a trespasser against the widow was not adverse possession against the adopted son and that there can be no adverse possession till the adopted son became entitled to possession, that is, on his adoption. We think the principle of this decision applies to this case. It is no doubt true that in *Srinath Kur v. Prosunno Kumar Ghose* (4) reference was made to the Articles applicable to remaindermen and reversioners—terms scarcely applicable to the so-called reversionary heirs to a deceased Hindu male, who have no estate so long as the heiress is alive—and no reference is made to Article 144, the residuary Article in respect of suits for immoveable property. It may also be noted that Seshagiri Aiyar, J., in the latter case cites (3) 23 B 725; 26 I. A. 71; 1 Bom. L. R. 607; 3 C. W. N. 62; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485.

(4) 9 C. 934; 13 C. L. R. 372; 4 Ind. Dec. (N. S.) 1273.

(5) 11 C. 791; 5 Ind. Dec. (N. S.) 1287.

(6) 26 C. 287; 13 Ind. Dec. (N. S.) 787.

(7) 25 Ind. Cas. 692; 27 M. L. J. 169; 16 M. L. T. 435.

(1) 1 M. L. J. 392.

(2) 13 M. 512; 4 Ind. Dec. (N. S.) 1069.

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Sambasiva v. Ragava (2) as authority for his position without noting that that case had been overruled on review. We think, however, the principle is not affected by this. The case of *Pydigantam Jagannatha Row v. Rama Doss Patnaik* (8) does not affect the present question, as there the question related to the office of trustee in which the widow had no beneficial interest; in fact that very case recognises the principle that adverse possession against the ultimate reversioner does not begin till he is entitled to possession.

We must, therefore, reverse the decree of the lower Court and decree the plaintiffs' suit in respect of the properties the subject of the appeal with costs here and in the lower Court. The plaintiffs are also entitled to mesne profits from the date of the suit at the rate fixed by the lower Court.

Appeal allowed; Suit decreed.

V. R. P.
(8) 28 M. 197.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 92 OF 1914.

January 9, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

JOGENDRA PROSAD MITRA AND OTHERS—
JUDGMENT-DEBTORS—APPELLANTS

versus

ASUTOSH GOSWAMI AND OTHERS—

DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19, Sch. I, Art. 182—Execution—Application for adjournment of sale—Acknowledgment—Leave to bid, application for, whether step-in-aid of execution—Decree, splitting up of—Acceptance of portions of decretal debt from different judgment-debtors—Uncertified payment, power of executing Court to recognize.

Where a judgment-debtor stated in an application for adjournment of an execution sale that, in case of his failure to pay up the decretal money on the date to be fixed for sale in the month following, he would not take any objection to the validity of the sale:

Held, that the application contained an acknowledgment within the meaning of section 19 of the Limitation Act. [p. 739, col. 1.]

Where a decree-holder applied for leave to bid at the sale, and on the very day the application was granted consented to its adjournment and on the day of sale, refrained from bidding although there were no bidders present:

Held, that under these circumstances, the application could not be treated as an application to the proper Court to take a step-in-aid of execution. [p. 740, col. 1.]

Bansi v. Sikree Mall, 13 A. 211; A. W. N. (1890) 230; 7 Ind. Dec. (N. S.) 132; *Dalel Singh v. Umrao Singh*, 22 A. 399; A. W. N. (1900) 129; 9 Ind. Dec. (N. S.) 1302; *Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebrī*, 21 B. 331; 11 Ind. Dec. (N. S.) 224, dissented from.

Toree Mahomed v. Mahomed Maboob Bux, 9 C. 730; 13 C. L. R. 91; 5 Shome L. R. 21; 4 Ind. Dec. (N. S.) 1135; *Raghuwundun Misser v. Kallydut Misser*, 23 C. 690; 12 Ind. Dec. (N. S.) 459, followed.

The acceptance by a decree-holder of sums tendered by different judgment-debtors under the same decree from time to time with an undertaking not to proceed with execution against those judgment-debtors, without, however, releasing them from liability under the decree, does not split up the decree so as to make the decree-holder bound to pursue his remedy against each judgment-debtor only to the extent of his separated liability. [p. 740, col. 2.]

Ram Ratan Kapali v. Aswini Kumar Dutt, 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849, distinguished.

It is not competent to an execution Court to allow credit for uncertified payments even where the omission on the part of the decree-holder to give credit for them amounts to an act of fraud. [p. 741, col. 1.]

Gadadhar Pande v. Shyam Churn Naik, 12 C. W. N. 485, followed.

Quære.—Whether, under any conceivable circumstances, an application by a decree-holder for leave to bid may be deemed an application to the proper Court to take a step-in-aid of execution. [p. 740, col. 1.]

Appeal against an order of the Subordinate Judge, Jessore, dated the 5th August 1909.

Babus *Biraj Mohan Mojumdar* and *Hari Bhusan Mookerjee*, for the Appellants.

Babus *Sib Chandra Palit* and *Hira Lal Sanyal*, for the Respondents.

JUDGMENT.—This is an appeal by five of the judgment-debtors against an order for execution of a decree for mesne profits, made on the 11th December 1899. There were applications for execution in 1901 and 1903 to which no detailed reference is necessary for the purposes of this appeal. These were followed by a third application for execution on the 22nd August 1905. The present application was not made till the 6th January 1909, and is *prima facie* barred by limitation. The decree holders endeavour, however, to take the case out of the bar of limitation by reliance upon section 19 and Article 182 of the First Schedule of the Indian Limitation Act.

In so far as the *first* ground is concerned, it is contended that on the 19th February 1906

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there was an acknowledgment by the appellants sufficient for the purpose of section 19. On that date, an application was presented to the Court for adjournment of the sale. The application on the face of it purports to have been made on behalf of one of the appellants Jogendra Prosad Mitter. It has been argued, however, that the application was in reality made by him on behalf of the other judgment-debtors as well. Before we deal with this question, it is necessary to point out that the application is not explicitly on behalf of all the judgment-debtors. An examination of the original application shows that an attempt has been made to tamper with it. In the right hand corner, there appears the signature of Jogendra Prosad Mitter. He is consequently the applicant and the application purports to have been made on his behalf by his Pleader Amrit Lal Mitter. In the body of the petition, it was originally stated that the application was on behalf of Jogendra Prosad Mitter, but an alteration has been effected, which on the face of it looks like a subsequent interpolation. This is obvious from an examination of the two paragraphs which constitute the body of the petition. In the first paragraph, it is stated explicitly that there was a prayer for one month to be granted to the petitioner. The word used is *amahe* (* *) in the singular. In the second paragraph also, it is clear that in the petition as originally drawn up, there was a statement that 'I,' that is the petitioner, will not take any objection to the validity of the sale which might be held. An attempt, however, has been made to alter the word * * into * *. In these circumstances the petition must be taken to have been made by Jogendra Prosad Mitter alone. Hence arises the question whether the application, if it be construed to embody an acknowledgment, avails against the other defendants. That the application does embody an acknowledgment is clear, because the petitioner states that in case of his failure to pay up the decretal money on the date to be fixed for sale in the month following, he will not to be able to take any objection to the validity of the sale. This implies and acknowledges an obligation to pay the decretal debt. In order to make this acknowledgment operative against the co-judgment-

debtors of Jogendra Prosad Mitter, the requirements of section 19 must be fulfilled. Section 19 requires that the acknowledgment of liability be made in writing, signed by the party against whom the right is claimed or by some person through whom he derives title or liability. The second explanation to the section then states that the term 'signed' means signed either personally or by an agent duly authorised in this behalf. The application was, as already stated, signed by Jogendra Prosad Mitter alone and by his Pleader Amrita Lal Mitter on his behalf. It has been contended on behalf of the respondents-decree-holders that this signature may be taken to have been made by an agent of the other judgment-debtors. But there is no proof that Jogendra Prosad Mitter was authorised duly to make this acknowledgment on behalf of his co-judgment-debtors. It is clear, therefore, that the decree-holders have failed to establish that there has been a valid acknowledgment under subsection (1) of section 19 of the Indian Limitation Act as against the four judgment-debtors other than Jogendra Prosad Mitter. The acknowledgment is of no avail against them.

In so far as the *second* ground is concerned, it has been argued that within three years antecedent to the application of the 16th January 1909, the decree-holders had applied to the proper Court to take a step-in-aid of execution of the decree. Reliance is placed, in this connection, upon an application made by the decree-holders on the 19th February 1906 for leave to bid at the sale which had then been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holders to make a purchase for the decretal amount, if no other purchaser offered any bid, and it was prayed that permission might be granted in that behalf. For the decree-holders, it has been argued that this application was an application to the proper Court to take a step-in-aid of execution of the decree, and reliance has been placed in support of this view upon the cases of *Bansi v.*

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Sikree Mal (1), *Dalel Singh v. Umrao Singh* (2), and *Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebri* (3). These cases, it may be conceded, do support the contention of the decree-holders. But it has not been disputed that a contrary rule was laid down by this Court in the cases of *Toree Mahomed v. Mahomed Maboob Bux* (4), *Raghunundun Misser v. Kallidut Misser* (5). On behalf of the decree-holders, the view taken in the case last mentioned has been criticised and we have been invited to refer the question for decision to a Full Bench. Our attention has also been drawn to the dictum of Mr. Justice Banerjee in *Troylokya Nath Bose v. Jyoti Prokash Nandi* (6), and reference has been made to the judgment of one member of this Bench in *Hira Lal Bose v. Dwija Charan Bose* (7). We may say at once that we are not prepared to accept the view expounded in *Bansi v. Sikree Mal* (1), *Dalel Singh v. Umrao Singh* (2) and *Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebri* (3). For our present purposes, it is also unnecessary to determine whether, in any conceivable circumstances, an application for leave to bid may be deemed an application to the proper Court to take a step-in-aid of execution, because even if it be assumed that there may be cases in which an application for leave to bid may be an application to the proper Court to take a step-in-aid of execution, such circumstances undoubtedly do not exist in the case before us. It has been established that on the very day when the application for leave to bid was granted, the decree holders consented to an adjournment of the sale, and on the date when the property was subsequently put up for sale, although there were no bidders present, the decree-holders themselves did not avail themselves of the opportunity granted to them to offer bids. Under these circumstances, it is impossible to hold that the application of the 19th February 1906 was in any sense an application to the

proper Court to take a step-in-aid of execution. The conduct of the decree-holders shows that not only was execution not aided, it was rather retarded by them. The two grounds assigned to support the contention that the application for execution, dated the 6th January 1909, is not barred by limitation, both prove unsustainable in so far as the judgment-debtors other than Jogendra Prosad Mitter are concerned. As regards him, however, there was clearly a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act. We must consequently hold that the application is barred by limitation as regards the four judgment-debtors other than Jogendra Prosad Mitter.

On behalf of Jogendra Prosad Mitter, it has been finally contended that the appeal should succeed on two other grounds. It has been argued, in the first place, that the decree-holders were disentitled, in view of their own conduct, to execute the decree against him for recovery of the balance thereof. It has been stated that on a previous occasion the decree-holders accepted from some of the judgment-debtors moneys alleged to represent their rateable share of the entire judgment-debt. On this basis, it has been contended that the judgment-debt was by the conduct of the decree-holders split up and the decree-holders can pursue their remedy against each judgment-debtor only to the extent of his separated liability. In our opinion, there is no foundation for this contention. The decree-holders, no doubt, accepted sums tendered by the different judgment-debtors from time to time. They also undertook not to proceed with execution against those judgment-debtors; but at the same time, they did not release them from liability under the decree. On the other hand, it was expressly stated that if upon execution of the decree against the other judgment-debtors, the whole of the judgment-debt was not realised, the decree-holders would be at liberty to proceed with execution for recovery of the balance even as against those who had made the payments mentioned. Consequently, the principle recognised in the case of *Ram Ratan Kapali v. Aswini Kumar Dutt* (8)

(8) 6 Ind. Cas. 63; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849.

(1) 13 A. 211; A. W. N. (1890) 230; 7 Ind. Dec. (N. s.) 132.

(2) 22 A. 392; A. W. N. (1900) 129; 9 Ind. Dec. (N. s.) 1302.

(3) 21 B. 331; 11 Ind. Dec. (N. s.) 224.

(4) 9 C. 730; 13 C. L. R. 91; 5 Shome L. R. 21; 4 Ind. Dec. (N. s.) 135.

(5) 23 C. 690; 12 Ind. Dec. (N. s.) 459.

(6) 30 C. 781; 8 C. W. N. 251.

(7) 3 C. L. J. 240; 10 C. W. N. 239.

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cannot be applied to the circumstances of this case.

The next ground upon which it has been urged that execution should not be allowed to proceed against Jogendra Prosad Mitter is that he had from time to time made payments towards satisfaction of the decree for which no credit had been allowed by the decree-holders. But these payments were not duly certified as required by rule 2 of Order XXI of the Code, and the time within which the judgment-debtor could have invited the Court to have the payments recorded, has elapsed. It is thus no longer open to the execution Court to take notice of the alleged payments. Reliance, however, has been placed upon the case of *Gadadhar Pande v. Shyam Churn Naik* (9), in support of the proposition that as this omission on the part of the decree-holders to allow credit for the payments made was an act of fraud, it is open to the Court to investigate the question of fraud under section 47 of the Code. In our opinion, there is no foundation for this contention. If this argument were to prevail, the restriction imposed by the Legislature upon the execution Court under rule 2 of Order XXI of the Code would be nullified. It is worthy of note that the view taken in the case of *Gadadhar Pande v. Shyam Churn Naik* (9), which accords with that adopted in *Ramayyar v. Ramayyar* (10), has been repudiated: *Ganapathy Aiyar v. Chinna Chenga Reddy* (11), *Veerappa Chettiar v. Arumugam Poosari* (12), *Kamini Devi v. Aghore Nath Mukerjee* (13), *Nistarini Dasi v. Kazim Ali* (14), *Mon Mohan Karmakar v. Dwarka Nath Karmakar* (15), *Hiramon Biswas v. Musa Khan* (16), *Biroo Geraia v. Jainurat Koer* (17). As it is not competent to the execution Court to allow credit for uncertified payments, it is not necessary for us to investigate whether the alleged payments were actually made.

The result is that this appeal is allowed in so far as the appellants other than Jogendra Prosad Mitter is concerned, and any sums belonging to them, which may have been taken away by the decree-holders under the order of the Court below, must be refunded at once. In so far as Jogendra Prosad Mitter is concerned, the appeal will stand dismissed. The decree-holders-respondents must pay the successful appellants their costs both here and in the Court below; but they will be entitled to receive from Jogendra Prosad Mitter their costs in both the Courts. We assess the hearing-fee in this Court at five gold mohurs.

Appeal partly allowed.

MADRAS HIGH COURT. FULL BENCH.

APPEAL AGAINST APPELLATE ORDER NO. 105
OF 1914.

August 7, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

AIYASAMIER AND OTHERS—PLAINTIFF AND
HIS LEGAL REPRESENTATIVES—APPELLANTS
versus

VENKATACHELA MUDALI AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 48 (1) (a), (b), 11—Mortgage decree—Composite decree for sale of mortgaged property with provision for recovery of balance outstanding from other properties of mortgagor—Execution for balance due after appropriation of sale-proceeds—Limitation—Question of law—Res judicata—'Certain date', meaning of.

A combined decree in a mortgage suit for sale of the mortgaged properties and, if the sale-proceeds are insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor, though irregular, is not illegal. [p. 745, col. 2; p. 747, col. 1; p. 749, col. 2.]

Dinabandhu Nandi v. Mashuda Khatun, 17 Ind. Cas. 263; 16 C. L. J. 318; *Periasami Kone v. Muthia Chettiar*, 23 Ind. Cas. 515; 38 M. 677; 15 M. L. T. 232; *Sudho Singh v. Maharaja of Benares*, 29 A. 12; 3 A. L. J. 606; A. W. N. (1906) 251, referred to.

The proper procedure in such a case is to pass a decree for sale of the mortgaged properties in the first instance, and if the mortgaged properties are found, on sale, insufficient to satisfy the decree, a separate decree or order should then be made for

(9) 12 C. W. N. 485.

(10) 21 M. 356; 7 Ind. Dec. (N. S.) 608.

(11) 29 M. 312; 16 M. L. J. 33.

(12) 17 M. L. J. 57.

(13) 4 Ind. Cas. 402; 11 C. L. J. 91; 14 C. W. N. 357.

(14) 7 Ind. Cas. 228; 12 C. L. J. 65.

(15) 7 Ind. Cas. 55; 12 C. L. J. 32.

(16) 7 Ind. Cas. 625; 16 C. L. J. 169.

(17) 13 Ind. Cas. 63; 16 C. L. J. 174; 16 C. W. N. 923.

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realization of the balance from the person and other properties of the judgment-debtor. [p. 745, col. 2; p. 747, col. 1; p. 748, col. 2.]

Per *Abdur Rahim, Offg. C. J., and Seshagiri Aiyar, J. (Phillips, J., dissenting).*—The starting point of limitation for execution of the portion of the decree relating to the unsatisfied balance under section 48, Civil Procedure Code, is the date when, after the remedy against the mortgaged property has been exhausted, it is ascertained that there is a balance due to be recovered from the defendant and his other properties. [p. 746, col. 2; p. 747, col. 2.]

Venkata Perumal v. Prayag Dossjee, 29 Ind. Cas. 556, overruled.

Jnanendranath Bose v. Khulna Loan Company Limited, 24 Ind. Cas. 35; 18 C. W. N. 492, disapproved.

Ratnachalam Ayyar v. Venkatrama Ayyar, 29 M. 46; *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi*, 15 Ind. Cas. 822; 36 B. 368; 14 Bom. L. R. 381; *Kommachi Kather v. Pakker*, 20 M. 107; 7 M. L. J. 66; 7 Ind. Dec. (N. S.) 75; *Munawar Husain v. Jani Bijai Shankar*, 29 A. 619; A. W. N. (1905) 132; 2 A. L. J. 376, referred to.

Per *Abdur Rahim, Offg. C. J., and Phillips, J.*—Such an application is not covered by clause (b) of section 48, Civil Procedure Code, for the decree does not direct payment on a 'certain date'. For that clause to apply, the date should be fixed in the decree or at least should be ascertainable from its terms. The expression 'certain date' cannot be construed to mean a date which can be made certain, and there is no authority for applying the maxim 'whatever can be made certain is to be treated as certain' to the construction of a Statute of Limitation. [p. 746, col. 1; p. 749, col. 1.]

Per *Abdur Rahim, Offg. C. J.*—The application, however, falls under clause (a) of the section. The date of the decree sought to be executed need not necessarily be the date put down at the time it was drawn up. The words 'sought to be executed' in the clause indicate that the date is to be ascertained with reference to the time when the decree becomes capable of and ripe for execution according to its terms, and not always the date which it bears on its face. [p. 746, col. 1.]

Per *Seshagiri Aiyar, J.*—The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's rights. But where the party is unable to seek his remedies, it cannot be said that he has failed to avail himself of the cause of action that has accrued to him. [p. 747, col. 2.]

Per *Phillips, J.*—Such an application falls neither under clause (a) nor under clause (b) of section 48, Civil Procedure Code. The Legislature has laid down a period of twelve years as the maximum period within which a decree can be executed (save in the case of fraud) and presumably this period has been fixed to avoid a prolonged harassing of the judgment-debtor, and consequently the section must be construed strictly. [p. 749, cols. 1 & 2.]

It is open to the decree-holder in the case of such a composite decree, to apply for amendment by omission of the personal decree, in which case, if a personal decree is subsequently given, twelve years' time will run from the date of the latter decree. The words of section 48 should be interpreted as they stand, viz., the date of the decree must be one date alone and from that date twelve years must be calculated. [p. 750, col. 1.]

Per *Sadasiva Aiyar, J.* (in the referring order):—The decision on a question of law in one proceeding is not *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. [p. 744, col. 1.]

Civil miscellaneous second appeal against the decree of the District Court, Tanjore, in Appeal Suits Nos. 598 and 653 of 1913, preferred against the order of the Court of the District Munsif, Valangiman, in Execution Petition No. 454 of 1912, in Original Suit No. 117 of 1894.

This civil miscellaneous second appeal coming on for hearing on the 7th February 1916, upon perusing the grounds of appeal, the judgment and decree of the lower Appellate Court and the judgment and order of the Court of first instance and the material papers in the case, and upon hearing the arguments of Mr. G. S. Ramachandra Aiyar, for the Appellants, and of Mr. S. Muthiah Mudaliar, for the Respondents, and the case having stood over for consideration till the 16th of February 1916, the Court (Sadasiva Aiyar and Moore, JJ.) made the following

ORDER OF REFERENCE TO
FULL BENCH.

SADASIVA AIYAR, J.—The plaintiff is the 1st appellant. The decree was passed so long ago as in January 1895. The execution petition out of which this appeal arose was filed on the 14th November 1912. The question is whether it is barred by the twelve years' period mentioned in section 48 of the Code of Civil Procedure.

The decree, as I construe it, is a mortgage-decree directing sale of the mortgaged properties, if they are not redeemed within three months by payment of the decree amount. It is also a personal decree against the 1st defendant and a decree realisable by the attachment and sale of the family properties of the defendants for any balance which might be left after the mortgaged properties are sold. Instead of postponing the passing of the personal decree till after the mortgaged properties are sold and the price fetched at the sale is ascertained to be inadequate to satisfy the amount due to the mortgagee, a personal decree contingent on the mortgaged properties not fetching the whole of the decree amount

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was passed at once on the 16th January 1895, according to the old practice in the *mofussil*. I do not think that, as contended by the respondents, a decree executable at once against the person of the 1st defendant for the whole amount decreed was intended to be passed, that is, executable even before the mortgaged properties were brought to sale. [See *Paradiah v. Kumara Venkata Perumal* (1)].

An order absolute for sale was passed on the 11th April 1900. The passing of an order absolute was made in execution under the old Civil Procedure Code and did not mean the passing of a final decree (according to the decisions of this Court). In accordance with the order absolute, the mortgaged properties were sold on the 3rd May 1901 and the sale was confirmed on the 12th July 1901. and the right to proceed against the person of the 1st defendant and against the family properties of the defendants granted by the decree of 16th January 1895 became ripe on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties.

If the twelve years' period mentioned in section 48 of the Code of Civil Procedure be calculated either from the date of the combined decree of 1895, or the date of the order absolute for sale, April 1900, the present execution petition of November 1912 is clearly barred. If, however, it is calculated from July 1901, when alone the decree holder's right under the decree to proceed against the person of the 1st defendant and the other properties of the defendants could be, for the first time, enforced, then the execution petition is not barred by limitation.

As I have held that the decree did not give a right to proceed against the person and other properties for the decree amount at once on the date of the passing of the decree and as no "certain" date was fixed for the accruing of that right to the decree-holder, it is arguable that section 48 (1) (b) of the Code of Civil Procedure, which prohibits any fresh application for execution after the expiration of twelve

years from the date of default in making a payment which is directed by the decree to be made at a "certain date", does not apply to this case. The date on which the decree directs the balance to be paid, in default of which execution can proceed against other properties, is the date of the confirmation of a future sale of the mortgaged properties, the latter date depending on when the decree-holder applies for sale of the mortgaged properties and when the proceedings for sale become ripe and when the Court fixes the date for sale, etc. But it can so be made certain by the decree-holder bringing the mortgaged properties to sale, and may we not apply the doctrine that that is certain which can be rendered certain? In *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) it was held that section 48, clause 1 (a), itself must be interpreted as meaning "the date of the decree sought to be executed if the decree is capable of execution at once or, if the decree is not capable of execution at once, the date when the decree becomes executable." I have incidentally considered this decision in my judgment in the case reported as *Venkatamma v. Manikkam Nayani Varu* (3). The case of *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) is in respect of the material facts analogous to the present case. There a decree passed in 1892 became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part of that decree. Until 1908 the decree in respect of that part of the remedy was merely ancillary and provisional. It was held that the twelve years' period mentioned in section 48 must be calculated from 1908 when only that part of the decree became capable of execution. Though I was inclined to follow *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) in my judgment in *Venkatamma v. Manikkam Nayani Varu* (3), it was unnecessary to express a final opinion on that point for the purpose of that decision. Mr. Justice Napier who took part with me in the decision in *Venkatamma v. Manikkam Nayani Varu* (3) expressed still greater doubts than myself

(1) 21 Ind. Cas. 782; 26 M. L. J. 93; 11 M. L. T. 530; (1914) M. W. N. 157.

(2) 15 Ind. Cas. 822; 36 B. 368; 14 Bom. L. R. 351.

(3) 26 Ind. Cas. 244; 16 M. L. T. 399.

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as regards the correctness of the construction of section 48 in *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) and of the construction of Article 182, old Article 179, in *Muhammad Suleman Khan v. Muhammad Yar Khan* (4), the analogy of which decision was relied on in *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2).

Mr. G. S. Ramachandra Aiyar suggested that the decision as to the construction of section 48 is not necessary in this case, because it had been held in a prior execution application of 1910 that that application was not barred as the twelve years should be calculated only from July 1901. But as the applicability of the bar by section 48 to the present execution application does not necessarily depend upon the former application of 1910 being barred, in other words, as this application need not necessarily be within time if the former application of 1910 is held to be within time, I do not think that there is anything in the contention of the appellants' Vakil on this question of *res judicata*, the decision on a question of law in one proceeding not being *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. See *Mangalathammal v. Narayanaswami Aiyar* (5) and *Palaniappa Chettiar v. Savari Naidoo* (6).

Returning then to the main question, the case of *Venkata v. Perumal Prayag Dossjee* (7) was quoted by the respondents' learned Vakil as in his favour. The decree in that case was construed by the District Judge (see his "finding") as a decree granting only a provisional personal remedy, provisional on the sale of the mortgaged property not fetching the full decree amount. But it does not appear that the learned Judges of this Court (Oldfield and Tyabji, JJ.) accepted that finding, as the following sentence occurs in their judgment:—"We think it sufficient that the

decree before us was never at any time, after it was passed, inexecutable." But they also state that "it did not provide for the payment of any money by defendant on a certain date," thus showing that on the date of the decree, the mortgagor was not made liable at once to pay personally the whole decree amount. Anyhow, I have been unable to fully understand the reasoning of the judgment in that case. *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) is referred to in the judgment as also *Venkatamma v. Manikkam Nayani Varu* (3), but no dissent is expressed from *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2). I think that even if the words of section 48, clause (1) (a), cannot be extended as held by the Bombay High Court in *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) so as to include the later date when a decree becomes executable, the decision therein can be supported on the ground that the words "certain date" in clause (1) (b) might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place. For instance, let us take a case where a compromise decree is passed making a certain sum payable to a minor girl on her marriage, the minor being six years old on the date of the decree. Supposing that the marriage takes place when she attains her nineteenth year, more than twelve years after the decree—Is section 48 to be treated as a bar to execution because the date of her marriage was not "certain" in the ordinary sense on the date of the decree?

I would, therefore, refer for a decision of a Full Bench the following question:—

Where a mortgage-decree for sale includes also a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient, to satisfy the entire decree amount and where the mortgaged properties are afterwards sold and the sale-proceeds are insufficient, from what date is the twelve years' period mentioned in section 48 of the Code of Civil Procedure to be calculated where an application is made to enforce the decree for the balance against the judgment-debtor's other properties?

(4) 17 A. 39; A. W. N. (1894) 191; 8 Ind. Dec. (N. S.) 349.

(5) 20 M. 461; 17 M. L. J. 270.

(6) 18 M. L. J. 648; 4 M. L. T. 233.

(7) 19 Ind. Cas. 556.

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MOORE, J.—The decree in this case is similar in its terms to the decree which the learned Judges had to construe in *Venkata Perumal v. Prayag Dossjee* (7), which is against the appellants.

The decree directs first the sale of the mortgaged properties in default of payment of the decree amount within three months and that the 1st defendant personally and the common family properties of the defendants shall be liable for any balance not obtained by the decree. The decree was not, I think, executable against 1st defendant personally and the family properties until after the sale of the mortgaged properties had taken place. In fact, as my learned brother has pointed out, the right to proceed against 1st defendant personally and the family properties of the defendants was contingent on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties. *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2) is referred to but not expressly dissented from in *Venkata Perumal v. Prayag Dossjee* (7), and I confess that I have found some difficulty in following the reasoning of the judgment in the latter case.

The learned Judges (Oldfield and Tyabji, JJ.) observe that 'authority is unsettled as to the portion of section 48 of the Code of Civil Procedure applicable to such a decree, and go on to say "that the decree before us was never at any time inexecutable and that it did not provide for the payment of any money by the defendant on a certain date." The effect of the decision appears to be that in the opinion of the learned Judges the period of twelve years' limitation in that particular case must be calculated from the date of the decree, and not from the date when the sale-proceeds of the mortgaged properties prove insufficient and the balance is ascertained.

In *Venkata v. Manikkyam Nayani Varu* (3) my learned brother was inclined to follow *Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi* (2), while Napier, J., doubted the correctness of the decision.

I accordingly agree in the question which my learned brother proposes to refer to a Full Bench,

This civil miscellaneous second appeal coming on for hearing on the 18th July 1916, upon the question referred for the decision of the Full Bench, upon perusing the Order of Reference and upon hearing the arguments of Mr. A. V. Viswantha Sastri for Mr. G. S. Ramachandra Aiyar, for Appellants Nos. 3 to 5, and of Mr. S. Muthiah Mudaliar, for the Respondents, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.

ABDUR RAHIM, OFFG. C. J.—The answer to the question referred to the Full Bench should be that the period of limitation under section 48 of the Code of Civil Procedure runs from the date when, after the remedy against the mortgaged property has been exhausted, it is ascertained that there is a balance due to be recovered from the defendant and his other properties. The decree in this case was passed before the present Code of Civil Procedure came into operation, and under the provisions of the Transfer of Property Act. Properly speaking, there should have been first a decree for sale of the mortgaged properties, and if the mortgaged properties were found insufficient, a separate decree or order should then have been made for realization of the balance from the person and other properties of the judgment-debtor. But there was a very prevalent practice in the *mofussil* Courts to draw up one decree providing for the sale of the mortgaged property and if the sale-proceeds were insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor. A combined decree like this, though irregular, has been held to be within the competency of the Court and binding on the parties—See *Dinabandhu Nandi v. Mashuda Khatun* (8). It has further been ruled that in such cases, it is not necessary to obtain another separate decree or order under section 90 of the Transfer of Property Act, see *Periasami Kone v. Muthia Chettiar* (9).

That was the state of law, when section 48 of the Code of Civil Procedure which now

(8) 17 Ind. Cas. 263; 16 C. L. J. 316.

(9) 23 Ind. Cas. 516; 38 M. 677; 15 M. L. T. 232.

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provides the limit of time for execution was enacted. It is in these words:—

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree." I am not prepared to hold that clause (b) applies to decrees like the one under consideration, for they cannot be said to direct payment or delivery of property at a "certain" date. For that clause to apply, the date should be fixed in the decree or at least should be ascertainable from its terms. We have not been referred to any authority for applying the maxim "whatever can be made certain is to be treated as certain" to the construction of a Statute of Limitation and I am not aware of any.

I think, however, the case falls under clause (a). There is no good reason for holding that the date of the decree sought to be executed must necessarily be the date put down at the time it was drawn up. The Legislature by using the qualifying words "sought to be executed" seems to me to have indicated that the date is to be ascertained with reference to the time when the decree becomes capable of execution. Otherwise, there are cases in which, if time were to be reckoned from the date when the judgment is pronounced, which as provided in the Code of Civil Procedure (Order XX, rule 7) is the date which the decree must bear, the result would be that the decree-holder would not be able to execute the decree at all; for instance where a decree directs something to be done upon a certain contingency, such as in the case mentioned by Sadasiva Aiyar, J., where a decree for partition provides for an amount to be spent for the marriage of a girl belonging to a Hindu family in the event of and when the marriage takes place. A decree may give more than one relief, some of them may be

enforceable at once and some can only be enforced at future dates either fixed in the decree or depending on the happening of a particular event. A decree is defined as 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit'. When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution, there are in fact more than one decree though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of section 48, clause (a), of the Code of Civil Procedure may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree.

This is the view of the law adopted in *Ratnachalam Ayyar v. Venkatrama Ayyar* (10) and in *Narhar Raghunath Naphad v. Krishnaji Govind Nagavandi* (2). In *Vydia-natha Iyer v. Subramanian Pattar* (11) the learned Judges seem to have gone even further, holding that in cases of this class, time begins to run for the whole of the decree only from the time of the ascertainment of the amount left undetermined. But I do not wish to express any decided opinion as to whether this is correct. The opposite view was expressed in *Jnanendranath Bose v. Khulna Loan Company, Limited* (12) and by this Court in *Venkata Perumal v. Prayag Dossjee* (7), where it was held that time must be calculated from the date which the decree bears on the face of it, and it makes no difference whether that part of the decree which is sought to be executed did not become capable of being enforced until afterwards. For the reason which I have given, I am of opinion that the ruling in *Ratnachalam Ayyar v. Venkatrama Ayyar* (10) and *Narhar Raghunath Naphad v. Krishnaji Govind Nagavandi* (2) is correct and the case reported as *Venkata Perumal v. Prayag Dossjee* (7),

(10) 29 M. 46.

(11) 10 Ind. Cas. 552; 35 M. 104; 21 M. L. J. 546; 10 M. L. T. 69; (1911) 2 M. W. N. 93.

(12) 21 Ind. Cas. 35; 18 C. W. N. 492.

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so far as this point is concerned, must be overruled.

The answer will be as proposed by Seshagiri Aiyar, J., and myself.

SESHAGIRI AIYAR, J.—I am of the same opinion. The decree in this case was passed in January 1895. Its terms are "that the defendants do pay to the plaintiff the suit amount with costs and with interest on the suit amount at the rate of 5 per cent. per annum from the date of the plaint till the date of realization of the amount within three months from this date, that in default the mortgaged properties shall be sold by public auction and if there be balance even after that, it shall be recovered by the plaintiff from the 1st defendant and the common family properties of both the defendants." Even under the Transfer of Property Act, the decree for the balance ought to have been passed only on ascertaining the amount remaining due after the sale of the hypotheca. Nonetheless, the loose practice of passing a combined decree for sale as well as for the recovery of the balance in case the sale proceeds resulted in a deficit was generally prevalent. The new Code of Civil Procedure, by making section 90 of the Transfer of Property Act part of the procedure to be followed in the framing of decrees, has drawn pointed attention to what a mortgage-decree should contain at the outset, and when the personal decree for the balance should be passed. It was held by Mookerji, J., in *Dinabandhu Nandi v. Mashudah Katun* (8) that a composite decree like the present one, "though not strictly in conformity with the provisions of the Transfer of Property Act, is a good and valid decree as between the parties thereto." It has also been held that in the case of such decree it is not necessary to apply for a further order under section 90 of the Transfer of Property Act, after exhausting the mortgaged properties: *Sadho Singh v. Maharaja of Benares* (13) and *Periasami Kone v. Muthia Chettiar* (9).

If the decree is binding on the parties, and if it is executable without a further application for granting a personal decree, the next question is, when does it become

executable. In *Kommachi Kather v. Pakker* (14), it was held by this Court that it is only on the ascertainment of the deficit that the decree is executable. The observations of the Banerji and Richards, JJ., in *Munawar Husain v. Jani Bijai Shankar* (15) show that any application to execute the personal decree before the hypotheca is sold will not be in accordance with law and will not be regarded as a step-in-aid of execution. *Periasami Kone v. Muthia Chettiar* (9) speaks of such an application as one which the Courts should never entertain.

Now comes the crucial question whether under section 48 of the Code of Civil Procedure, time begins to run against the decree-holder from the date of the composite decree or only from the date when it becomes executable against the person and the other properties of the judgment-debtor. If the parties are bound by the terms of the decree, and if it cannot be given effect to until the happening of a contemplated contingency, limitation cannot be said to run against the party seeking to enforce his rights until he is in a position to avail himself of the advantage. The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's rights. But where the party is unable to seek his remedies, it cannot be said that he has failed to avail himself of the cause of action that has accrued to him.

It is true that under section 48, the twelve years' period runs from the date of the decree sought to be executed. As pointed out by Sadasiva Aiyar, J., in the order of reference, the literal construction of this section would render nugatory clauses in partition decrees directing payment of sums of money for marriages, etc., on the performance of the ceremonies. *Ex facie* such sums would not be recoverable at once; for the contingency may never happen. Consequently, if the twelve years are to be reckoned from the date of the decree, the party in very many cases will be without a remedy.

It is a well recognised principle of jurisprudence that "where the language of a

(13) 29 A. 12; 3 A. L. J. 606; A. W. N. (1906) 251.

(14) 20 M. 107; 7 M. L. J. 66; 7 Ind. Dec. (N. S.) 75.

(15) 29 A. 619; A. W. N. (1905) 132; 2 A. L. J. 376.

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Statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." Maxwell on the Interpretation of Statutes, page 344*. It is on this principle, I take it, that the decision of the learned Judges of the Bombay High Court in *Shedds Daulatram Marwari v. Narayan Asaji* (16) proceeds. *Vylianatha Iyer v. Subramania Pattar* (11) and *Ratnachalam Ayyar v. Venkatram Ayyar* (10) lay down that notwithstanding the date of the decree, it becomes executable, so as to invite limitation against the party not able to seek relief at once, only when the decree is capable of execution and not before. The learned Judges who decided *Venkata Perumal v. Prayag Dossjee* (7) have taken a different view, and they are supported by *Jnanendra-nath Bose v. Khulna Loan Company, Limited* (12). The course of decisions in this Presidency is the other way. I would, therefore, overrule *Venkata Perumal v. Prayag Dossjee* (7) and answer the reference by saying that limitation began to run in the case of the decree under execution only when the balance was ascertained.

PHILLIPS, J.—This reference has arisen from the fact that the question referred has been answered in two different ways, in one way by this Court in *Venkata Perumal v. Prayag Dossjee* (7) and in another way by the Bombay High Court in *Narhar Raghunath Naphad v. Krishnaji Gorind Nadgavandi* (2). The Bombay High Court has held that the date from which the limitation is to run is the date when the decree became in all its parts ripe for execution, that is to say, when the personal remedy became available to the decree-holder. In *Venkata Perumal v. Prayag Dossjee* (7), Oldfield and Tyabji, JJ., have held that the period of limitation must run from the date of the decree. The decision of the Bombay High Court is supported by a

(16) 12 Ind. Cas. 811; 36 B. 263; 13 Bom. L. R. 1153.

*Fifth Edition page 372—Ed.

decision in *Muhammad Suleman Khan v. Muhammad Yar Khan* (4), where it was held that, under Article 179 of the Limitation Act of 1877, the date of the decree from which the three years' limitation is to run must necessarily apply only where there is a decree or order which can at its date be executed. In *Vylianatha Iyer v. Subramania Pattar* (11) it was held "For the purposes of limitation regarding execution of a decree the decree must be taken as a whole and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment of the amount left undetermined, even though it might have been open to the party to have executed the other portions earlier." Those two cases did not raise a question under section 48 of the Code of Civil Procedure, but under the Limitation Act, and they are not direct authority for the present case. In *Sabhanatha Dikshatar v. Subba Lakshmi Ammal* (17), in the case of a decree for payment of a certain sum annually as maintenance, it was held that execution was barred by limitation when the application was put in more than three years from the previous application, and similarly in *Yusuf Khan v. Sirdar Khan* (18). In *Ratnachalam Ayyar v. Venkatarama Ayyar* (10) it was also held, "A decree which leaves matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained; and an application for execution will not be barred if presented within three years of the time when, by such matters being settled, it becomes executable."

The authorities are clearly conflicting, and I think we must turn to the section for determining what is the correct interpretation of it.

Section 43 of the Code of Civil Procedure lays down:—Where an application to execute a decree not being a decree granting an injunction has been made, no order for

(17) 7 M. 80; 2 Ind. Dec. (N. S.) 641.

(18) 7 M. 83; 2 Ind. Dec. (N. S.) 643.

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execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

It is suggested by Sadasiva Aiyar, J., in his order of reference, that, possibly, clause (b) might cover the present case "on the ground that the words 'certain date' might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place." But, with all deference, it appears to me that, in the present case, there is no decree for payment at a certain date because the decree provides, firstly, for the sale of the mortgaged properties, and it is only in case the proceeds of the sale are insufficient to extinguish the debt that any necessity arises for payment under the personal decree, and it can hardly be said, when it is not even certain that any payment will have to be made, that it orders payment at a certain date. In this view, clause (b) is not applicable to the present case, and the application would be barred unless it is in time under clause (a). Under clause (a) we have to compute the period from the date of the decree sought to be executed. The words, in themselves, are very clear for a decree can only bear one date, but the matter has been somewhat complicated by the rulings to which I have referred above, that similar words in the Schedule to the Limitation Act are to be modified by reading into the words "the date of the decree" the words "the date when the decree becomes executable." This addition to the words of the Statute has, it appears to me, been suggested in order to avoid hardship and to give a reasonable meaning to the words contained in the Statute. A similar addition may be read into section 48 (a), but this is no authority for going even farther. The Legislature has laid down a period of twelve years as the maximum period within which a decree

can be executed (save in the case of fraud) and presumably this period has been fixed with a view to avoid a prolonged harassing of the judgment-debtor, and consequently I think the section must be strictly construed. Assuming that "the date of the decree" means "the date when the decree becomes executable," I can see no reason for adding the words "and any subsequent date on which a further relief is granted", more especially when the decree is one which ought not to have been passed in its present form. The trouble in this case has arisen from the fact that the decree is erroneous. The decree for the sale of the mortgaged properties should first have been made, and subsequently a personal decree given for any balance outstanding. It would have been open to the decree holder to have the decree amended by omitting the personal decree. In that case, if a personal decree had been subsequently given, twelve years' time would have run from the date of that decree. It has been held that a decree must be treated as a whole [*vide Vudianath Iyer v. Subramania Partar* (11) and *Viraraghava Ayyangar v. Iorammal* (19)]. In *Ashfaq Husain v. Gauri Sahai* (20), it was even held by the Privy Council that, where there were two decrees, one against several defendants and a subsequent decree against another defendant who had been *ex parte* at the first hearing, the period of limitation did not begin to run until the date of the subsequent decree against this one defendant. These cases are authority for holding that there can be only one date from which limitation is to proceed. What is suggested should be done in the present case is, that limitation as regards one part of the decree should run from the date of the decree, and as regards another part of it, from the date when that portion becomes ripe for its execution. If, however, there is only one date from which limitation begins to run, it does not appear to me possible to construe this one decree as having two separate dates for the

(19) 23 M. 60; 9 M. L. J. 284; 8 Ind. Dec. (N. S.) 436.

(20) 9 Ind. Cas. 975; 33 A. 264; 8 A. L. J. 322; 15 C. W. N. 370 (P. C.); 9 M. L. J. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

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commencement of limitation. There is nothing in the words of section 48, clause (a), to support this theory, unless one can read something into that section which is not there. In consequence of the law having been laid down to that effect, I would prefer to interpret the words as they stand, and would hold that the date of the decree must be one date alone and from that date twelve years must be calculated. It is the view taken in *Venkata Perumal v. Prayag Dossjee* (7) by a Bench of this Court and also by the Calcutta High Court in *Jnanendranath Bose v. Khulna Loan Company, Limited* (12) and I would prefer to follow these decisions rather than the one of *Narhar Raghunath Naphad v. Krishnaji Govind Nagavandi* (2). In this view, in answer to the question referred, I would hold that the date mentioned in section 48 of the Code of Civil Procedure is the date of the decree and not the date when the sale-proceeds of the mortgaged properties had been found to be insufficient to satisfy the decree.

This case coming on for hearing after the expression of the opinion of the Full Bench on the question referred for decision by the order dated the 16th of February 1916, the Court (Mr. Justice Sadasiva Aiyar and Mr. Justice Napier) delivered on the 18th September 1916 the following

JUDGMENT.—Following the opinion of the Full Bench we hold that the execution petition is not barred by limitation. We reverse the lower Appellate Court's order and restore that of the District Munsif. The respondents will pay the appellants' costs in this and in the lower Appellate Court.

Appeal allowed.

V.R.P.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS SECOND APPEAL No. 11
of 1916.

August 9, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

SAMINATHA ASARI—RESPONDENT No. 1
—APPELLANT

versus

G. GOPALAKRISHNA AIYENGAR—

PETITIONER No. 3—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182—
Execution of decree, application for—Last intervening
application by hostile claimant—Prior applicant,
whether representative of petitioner.*

An application for execution of a decree which is presented more than three years after a prior application by a person not entitled to execute the decree and claiming hostilely to the petitioner, is barred under Article 182 of the Limitation Act. The prior applicant cannot be treated as the representative of the petitioner to the prejudice of the judgment-debtor. [p. 752, col. 1.]

A mortgagee decree-holder having died in 1908, his widow, on 24th November 1910, made an application for execution of the decree, which was opposed by the alleged adopted son of the decree-holder. In 1912, the latter filed a suit to declare his adoption and it was upheld on 21st July 1913. He made the present application for execution more than three years after the application by the widow.

Held, that the application by the widow having been hostile to the petitioner, she could not be treated as the representative of the petitioner to the prejudice of the judgment-debtor and that the present application was, therefore, barred. [p. 752, col. 2.]

Appeal against the order of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit No. 26 of 1915, preferred against that of the Principal District Munsif, Kumbakonam, in Execution Petition for Revision No. 388 of 1914 (Original Suit No. 317 of 1902).

FACTS are clear from the following judgment of the Subordinate Judge:—

"1. This appeal arises out of an execution petition for enforcement of the mortgage decree in Original Suit No. 317 of 1902 on the file of the Principal District Munsif, Kumbakonam, by sale of the hypotheca.

2. The decree in the suits was obtained by one Gopalasami Aiyengar. After his death, his widow Kannammal came on record as 2nd plaintiff. On the latter's death, the petitioner was added as 3rd plaintiff, as being the adopted son and legal representative of the original decree-holder.

3. There were some seven applications for execution filed in the case. The first

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applications were put in by the original decree-holder Gopalasami Aiyangar. The decree was made absolute on the second application. The third application was filed by the widow of the original decree-holder Kannammal, as his legal representative. The remaining applications were put in by the present petitioner as adoptive son of the original decree-holder. The applications Nos. 3 to 5 were dismissed without any effective steps being taken. The sixth application was also dismissed after service of notice on some of the defendants for non-payment of *batta* in regard to the other defendants. The seventh is the final application by the present petitioner. All the applications were filed within three years of each other, and within twelve years from the date of the decree.

4. The final application was opposed by the 1st defendant, the opposition being based on the following grounds:—

- (1) That the petitioner's alleged adoption is not true.
- (2) That the application is not sustainable without the production of a succession certificate.
- (3) That the application is barred by limitation, since the third application by the widow of the original decree-holder was not a valid one and cannot enure to the benefit of the petitioner.

* * * *

8. The remaining point raised in the appeal relates to the question of limitation.

It is based on the ground that the third application for execution by the widow of the original decree-holder was invalid, the petitioner's adoption having admittedly taken place during the lifetime of the original decree-holder. If the said application be held to be invalid as put in by a person having no right to do so, the present application would be barred by limitation. If it be held to be valid, the application could be within time.

9. In reference to the question under notice there seems to be no authority directly bearing on the point. From the deposition of the petitioner's brother Srinivasa Ragavachariar (P. W. No. 1), it would appear there were misunderstandings between

the petitioner and his adoptive mother Kannammal after the death of the original decree-holder. The petitioner himself established his adoption in the course of the decree in Original Suit No. 47 of 1912, on the file of the Kumbakonam Sub-Court (Exhibit A), decided on 21st July 1913. The original decree-holder having died in 1908, his widow Kannammal put in the third application (24th November 1910), "before petitioner could establish his adoption, as representing the estate of her husband ignoring the petitioner's adoption." In this view of the matter her application may not be considered as put in by a person having no right whatever to do so. It would seem to have been put in by a person professing to represent the estate on the assumption of the non-existence of the petitioner's adoption, which necessitated the institution of the suit, Original Suit No. 47 of 1912, by the petitioner. That being so, the application by the widow was a valid one on the analogy of the rulings cited in the order of the lower Court (see Rustomji's Law of Limitation at pages 497 and 498).

10. For the appellants themselves, reliance is placed on the case of *Saramma v. Seshayya* (1), where it was held that an application for execution made by a mother as guardian on behalf of her son who was really a major at the time, was not an application in accordance with law. In that case, the son being really a major as to which there was no doubt whatever, his mother had not even an apparent right to put in the application. In the present case the petitioner's adoption itself being in dispute between him and his adoptive mother, the latter had *prima facie* right to apply for execution of the decree standing in the name of her late husband, though such right vanished subsequently by reason of the adoption being established in the course of the litigation. This circumstance would seem to differentiate the present case from the ruling cited for the appellants.

11. For these reasons I am of opinion that the petitioner's final application for execution is within time."

Mr. T. Narasimha Aiyengar, for the Appellant.

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Mr. A. Krishnasami Aiyer, for the Respondent.

JUDGMENT.—We cannot agree with the lower Appellate Court's conclusion that the application by the widow enured for the benefit of the adopted son, the present petitioner. For the cases they have relied on relate either to the representation of the real judgment-debtor by some other person or to the representation of the decree-holder by a person not claiming hostilely against him, as the widow was against petitioner. The authorities in question being irrelevant, we have not been shown any other ground on which the widow can be treated as the representative of the petitioner to the prejudice of the judgment-debtor. We allow the appeal, set aside the lower Court's decision and dismiss the execution petition with costs throughout.

Appeal allowed.

V. R. P.

ALLAHABAD HIGH COURT.
APPLICATION IN SECOND APPEAL No. 709
OF 1916.

August 1, 1916.

Present:—Mr. Justice Piggott.

BALBIR PRASAD AND ANOTHER—
JUDGMENT-DEBTORS—APPLICANTS
versus

KARAN SINGH AND ANOTHER—DECREE-
HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5, applicability of—Execution—Appeal—Application to stay execution, maintainability of.

The provisions of Order XLI, rule 5, are applicable *mutatis mutandis* to applications on the execution side. [p. 752, col. 2.]

An application made by an appellant to an appeal pending on the execution side in the High Court, asking for an order to restrain the Court of first instance from taking any steps in execution pending the disposal of the appeal, is entertainable under Order XLI, rule 5, of the Civil Procedure Code, 1908. [p. 752, col. 2.]

Mr. Panna Lal, for the Applicants,
Messrs. Pearey Lal Banerji and Sarat Chandra Chaudhri, for the Opposite Party.

JUDGMENT.—This is an application of an unusual character. The position of the parties is as follows:—

The applicants are judgment-debtors and the opposite party are decree-holders.

Under a certain decree for sale on a mortgage, it is common ground that the decree directed the sale of some share in a particular *mahal*. It so happened that the decree was ambiguous. A difficulty arose on the execution side as to whether it was a $\frac{1}{4}$ th share of this *mahal* or a $\frac{1}{8}$ th share which was to be sold. The question must be determined primarily on the wording of the decree, though the surrounding circumstances may have to be taken into consideration.

The Court below has ordered a $\frac{1}{4}$ th share of the *mahal* to be sold, and the sale has already taken place, but an appeal against that order has been admitted, and is pending before this Court, raising the question whether it was $\frac{1}{4}$ th share and not $\frac{1}{8}$ th share which should have been sold. Now the judgment-debtor has presented this application praying for an order directing the Court below not to confirm the sale pending the disposal of this appeal. I must make it clear that in the sale held under the decree the decree-holder purchased the property so that no question could arise of the rights of third parties. The question at issue will be decided between the parties to the decree itself.

There has been considerable argument before me as to the precise provisions of the Civil Procedure Code applicable to the present application.

Personally I have no doubt that the application is under Order XLI, rule 5, and has to be dealt with as such. On behalf of the decree-holders it is argued that this rule is not applicable, as the execution proceedings terminated with the sale and confirmation cannot be regarded as a step-in-aid of execution.

The provisions of Order XLI, rule 5, are only applicable *mutatis mutandis* to applications on the execution side. The rule as it stands presupposes a regular application in a suit, the decree in which is sought to be executed during the pendency of the appeal.

Here the appeal is before this Court on the execution side and the applicant is asking for an order to restrain the Court of first instance from taking any steps in the matter pending the disposal of the appeal.

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I am satisfied that such an application is entertainable, being subject to the provisions of Order XLI, rule 5, of the Civil Procedure Code in so far as they can be made applicable.

Looking at the matter from this point of view, I do not think this application should be granted. So far as the papers before me are concerned they show that no security has been furnished or tendered. The position taken up by the applicants-judgment-debtors is that, in the case of an order postponing the confirmation of the sale being passed, the property itself will remain available to meet the claims of the decree-holders-respondents in the event of the appeal failing.

This argument overlooks the fact that as matters stand the decree-holders are entitled to the possession of the property and the enjoyment of its profits. An order postponing the confirmation of the sale would certainly deprive them of this advantage and put them to undeserved loss in case the appeal is dismissed.

This view of the case being pointed out to the applicants they said they might be required to furnish security.

I do not think they are entitled to this indulgence and I am further of opinion that considerable difficulty might be felt by the decree-holder in obtaining compensation in the event of the appeal failing.

On behalf of the applicants it was contended that confirmation of the sale would leave them without any remedy in the event of the appeal succeeding, and it was sought to invoke the inherent jurisdiction of the Court in order to stay further proceedings in order to prevent the prosecution of the appeal from becoming purposeless or futile. I am quite unable to accede to this view of the case.

At the hearing of the appeal this Court will be sitting on the execution side, and fully seised of the case. If the appeal succeeds it will be upon a finding that the decree directed the sale only of $\frac{1}{8}$ th of the *mahal*. If this Court arrives at that conclusion I have no doubt that it can set aside the sale.

The Court below is bound to confirm the sale, provided the conditions of Order

XXI, rule 92, have been satisfied. Its order of confirmation will necessarily be subject to the result of the appeal.

For these reasons I do not think that the order applied for would be equitable and justified.

I dismiss the application. The *interim* order is discharged.

Application dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 231
OF 1916.

January 16, 1917.

Present:—Mr. Justice Oldfield and
Mr. Justice Bakewell.

VAITHILINGA ODAYAR AND ANOTHER—
DEFENDANTS NOS. 1 AND 2—
APPELLANTS

versus

AYYATHORAI ODAYAR AND OTHERS—
PLAINTIFFS NOS. 1 AND 2 AND
DEFENDANTS NOS. 3, 5 AND 6—
RESPONDENTS.

Caste Disabilities Removal Act (XXI of 1850), s. 1—Apostasy, effect of, on descendants of convert—Claim, reversionary, by descendant of convert to estate of deceased Hindu, maintainability of—‘Renouncing,’ ‘excluded,’ ‘deprived,’ meaning of.

The removal of disabilities on rights of inheritance by an apostate provided for by Act XXI of 1850 applies only to the convert himself and not to his descendants. [p. 754, col. 1.]

The descendants of a convert to Christianity, therefore, cannot maintain a reversionary suit to the estate of a deceased Hindu. [p. 754, col. 1; p. 755, col. 1.]

Bhagwant Singh v. Kallu, 11 A. 100 A. W. N. (1938) 248; 6 Ind. Dec. (N. S.) 49, dissented from.

Per Oldfield, J.—The ‘renunciation’ and ‘deprivation’ referred to in section 1 of the Act apply only to rights which have accrued and not to persons who were born in another religion before the succession opened. Under the section protection is, in terms, given only to one person, the one who has renounced or been excluded or deprived, and it cannot be extended by construction to others. [p. 754, col. 1.]

Per Bakewell, J.—The words “having been excluded and being deprived of caste” connote an act directed against a particular person, and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community. [p. 755, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit No. 56 of 1915, preferred against

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the decree of the Court of the District Munsif, Tiruvalur, in Original Suit No. 352 of 1913.

Mr. T. V. Muthu Krishna Aiyar, for the Appellants.

Messrs. T. R. Venkatarama Sastri and Aravamuda Aiyangar, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The plaintiffs, Christians, sued to recover the estate of a deceased Hindu, as his reversioners. That is, they claimed in virtue of their own relationship to him, not through any earlier reversioner, such as Saminada Odayar, the member of their branch of the family, who first embraced Christianity. The lower Appellate Court following *Bhagwant Singh v. Kallu* (1) held that they were relieved from all religious disability by Act XXI of 1850 and remanded the suit for decision on its merits. The question is whether this decision is right.

The persons relieved by the Act are those, who (1) renounce (2), have been excluded from the communion of a religion, (3) are deprived of caste. Renunciation and deprivation are applicable only to rights, which have accrued, and, therefore, are irrelevant in the case of plaintiffs, who were born Christians, before the succession opened. They, therefore, are not covered by descriptions (1) and (3). As regards (2) there is more difficulty. For the word "exclude" is applied in ordinary parlance to refusal of rights newly claimed and also deprivation of rights already enjoyed, the meaning as given in Webster's Dictionary being (1) "to shut out; to hinder from entrance or admission; to debar from participation or enjoyment; the opposite to admit and (2) to thrust out; to expel." It is an argument against the interpretation of "exclude" in the Act in the first of these senses that it is used in the context between two terms, which, as I have pointed out, express a different idea. It is further material that, if the Legislature had intended the result entailed by plaintiffs' contention, the perpetual right of the descendants of a convert to rely on the law of his birth for purposes of inheritance from unconverted relatives, it could and would have effected it by shorter and more explicit language.

These arguments are supported by the fact that plaintiff's contention entails consequences repugnant to reasonableness and consistency. In the case of the original convert, his status will be fixed at the date of his conversion and his original law will be invoked only in order to determine whether his relationship entitles him to inherit, not whether that relationship exists. No anomalies, therefore, beyond the initial one, involved in the application of his original law, will be entailed. With his descendant that case is different. He, having to establish both the points referred to above, will find the concession involved in plaintiffs' interpretation of the Act illusory, since his descent will have to be traced through some Christian marriage, which will not be valid according to the law under application and can be established, only if the claimant is allowed to apply both his abandoned and his present law as may suit each portion of his case. And if it be said that this is contemplated, the suggestion is so startling that a clearer expression of it than the Act contains may fairly be required.

The only decision of a High Court on the point [*Bhagwant Singh v. Kallu* (1)] is no doubt in plaintiffs' favour. It is based on considerations first of the preamble and then of the body of the Act. In respectfully dissenting from it. I observe first that the preamble set out a part only of section 9 of the Bengal Regulation VII of 1832, to which it refers. Reference to the whole and to section 8 of which it is a continuation, shows that (1) their object was to settle all cases of conflict of laws, one omitted portion restricting the operation of section 8 to "bona fide professors" of the religion in the question at the time of the trial and the whole having no special reference to the particular case of conversion, (2) the settlement consisted, not only in exempting either party from disabilities entailed by the Hindu or Muhammadan Law, but also, as provided in the other omitted portion, in applying the principles of justice, equity and good conscience. This recognised, the attempt to identify the purpose of the Act with that stated in the preamble or to explain the one with reference to the other must be abandoned. As regards the argument from the body of the Act the learned Judges, I think, overlooked the

(1) 11 A. 100; A. W. N. (1888) 288; 6 Ind. Dec. (N. S.) 492

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fact that protection is in terms given only to one person, the one who has renounced or been excluded; and, with all due deference, they were not justified in extending it by construction to others.

As the Act will not bear the construction proposed by plaintiff, the appeal must be allowed, the District Munsif's decision dismissing their suit being restored with costs throughout.

BAKEWELL, J.—I agree with regard to the construction of Act XXI of 1850, the plaintiffs are not "excluded from the communion of any religion or deprived of castes" by reason of their own conduct or by anything except what was done or suffered by their remote ancestor. The consequence of this Act is that his descendants form part of a community separated from his other relations by the observance of a different religion and other usages and governed by a different system of law.

In my opinion the words "having been excluded and being deprived of castes" connote an act directed against a particular person, and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community.

The plaintiffs and defendants belong to different communities governed by different laws of inheritance and the former desire to bring themselves within both systems, in so far as they can deprive benefit from so doing and argue that the provisions of the Mitakshara which exclude them have been repealed.

I do not think that the wording of the Act supports this contention.

Appeal allowed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3595
OF 1914.

July 20, 1916.

Present:—Mr. Justice Fletcher and

Mr. Justice Teunon.

SRIMANTES LAL MAITY AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

SIBU RAUL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Cess Act (IX B. C. of 1880), ss. 14, 20—Suit for recovery of rent due under kabuliyat, whether comes under the Act.

A suit brought by a landlord to recover certain rent, alleged to have been due by the tenant under a *kabuliyat*, does not come under section 14 of the Cess Act (IX B. C. of 1880), and, therefore, the Court is not precluded by reason of section 20 of the Act from giving the plaintiff-landlord a larger amount than the amount mentioned in the cess return. [p. 755, col. 2.]

Appeal against the decree of the Additional District Judge, Midnapur, dated the 22nd August 1914, reversing that of the Munsif, 3rd Court, at that place, dated the 14th August 1912.

Babus Mohendranath Ray and Satkowri-pati Ray, for the Appellants.

Babu Jyotish Chandra Hazra, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the learned Additional District Judge of Midnapur, dated the 22nd August 1914 reversing the decision of the Munsif. The suit was brought to recover certain rent alleged to have been due under a *kabuliyat*, the rent being payable in paddy. The defendant in their written statement denied the paddy rent but admitted a cash rent of Rs. 6-12-0. So, presumably, the only question to try was whether the rent was, as stated by the plaintiff, the paddy rent or whether the story set up by the defendants that the rent was a cash rent of Rs. 6-12-0 was correct. The learned Judge of the lower Appellate Court found the rent to be a cash rent; but he has given a smaller rent than that admitted by the defendants and the ground on which he has done so is that he considers that by reason of section 20 of the Cess Act, IX(B. C.) of 1880, the Court is precluded from giving the plaintiff a larger amount than the amount mentioned in the cess return. The

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question is: "Is the view of the learned Judge right as regards that?" Apparently no issue was settled as regards that point and the learned Judge acted on the materials that were before him. But so far as we can see, this case does not come under section 14 of the Act and, therefore, the plaintiff is not limited to recover the amount mentioned in the cess return. In that view of the case, the admission of the defendants that the amount is Rs. 6-12-0 must be acted on and the decree appealed from will be varied by allowing rent at Rs. 6-12-0 instead of at Rs. 3-15-0. The parties will receive and pay costs in proportion to their respective success and failure.

Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1595 of 1914.

October 3, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Spencer.

ATHAN KUTTI AND OTHERS—DEFENDANTS

Nos. 10, 11, 12 & 23—APPELLANTS

versus

KUTTANAT ILLOTH NARAYANAN

NAMBUDRI'S WIFE MATAVIL

ILLOTH SUTARJANAM AND OTHERS—

PLAINTIFFS NOS. 2, 3 & DEFENDANTS NOS. 3 TO
9, 13 TO 22, 24 TO 75—RESPONDENTS.

Mortgage prior to Transfer of Property Act—Redemption, clause in restraint of—Stipulation for absolute title on default of payment on specified date—Clog—Adverse possession, title by, whether can be set up in bar of right to enforce mortgage—Appropriation of rents due by mortgagee towards interest due by mortgagor, whether saves limitation—Transfer of Property Act (IV of 1882), s. 60—Limitation Act (IX of 1908), s. 20, Sch. I, Art. 132.

In the case of mortgages executed prior to the passing of the Transfer of Property Act, no agreement of the parties can operate *ipso facto* to clog or restrain the equity of redemption, nor can an agreement affect the character of the mortgagee's possession so as to convert it from that of a mortgagee into that of a person prescribing for a full title. [p. 757, col. 2.]

Thumbusawmy Moodelly v. Hossain Rowthen, 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. s.) 1; *Ramasami Sastrigal v. Samiyappanaykan*, 4 M. 179; 6 Ind. Jur. 81; 1 Ind. Dec. (N. s.) 950; *Venkatasubbayya v. Venkayya*, 15 M. 230; 1 M. L. J. 677; 5 Ind. Dec. (N. s.) 511 and *Neellakandhan v. Nambudripad Terumilai Ananthakrishna Ayyar*, 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426, referred to.

Usman Khan v. Nagalla Dasanna, 16 Ind. Cas. 694; 37 M. 545; (1912) M. W. N. 99; 12 M. L. T. 330; 2 M. L. J. 380 and *Shankar Din v. Gokul Prasad*, 16 Ind. Cas. 78; 15 O. C. 285; 12 M. L. T. 419; (1912) M. W. N. 106; 10 A. L. J. 344; 14 Bom. L. R. 1098; 23 M. L. J. 621; 17 C. W. N. 1; 17 C. L. J. 9; 34 A. 620, distinguished.

The effect of the Transfer of Property Act is to preserve the equity of redemption unfettered, section 60 providing that only an independent act of the parties or an order of Court can operate to extinguish it. [p. 757, col. 2; p. 758, col. 2.]

Perayya v. Venkata, 11 M. 403; 4 Ind. Dec. (N. s.) 281, referred to.

Where the right to enforce a mortgage has become barred under Article 132 of the Limitation Act, it is not open to the mortgagee to set up his possession under an invalid stipulation in restraint of redemption in a suit for possession by the mortgagor and compel the mortgagor to redeem, and thus discharge a barred debt. [p. 759, cols 1 & 2.]

Lakshmi Doss v. Rup Lal, 30 M. 169; 2 M. L. T. 4; 17 M. L. J. 19; *Ramanasari v. Muthusami Naik*, 30 M. 240; *Sri Kishan Lal v. Kashmiro*, 34 Ind. Cas. 37; 31 M. L. J. 362; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 14 A. L. J. 1236 *Parasurama Pattar v. Venkatachalam Pattar*, 21 Ind. Cas. 701; 25 M. L. J. 561; (194) M. W. N. 198; *Seshamma Shettati v. Chikaya Hegade*, 25 M. 507; 12 M. L. J. 119, referred to.

Per Ayling, J.—A payment under section 20 of the Limitation Act, in order to save limitation, must be a conscious act. [p. 758, col. 1.]

The mere appropriation of rents due by a mortgagee to the mortgagor towards the interest due by the latter will not save limitation, especially when the interest is payable not periodically but on a single date [p. 758, col. 1.]

First plaintiff's father effected a *kanom* (usufructuary) mortgage with possession to defendants' ancestor on 14th November 1874 for 30 years for Rs. 400. On 12th August 1875, he executed a simple mortgage on the same lands for Rs. 400. This latter mortgage contained a stipulation that if the principal and interest were not discharged by 13th August 1876, the mortgagees were to have *jeinmam* or absolute rights. In a suit for redemption of the first *kanom* mortgage, defendants pleaded the forfeiture clause in the second mortgage and their own adverse enjoyment in bar of plaintiffs' suit.

Held, (1) that the stipulation in the second mortgage was invalid as a clog on the equity of redemption; [p. 757, col. 2.]

(2) that the effect of the said stipulation was not to alter the character of defendants' possession from 13th August 1876 and to render it adverse to the title of the mortgagor, but that it still continued as the possession of the mortgagees; [p. 757, col. 2.]

(3) that plaintiffs were not bound to redeem the second mortgage after plaintiffs' rights thereunder had become extinguished under Article 132 of the Limitation Act; [p. 758, col. 1.]

(4) that, in the absence of a payment for interest in respect of the second mortgage, the appropriation by the defendants of rents due by them towards interest did not operate to save the bar of limitation. [p. 758, col. 1.]

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Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 305 of 1913, preferred against that of the Subordinate Judge, South Malabar at Calicut, in Original Suit No. 4 of 1911.

Mr. C. V. Ananthakrishna Aiyar, for the Appellants.

Messrs. C. Madhavan Nair and T. R. Ramachendra Aiyar, for the Respondents.

JUDGMENT.

AYLING, J.—The main question for determination in this appeal is whether the plaintiffs' right of redemption is affected by the provision in Exhibit III, or by defendants' subsequent possession of the mortgaged property after the date prescribed for discharge of that document.

The facts are simple. On 14th November 1874 by Exhibit A 1st plaintiffs' father effected a mortgage with possession (*kanom*) of the plaint properties to defendants' ancestress Kunhachamma for 36 years for Rs. 3,000. On 12th August 1875 he executed another document Exhibit III, which is in effect a simple mortgage on the same lands for Rs. 400. It was therein provided that if the latter amount with interest thereon was not discharged by 13th August 1876 the mortgagor had no objection to the mortgagee's holding and enjoying the property as *jenmam*. It is admitted that the latter phrase means in absolute ownership and that the object of the clause is to terminate plaintiffs' right of redemption of both mortgages, Exhibit A and Exhibit III.

Both documents were executed long before the enactment of the Transfer of Property Act, and following the decisions in *Thumbusawmy Moodelly v. Hossain Rowthen* (1), *Ramasami Sastrigal v. Samiyappanaykan* (2) and *Venkatasubbayya v. Venkayya* (3) it seems to me we have no option but to hold that this clause in restraint of the right of redemption is *per se* inoperative.

It is, however, argued that, although this may be so, yet the effect of the agreement

of parties in Exhibit III is to alter the character of the possession of defendants or their ancestor from 13th August 1876 and to render it adverse to the title of the mortgagor. This being so, defendants must after twelve years' uninterrupted possession (which is not denied), have acquired full title to the property and plaintiffs' right to redeem must be regarded as extinguished.

If no agreement of parties to a mortgage can operate, *ipso facto*, to clog or restrain the equity of redemption and that is the law which has been declared to be applicable in Madras from 1858 up to the passing of the Transfer of Property Act (*Vide* decisions above quoted) I find it difficult to understand how, consistently with this view, agreement of parties to a mortgage can affect the character of the mortgagee's possession so as to convert it from that of a mortgagee, into that of a person prescribing for a full title.

The chief authority relied on by appellants is *Usuman Khan v. Nagalla Dasanna* (4). In that case a relinquishment by the mortgagor in favour of the mortgagee was held invalid to extinguish the equity of redemption, but, being followed by a continuance in possession of the mortgagee for more than the statutory period, the mortgagor's right to redeem was held to be extinguished. The learned Judges were of opinion that it was open to the parties to agree in what character the mortgagee should hold possession and that they had agreed by the relinquishment above referred to, that his possession thereafter should be as absolute owner. What distinguishes that case from the present one is this. The relinquishment or agreement was not only after the expiry of the period of mortgage, but after the enactment of the Transfer of Property Act. Section 60 of the latter provides that the right of redemption may be extinguished by act of parties, and this at once removes the case from the purview of the rulings already cited. None of them are in fact referred to.

In my opinion the possession of defendants after 13th August 1876 must be treated as still that of mortgagor and not adverse to the mortgagor.

(1) 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. S.) 1.

(2) 4 M. 179; 6 Ind. Jur. 81; 1 Ind. Dec. (N. S.) 960.

(3) 15 M. 220; 1 M. L. J. 877; 5 Ind. Dec. (N. S.) 511.

(4) 16 Ind. Cas. 694; 37 M. 515; (1912) M. W. N. 935; 12 M. L. T. 330; 23 M. L. J. 390.

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The only other question is whether plaintiffs are bound to redeem Exhibit III or whether defendants' rights thereunder have become extinguished under Article 132 of Schedule I of the Limitation Act.

Reliance is placed on section 20 of the Act and it is argued that defendants having admittedly failed to pay plaintiffs the *poreppad* due under Exhibit A, it should be presumed that they appropriated it towards the interest due under Exhibit III year by year and that each such appropriation gives a fresh starting point of limitation. This argument hardly deserves serious consideration. Exhibit III makes no provision for payment of interest annually, but only on a single date 13th August 1876. Apart from this the appropriation thereto is a pure fiction, which we are not justified in raising and which was in fact not raised in defendants' written statement. Respondent contends with some reason, that a payment under section 20 must be a conscious act. It may be taken as certain that no such appropriation was ever contemplated by the parties and it cannot be treated as a fact for the purpose of saving limitation.

Lastly it is contended that it is open to defendants to set up their right as mortgagees in a suit for possession although their right to enforce payment under Exhibit III may be barred under Article 132. No authority has been quoted which seems to support such a proposition in this case. Defendants' possession is under another mortgage, Exhibit A, which it is sought to redeem and not under Exhibit III. Their rights under the latter have clearly become time-barred and plaintiffs cannot be compelled to redeem them.

The appeal must be dismissed with costs.

Time for payment extended to four months from this date.

SPENCER, J.—I agree, Exhibit III is dated 12th August 1875.

There can be no doubt that under the equitable principles held in *Ramasami Sastrigal v. Samiyappanaykan* (2), *Venkaatasubbayya v. Venkayya* (3) and *Neeiakandhan Nambudripad v. Terunilai Ananthakrishna Ayyar* (5) to be

applicable to mortgages executed subsequent to 1858 and prior to 1882 the forfeiture clause must be treated as a mere clog on the equity of redemption and no bar to a suit for redemption (*vide* Shepherd and Brown's Transfer of Property Act, pages 239 to 243 where the history of the litigation that preceded the introduction of the Act is discussed). The effect of the Act was to preserve the same equity of redemption unfettered, section 60 providing that only an independent act of the parties or an order of Court could operate to extinguish it. [See *Perayya v. Venkata* (6)].

The agreement in Exhibit III that the mortgagee should enjoy the properties as his *jenm* if payment was not made by August 13th, 1876, cannot be treated as affording a starting point for adverse possession to run against the mortgagor, because no act was done on that date to alter the character of the mortgagee's possession. The mortgagee still remained in possession under Exhibit A, which ran for a term of 36 years from 1874. It has been found by the District Judge that Kunhachamma and her heirs and representatives did not begin to deal with the properties as their *jenm* earlier than twelve years before suit. *Usuman Khan v. Nagalla Dasanna* (4), cited for the appellants, was a case in which by a term in the original mortgage deed it was provided that on the happening of a certain event, the mortgagee was to hold possession as an absolute owner, and when that event happened the parties at once showed by their acts and admissions that they had mutually agreed to alter the character of the possession according to the terms in the deed. *Shankar Din v. Gokul Prasad* (7) was a case where parties to a mortgage entered into a separate arrangement or compromise limiting the right of redemption. So long as the possession of Kunhachamma is capable of being attributed to the right she acquired under Exhibit A to enjoy the land as *kanomdar*, there is no reason to regard it as possession adverse to the *jenmi* merely by reason of the inoperative clause in Exhibit III. In this connection I would refer to the observations of

(6) 11 M. 403; 4 Ind. Dec. (n. s.) 281.

(7) 16 Ind. Cas. 78; 34 A. 620; 15 O. C. 285; 12 M. L. T. 419; (1912) M. W. N. 1061; 10 A. L. J. 44; 14 Bom. L. R. 1098; 23 M. L. J. 621; 17 O. W. N. 1; 17 C. L. J. 9.

(5) 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426.

ATHAN KUTTI v. MATAVIL ILLOTH SUTARJANAM,

Bashyam Aiyangar, J., in *Seshamma Shettati v. Chackaya Hegade* (8) as to the incapacity of a tenant or usufructuary mortgagee by setting up a title adverse to that of his landlord or mortgagor to acquire a title inconsistent with that under which he was let into possession before the period prescribed for the determination of his tenancy or the redemption of his mortgage, as the case may be, expires.

As to the question whether plaintiffs were bound to redeem Exhibit III, which is styled a bond and is, I think, rightly treated by the lower Courts as a simple mortgage with a clog on the equity of redemption, the mortgagee might have sued upon it at any time up to August 8th, 1910, notwithstanding the decision of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai* (9) that suits upon simple mortgagees are governed by Article 132 of Schedule II of the Limitation Act, which allows twelve years from the date when the money becomes due.

Section 3' (1) of the Act especially allowed sixty years from the date of the money becoming due or two years from the passing of the Limitation Act of 1908 for mortgagees to institute a suit for sale or foreclosure *whichever period expired first*. The two years expired first, and on the 11th of January 1911 when this suit was instituted, the mortgagees had already lost their right to recover the loan.

But it is argued that the defendants being in possession are entitled to rely on Exhibit III in bar of plaintiffs' suit although a suit to enforce their rights under the document may be barred. It has been often expressed that a defendant may in equity set up a defence that a certain instrument is, by reason of its invalidity or other defect, ineffectual against him, although if he sued to have it avoided or declared a nullity, his suit would be barred by limitation [Vide *Lakshmi Doss v. Roop Laul* (10), *Ramanasari v. Muthusami Naik* (11) and *Sri Kishan*

Lal v. Kashmiro (12)].

This is very far from establishing a proposition that a party has a substantive right to compel his opponents to discharge a barred debt before they can succeed in their suit. In *Parasurama Pattar v. Venkatchalam Pattar* (13), where it was held that a mortgagor and a mortgagee are under mutual obligations to make all payments provided in the mortgage deed so long as the relationship of the mortgagor and mortgagee continues; it was expressly stated that this rule did not extend to payments which the parties were liable to make otherwise than under the contract of mortgage. The liability of the parties under Exhibit III is distinct from their liability under the mortgage sought to be redeemed in the suit. Although the defendants are, no doubt, entitled by way of equitable defence to set up the clause in Exhibit III that provides against redemption after a fixed time, we have already held that this clause is inoperative to bar redemption.

The plea that limitation has been saved by the appropriation of rents towards interest is one into which I consider we cannot now enter as it is not made a ground of second appeal, nor was it argued on the receipt of a finding in the lower Appellate Court upon this question of Exhibit III being time-barred. Besides the defendants' written statement has not been printed, and we are not now in possession of the necessary materials for deciding this mixed question of law and fact.

The claim for *post diem* interest has not been raised in the memorandum of second appeal and must be disallowed.

I am of opinion that this second appeal should be dismissed with costs.

Appeal dismissed.

V. R. P.

(12) 34 Ind. Cas. 37; 31 M. L. J. 362; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 14 A. L. J. 1236.

(13) 21 Ind. Cas. 701; 25 M. L. J. 561; (1914) M. W. N. 198.

(8) 25 M. 507 at pp. 511, 512; 12 M. L. J. 119.

(9) 30 M. 426 (P. C.); 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L. T. 333; 9 Bom. L. R. 1104; 34 I. A. 186.

(10) 80 M. 169; 2 M. L. T. 4; 17 M. L. J. 19.

(11) 30 M. 248

D. A. V. COLLEGE MANAGEMENT AND TRUST SOCIETY v. SECRETARY OF STATE.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2188 OF 1914.

May 25, 1916.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Broadway.

DAYANAND ANGLO-VEDIC COLLEGE
MANAGEMENT AND TRUSTS SOCIETY
—OBJECTORS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA—

RESPONDENT.

Costs—Land acquisition cases.

Costs in matters under the Land Acquisition Act should be calculated in the same way as in ordinary suits.

Ekambara Gramany v. Muniswamy Gramany, 31 M. 328, referred to.

First appeal from the order of the Divisional Judge, Lahore, dated the 27th July 1914.

Rai Sahib Lala Moti Sagar, for the Appellants.

The Government Advocate, for the Respondent.

JUDGMENT.—Under Punjab Government Notification No. 3254-G., dated the 31st October 1912, the Government acquired 7 kanals 5 marlas of land belonging to the Dayanand Anglo-Vedic Management and Trust Society for the purposes of the Veterinary College and Hospital, and in due course the Land Acquisition Officer gave his award which amounted to Rs. 5,252. The Dayanand Anglo-Vedic College objected to this price and put in a claim amounting to Rs. 14,500 and also claimed compensation for severance. Mr. Durga Das, who then appeared on behalf of the objectors, was asked to state what amount he claimed as compensation for severance and he undertook to do so by the next hearing. For reasons which are not apparent on the record he did not put in any formal application or make any formal statement showing what amount of compensation the objectors were claiming. But in the course of arguments he stated that the amount so claimed was Rs. 6,000. The Court rejected the objectors' application with costs and in the preparation of the memorandum of costs, apparently through an error, Rs. 335 alone was awarded as Pleader's fees, being calculated on the difference between the amount claimed and the amount awarded. The sum of Rs. 6,000 was not included

in the calculation. On this the objectors applied to the Court (Divisional Judge, Lahore) asking that the question of costs should be reconsidered, and the Government through the learned Government Advocate, applied that this sum of Rs. 6,000 should also be included in the calculation. After hearing Counsel the learned Divisional Judge held that the costs in suits of this nature should be calculated as in ordinary suits. In holding this he followed *Ekambara Gramany v. Muniswamy Gramany* (1) and certain unreported rulings of this Court. He has accordingly held that the Pleader's costs as calculated were correct with the exception that the sum of Rs. 6,000 ought to have been included in the calculation and altered the memorandum of costs accordingly, making the total amount payable to Government on account of Pleader's fees come to Rs. 451-15-3.

From the above order the Dayanand Anglo-Vedic Management and Trust Society has filed this appeal, and we have heard Rai Sahib Moti Sagar on its behalf. Mr. Petman has referred us, in addition to the rulings cited before the lower Court, to Civil Appeal No. 144 of 1913, in which it was held that costs in matters under the Land Acquisition Act should be calculated in the same way as in ordinary suits. With these decisions we are in accord and are of opinion that the ordinary rule should apply to cases of this kind. Mr. Moti Sagar then urged that in any event, inasmuch as the Rs. 6,000 as compensation for severance was not specifically claimed, this ought not to be included in calculating costs. We are, however, unable to agree with this contention. It is clear that a claim for compensation under this head was definitely made and put in issue, and it is also clear that Mr. Durga Das, on behalf of the objectors, in the course of his arguments distinctly stated that the amount claimed under this head was the sum of Rs. 6,000. We consider, therefore, that the learned Divisional Judge was right in including this sum as having been a part of the claim advanced by the objectors.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 31 M. 328.

NATARAJA PADAYACHI v. NAGAMUTHU PADAYACHI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1144 OF 1914.

October 3, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.NATARAJA PADAYACHI AND
OTHERS—DEFENDANTS—APPELLANTS
versus

NAGAMUTHU PADAYACHI

AND OTHERS—PLAINTIFFS RESPONDENTS.

Specific Relief Act (I of 1877), s. 18 (a)—Contract Act (IX of 1872), s. 56, para (2)—Agreement to re-convey land purchased in Court auction after setting aside sale—Omission to apply for cancellation of sale—Specific performance—Contract, performance of, whether rendered impossible—Imperfect title subsequently perfected—Damages, whether adequate relief.

Defendant, a Court auction-purchaser, agreed to convey the land he purchased to plaintiff, who was the judgment-debtor, after applying to Court for cancellation of the sale, on the plaintiff depositing Rs. 100 within a specified date, which the defendant was to credit under Order XXI, rule 89, Civil Procedure Code. Plaintiff duly deposited the amount, but defendant did not get the sale set aside. In a suit for specific performance of the contract:

Held, (1) that the contract did not become impossible of performance by reason of defendant's conduct in not applying for cancellation of the sale;

(2) that the transaction being, in substance, an agreement to re-sell the property to which the defendant had only an imperfect title pending confirmation of the Court sale, the defendant was compellable to make good the contract out of the interest that he subsequently obtained;

(3) that money compensation was not an adequate relief.

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 405 of 1913, preferred against that of the Additional District Munsif, Ariyalur, in Original Suit No. 73 of 1913.

Mr. *Mir Sultan Mohideen*, (with him Mr. *P. Tirumalachariar*), for the Appellants.

Mr. *V. O. Seshachariar*, for the Respondents.

JUDGMENT.—The defendant purchased at Court auction certain property sold in execution of a decree obtained against plaintiff by a third party. The plaintiff thereafter agreed with the defendant that, on payment of Rs. 100 within a specified date, the defendant would apply to the Court to have the sale set aside, taking credit for the deposit made under Order XXI, rule 89 of the Code of Civil Procedure.

The defendant, though he received the amount of Rs. 100, did not perform his part of the contract and get the sale set aside. The plaintiff has now been given a decree for specific performance on the footing that the contract to have the sale set aside was tantamount to a contract to reconvey the land to him.

It is argued (1) that there was no enforceable contract as, owing to the money not having been deposited in time, it became impossible to perform the contract, (2) that damages would have been an adequate remedy for non-performance.

We think that the defendant having agreed to take certain action with regard to the suit property which would have had the effect of restoring it to plaintiff's possession, and having instead placed obstacles in the way of the plaintiff getting back his land cannot take advantage of his own conduct and plead that the contract was void on account of impossibility of performance; and that the transaction being in substance an agreement to re-sell the property, to which the defendant had only an imperfect title pending the confirmation of the Court sale, the defendant can be compelled to make good the contract out of the interest he subsequently obtained. (*vide* section 18 (a), Specific Relief Act). Further the plaintiff's undertaking to pay Rs. 100 at once for which he was indebted to defendant was, in our opinion, a good consideration for the contract.

The whole purpose of the contract being that plaintiff should regain possession of his own land which he had lost in consequence of the Court proceedings, we do not consider that this is a case in which money compensation would have been an adequate relief.

The second appeal is dismissed with costs.

Appeal dismissed,

V. R. P.

MUHAMMAD ALAM v. MUHAMMAD HAYAT.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 521 OF 1916.

May 27, 1916.

Present:—Mr. Justice Shah Din.

MUHAMMAD ALAM—DEFENDANT—

APPELLANT

versus

MUHAMMAD HAYAT AND OTHERS—

PLAINTIFFS, AND ANOTHER—DEFENDANT—

RESPONDENTS.

Custom—Alienation—Gift by sonless proprietor of ancestral land to sister's son in presence of collaterals—Gujars of Jhelum Tahsil—Burden of proof.

Among *Gujars* of the Jhelum Tahsil a childless proprietor cannot make a valid gift of ancestral property in favour of his sister's son in presence of collaterals.

The burden of proving the validity of such a gift is on the donee.

Second appeal from the decree of the District Judge, Jhelum, dated the 24th November 1915.

Mr. Rama Nand, for the Appellant.

Mr. Jaigopal Sethi, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the learned District Judge, who has granted the defendants-appellants a certificate under section 41 (3) of the Punjab Courts Act with reference to the question of custom involved in the suit, *viz.*, whether among *Gujars* of the Jhelum Tahsil a sonless proprietor can gift his ancestral land to his sister's son.

Upon this question, both the Subordinate Judge and the District Judge have concurrently held that the defendants, on whom the onus lay, have failed to prove that by custom applicable to the parties the gift of ancestral land made by Nek Alam in favour of his sister's son, Muhammad Alam, is valid in the presence of the plaintiffs who are Nek Alam's collaterals, and they have accordingly granted a decree to the plaintiffs declaring the said gift to be invalid and ineffectual against the plaintiffs' right of reversion.

I have heard arguments on both sides and have referred to the oral and documentary evidence on the record bearing on the question of custom involved in the suit, and I am of opinion that the view taken by the Courts below is correct. Both the Courts have held that the land in suit is the ancestral property of the plaintiffs and the donor Nek Alam; and notwithstanding the attempt made by the

appellants' Pleader to show that the finding of the District Judge as to the land in suit being ancestral is based upon conjectures and upon wrong inferences drawn from the facts disclosed by the record, I have no hesitation in holding that the conclusion arrived at by the District Judge on this point is perfectly sound.

The land in suit being ancestral, it is not disputed that the initial onus lay upon the defendants-appellants to prove that the gift in dispute, being one by a childless proprietor in favour of his sister's son, was valid by the custom applicable to the parties. In my opinion they have entirely failed to discharge this onus. The *Jhelum Gujars* are an offshoot of the *Gujars* in the Gujrat District, and there can be no question that among *Gujars* in the Gujrat District a gift of ancestral land by a childless proprietor to his sister's son is not justified by custom [see Customary Law of the Gujrat District by Captain Davies, page 7; also *Maulu v. Fazal Ahmad* (1)]. A reference to the record of this case shows that the plaintiffs have proved instances showing that among *Gujars* of the Jhelum Tahsil gifts of ancestral land to daughters, sons-in-law or sisters' sons are invalid by custom, and the defendants have not produced even a single well-authenticated instance of such a gift being held valid. The statement of custom in the Customary Law of the Jhelum District by Mr. Talbot at page 59 supports the plaintiffs' claim.

I accordingly hold, in agreement with the lower Courts, that the defendants have failed to prove that by custom applicable to them the gift in dispute is valid. The appeal fails and is dismissed with costs.

Counsel's fee Rs. 16.

Appeal dismissed.

(1) 102 P. R. 1893.

INTI TARINI v. KOMOLO BISOI.

GANGA RAM v. BAJA RAM.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 735 OF 1915.

October 10, 1916.

Present:—Mr. Justice Srinivasa Aiyangar.

INTI TARINI AND ANOTHER—PETITIONERS

—APPELLANTS

versus

KOMOLO BISOI AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 315—Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Sale under old Code—Sale, setting aside of, after passing of new Code—Refund of purchase-money, claim for—Procedure—Execution—Suit.

The last clause of section 115 of the old Civil Procedure Code (Act XIV of 1882) prescribing that the right to recover the purchase-money on cancellation of a sale can be enforced in execution, has been repealed by O. XXI, r. 93, of the new Code (Act V of 1908). The latter rule provides for the refund of purchase-money where a sale is set aside in execution proceedings. But even where the sale was held under the old Code, if it is set aside in a separate suit after the passing of the Act V of 1908, the purchaser must enforce his claim only by a separate suit.

Mohideen Ibrahim v. Mahamed Meera Levvai, 17 Ind. Cas. 437, 12 M. L. T. 431; (1912) M. W. N. 1130; 23 M. L. J. 487, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge, Ganjam at Berhampore, in Appeal Suit No. 7 of 1915, preferred against that of the Principal District Munsif, Berhampore, in Miscellaneous Petition No. 1194 of 1913, in Original Suit No. 202 of 1913.

Mr. P. Narayana Murthi, for the Appellants.

Mr. H. Suryanarayana, for the Respondents.

JUDGMENT.—An application was made to the lower Court by a purchaser in a Court auction, whose purchase has been held to be bad in a separate suit on the ground that the judgment-debtor had no saleable interest, and who has been deprived of the property of which he was placed in possession in the Court sale. No application was made under Order XXI, rule 91, to set aside the sale. But still it is claimed that inasmuch as the sale took place while the old Act was in force, the present petitioner is entitled to take advantage of the procedure prescribed in section 315 and claim a refund of the purchase-money by way of execution under the last clause of section 315. Whether this case will be governed by the decision in *Mohideen Ibrahim v. Mahamed*

Meera Levvai (1), it is not necessary to consider: for, in that case both the sale and the setting aside of the sale by separate proceedings had taken place while the old Code was in force and the right to recover back the purchase-money under the specific terms of the section had already come into existence. I shall assume in favour of the petitioner that because his sale took place while the old Act was in force he is entitled to refund of the purchase-money although the sale was set aside after the new Act came into force and can enforce that right by a separate suit. But then the further question arises whether he is entitled to take advantage of the last clause of section 315 which merely prescribes the procedure by which the right to recover the purchase-money can be enforced. That procedure is by way of execution. That has been repealed and there is a special section now which deals with this matter, namely Order XXI, rule 93, which provides for the refund of purchase-money in cases where the sale is set aside on particular grounds including want of saleable interest in the judgment-debtor in the execution proceedings. That does not apply to the present case. I do not think that the petitioner is entitled to the particular procedure prescribed in section 315, whatever his rights may be to enforce his claim, if one there is in his favour, by separate suit. On this ground I dismiss this petition with costs.

Petition dismissed.

V. R. P.

(1) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) 2 M. W. N. 1130.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1128 OF 1915.

May 20, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Chevis.

GANGA RAM AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

RAJA RAM AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 9, 21 (2), 24—Pre-emption—Sale sanctioned by Deputy Com.

KANDULA PEDA LINGA REDDI v. KAKUM NU HANUMAYYA.

missioner—Punjab Alienation of Land Act (XIII of 1900), ss. 3 (2), 5, 21 (2)—Civil Court, power of, to inquire into action taken by Deputy Commissioner—Jurisdiction.

Section 9 of the Punjab Pre-emption Act, 1913, repeals by implication so much of section 5 of the Punjab Alienation of Land Act, 1900, as conflicts with itself and, therefore, no right of pre-emption exists in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the latter Act.

Section 21 (2) of the Alienation of Land Act debars a Civil Court from taking cognizance of the manner in which a Deputy Commissioner exercises his powers under the Act.

If a sale is opposed to the provisions of the Alienation of Land Act, a suit for pre-emption in respect of the sale must be dismissed under section 24 of the Pre-emption Act.

First appeal from the decree of the Senior Subordinate Judge, Ambala, dated the 11th February 1915.

Messrs. Sewa Ram Singh and Balwant Rai, for the Appellants.

Sheikh Marghub Ahmad, for the Respondents.

JUDGMENT.—This is a suit for pre-emption of land which was sold by an agriculturist to non-agriculturists with sanction of the Deputy Commissioner given under section 3 (2) of the Land Alienation Act. The lower Court, overruling a plea that section 9 of the Pre-emption Act of 1913 took away all right of pre-emption in such a case, decreed the claim. Defendants appeal to this Court.

The learned Subordinate Judge holds that section 9 of the Pre-emption Act, which lays down that no right of pre-emption shall exist in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the Punjab Alienation of Land Act, does not override the provisions of section 5 of the Land Alienation Act, which section provides, *inter alia*, that the Deputy Commissioner's sanction shall not affect any question relating to a right of pre-emption. There is certainly nothing in the Pre-emption Act which states precisely that section 5 of the Land Alienation Act is not still in full force, but, granting that section 5 of the latter Act is in conflict with section 9 of the Pre-emption Act (though appellant's Counsel does not admit that there is any such conflict) we have no hesitation in holding that section 9 of the Pre-emption Act repeals by implication so much of section 5 of the Land Alienation Act as

conflicts with itself (See Maxwell on the Interpretation of Statutes, 4th edition, pages 237 and 237).

Then Counsel for respondent further argues that the Deputy Commissioner did not make proper enquiry as required by section 3 (3) of the Land Alienation Act, but we cannot go into this, for section 21 (2) of the same Act debars all Civil Courts from taking cognizance of the manner in which the Deputy Commissioner exercises his powers under the Act.

Then it is urged that the sanction is no proper sanction, being initialled only and not signed in full by the Deputy Commissioner. But this plea is futile, for if there is no valid sanction the sale in question is opposed to the provisions of the Land Alienation Act, and in this case section 24 of the Pre-emption Act requires that the suit for pre-emption shall be dismissed.

Lastly Counsel for respondents refers to the order of this Court of 22nd January 1916, and urges that the plaintiff should be compensated for the interest which he could have got for his money during the time it was lying in Court. But the suit should never have been brought at all so plaintiff has only himself to thank for any loss he has sustained.

We accept the appeal and reversing the lower Court's decree we dismiss the suit with costs in both Courts.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL NO. 81 OF 1915.

October 3, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Krishnan.

KANDULA PEDA LINGA REDDI AND
OTHERS—DEFENDANTS—JUDGMENT DEBTORS

—APPELLANTS

versus

KAKUMANU HANUMAYYA—PLAINTIFF

—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 375—Compromise decree—Decree creating mortgage and directing sale of property Lawful agreement—Decree, whether in excess of what 'relates to the suit'—Registration, whether necessary—Interest, provision for, penal

KANDULA PEDA LINGA REDDI v. KAKUMANU HANUMAYYA.

whether relievable—Registration Act (XVI of 1909), s. 17, *Excep. cl. VI Transfer of Property Act (IV of 1882)*, s. 99.

A decree based on the terms of a compromise between the parties to a suit for money and creating a mortgage of properties for the amount that is payable and directing sale of the properties in default of payment within a certain time, is a mortgage decree and is executable as such. An agreement in pursuance of which such a decree is passed is a lawful agreement within the meaning of section 375 of Act XIV of 1882. Section 99 of the Transfer of Property Act has no application to such a decree nor is it repugnant to public policy. [p. 766, col. 1.]

Rameshar Upadhyaya v. Subbkarani Upadhyaya, 10 Ind. Cas. 481; 8 A. L. J. 418, dissented from.

Rameshar Upadhyaya v. Subbkarani Upadhyaya, 10 Ind. Cas. 481; 8 A. L. J. 418, *Chundra Nath Dey v. Burroda Shoonidury Ghose*, 22 C. 813; 11 Ind. Dec. (N. S.) 538; *Aubhoyessury Dabee v. Gouri Sunkur Panday*, 22 C. 859; 11 Ind. Dec. (N. S.) 568, distinguished.

Such a decree is not beyond the scope of section 375, Civil Procedure Code (Act XIV of 1882), as not relating to the suit which was one for money and, therefore, is not one passed without jurisdiction. [p. 766, col. 1.]

Joti Kuruvetappa v. Izari Sirusappu, 30 M. 478; 16 M. L. J. 354; *Natesan Chetty v. Vengu Nachiar*, 3 Ind. Cas. 07; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 26; *Sabapathi Pillay v. Yammahalinga Pillai*, 23 Ind. Cas. 58; 38 M. 959; 15 M. L. T. 206; 26 M. L. J. 331; (1914) M. W. N. 256, followed.

Venkatappa Nayanam v. Thimma Nayanam, 8 M. 410; 6 Ind. Dec. (N. S.) 634; *Muthu Vijaya Raghunatha Udayana Tevar v. Thandavaraya Thambiran*, 22 M. 214; 8 Ind. Dec. (N. S.) 153, referred to.

Such a decree falls under section 17, exception clause VI, of the Registration Act and does not require to be registered. [p. 766, col. 2.]

An agreement to pay an enhanced rate of interest, not from the date of default but from that of the original obligation, is in the nature of a penalty and is unenforceable. [p. 767, col. 1.]

Nonjappa v. Nanjappa, 12 M. 161; 4 Ind. Dec. (N. S.) 442; *Baid Nath Das v. Shrinand Das*, 22 C. 143; 11 Ind. Dec. (N. S.) 97, followed.

A penalty will be relieved against even where it is embodied in a decree passed by consent of parties. [p. 767, col. 1.]

Appeal against the order of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 277 of 1913, preferred against that of the District Munsif, Narasaraopet, in Execution Petition No. 1147 of 1912 (Original Suit No. 631 of 1903).

Mr. R. Kuppuswami Aiyer, for the Appellants.

Mr. V. Rama Das, for the Respondents.
JUDGMENT.

KRISHNAN, J.—This appeal arises in the execution of a compromise decree of 1903, passed in a suit brought by plaintiff-respondent for money due on two promissory

notes. The decree directed the defendants to pay the plaintiff Rs. 705, made up of the amount sued for, costs and interest in nine yearly instalments on specified dates and in default of payment of any one instalment on due date, to pay the whole amount due with interest at one per cent. per mensem, calculated from the date of the decree; it further directed that till the debt was discharged the schedule mentioned immoveable property be mortgaged and that "plaintiff do recover the above debt from defendants Nos. 1 and 2, from the family properties of defendants, and by auction of the mortgaged property aforesaid." Defendants did not pay any of the instalments except the first on due date; the second and third instalments were paid and received long after due dates; the other instalments were not paid at all. In 1911, plaintiff applied under Order XXXIV, rule 5 (2), for a decree "absolute" and an order was passed in his favour after notice to defendants who did not, however, appear. No formal decree was drawn up in pursuance of the order. Plaintiff then applied for execution of the decree by sale of the mortgaged property and his application was granted by both the lower Courts and the appeal is against it.

Defendants-appellants have raised before us several legal objections to the execution which I shall consider one by one. The first objection is that the compromise decree merely created a mortgage on the property but was not in itself an executable decree against it and that a separate suit should have been brought if plaintiff wanted to enforce the mortgage by sale. This question depends on the construction of the decree. Though the decree in question is an unusual one, it appears to me to be clearly a decree for sale of the mortgaged property. It sets out the amount due and provides that on failure to pay on due date the plaintiff do recover his money by sale of the property prescribed in the schedule. It was suggested that the sale by auction mentioned in the decree was not a Court sale but a private sale; but I am unable to accept that suggestion. No such objection was taken by the defendants when application was made under Order XXXIV, rule 5, of the

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Code of Civil Procedure on the footing that the decree was one, under rule 4 clause 1. The appellants' Vakils have relied on *Rameshar Upadhyaya v. Subbkarana Upadhyaya* (1) and *Chundra Nath Dey v. Burroda Shoondury Ghose* (2) and *Aubhoyessury Dabee v. Gouri Sunkur Panday* (3), they were all cases where mere charges had been created without any provision for sale of property to realise the debt.

The next contention is that the decree if viewed as a mortgage decree is an illegal decree because, it is alleged, that a mortgage decree for sale can be passed only in a suit on a mortgage and not otherwise; and because no decree on a compromise could have been passed except in "so far as it related to the suit" under section 375 of the old Code which was in force and this decree went beyond it. For the first part of the argument, appellants' Vakils relied on some observations of Richards, J., in *Rameshar Upadhyaya v. Subbkarana Upadhyaya* (1) already cited. They are *obiter dicta*, as the question for decision before the learned Judges was the construction of a decree and with all respect I am unable to follow them. There is no reason shown why an agreement between parties that a decree amount should be realised by sale of properties should be treated as anything but a lawful agreement and if it is lawful why a decree should not be passed in its terms. Section 99 of the Transfer of Property Act has no application and no question of public policy seems involved. The objection, therefore, fails.

The second part of the argument is that in so far as the decree directed the sale of property in the schedule it went beyond the scope of section 375 and was without jurisdiction, as it did not relate to the suit which was one for money due. It is conceded that the ruling in *Joti Kuruvetappa v. Izari Sirusappa* (4) is directly against this contention but it is argued that the rulings in *Venkatappa Nayanim*

v. Thimma Nayanim (5) and *Muthu Vijaya Raghunatha Udayana Tevar v. Thandavaraya Thambiran* (6) are not in consonance with it and the former has been accepted in Calcutta and we should, therefore, refer the question of the meaning of the expression "so far as it relates to the suit" to a Full Bench. The two Madras cases cited were referred to in *Joti Kuruvetappa v. Izari Sirusappa* (4) and reason given why it was unnecessary that they should be strictly followed. The view expressed in *Joti Kuruvetappa v. Izari Sirusappa* (4) has been ever since followed by this Court. See *Natesan Chetty v. Vengu Nachiar* (7) and *Sabapathi Pillay v. Vanmahalinga Pillai* (8). As I entirely agree with the ruling in *Joti Kuruvetappa v. Izari Sirusappa* (4) on the point, I see no need for any reference as suggested, I follow it and disallow the objection.

It was urged that such a question could not be raised in execution proceedings by a person bound by the decree even if it went beyond the scope of the section and reliance was placed on *Sabapathi Pillay v. Vanmahalinga Pillai* (8). It is not, however, necessary to decide this point as appellants' objection fails for the reason already stated.

The next point raised was that the decree required registration before it could validly affect immoveable property. This objection is entirely unfounded as we are dealing here with a decree which under section 17, exception clause VI of the Indian Registration Act, need not be registered.

It was next urged that as default had been waived by plaintiff by acceptance of instalments due, his right to execute the decree by sale of property had not accrued. Plaintiff has only accepted two instalments which were overdue, viz., the 2nd and 3rd and the defaults so far as they related to them, were no doubt waived, as payments were accepted without any reservation. See *Easin Khan v. Abdul Wahab Sikdar* (9).

(5) 18 M. 410; 6 Ind. Dec. (N. S.) 634.

(6) 22 M. 214; 8 Ind. Dec. (N. S.) 153.

(7) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(8) 23 Ind. Cas. 581; 38 M. 950; 15 M. L. T. 206; 26 M. L. J. 331; (1914) M. W. N. 256.

(9) 6 Ind. Cas. 138; 15 C. W. N. 10; 13 C. L. J. 207.

(1) 10 Ind. Cas. 481; 8 A. L. J. 418.

(2) 22 C. 813; 11 Ind. Dec. (N. S.) 538.

(3) 22 C. 859; 11 Ind. Dec. (N. S.) 568.

(4) 30 M. 478; 16 M. L. J. 354.

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But there are several subsequent defaults which plaintiff is entitled to rely on; and this objection also fails.

The last point urged is that the clause in the decree which gives interest at 12 per cent. on the amount due not from the date of default but from the date of decree itself, no interest being provided for originally, is a penal clause which should be relieved against. This contention is well-founded. It has always been held that an agreement to pay an enhanced rate of interest not from the date of default but from that of the original obligation is in the nature of a penalty and is unenforceable. See *Nanjappa v. Nanjappa* (10) and *Baid Nath Das v. Shamanand Das* (11). It is conceded that the fact that a compromise decree has been passed in terms of the agreement does not affect the right of the defendants to be relieved against any term in it if it is of a penal nature. Plaintiff will, therefore, be entitled to the interest of 12 per cent. only from the date of the first default which he is entitled to rely on, viz., 31st August 1906.

Defendants' appeal is dismissed subject to the above modification as to interest, parties will pay and receive proportionate costs here and in the lower Appellate Court.

OLDFIELD, J.—I agree.

*Appeal dismissed ;
Decree modified.*

V. R. P.

(10) 12 M. 161; 4 Ind. Dec. (N. s.) 462.

(11) 22 C. 143; 11 Ind. Dec. (N. s.) 97.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 192 OF 1916.

January 5, 1917.

Present:—Mr. Justice Parlett.

MAUNG PO HNYIN—APPELLANT

versus

MA HNYEIN—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 283—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Evidence Act (I of 1872), ss. 102, 110—Suit, regular, to set aside attachment—Burden of proof—Possession, proof of—Order—Appeal.

The initial burden of proof in a regular suit under Order XXI, rule 63, Civil Procedure Code, lies on the person who fails to get the attachment removed. On proving possession, however, the burden is shifted on to the person out of possession under section 110 of the Evidence Act and the finding that he has failed to discharge it is not open to appeal. [p. 767, col. 2; p. 765, col. 1.]

Kadappa Chetty v. Maung Shwe Bo, 2 L. B. R. 152 and *Narak Lal v. Thagoo Lal*, 13 Ind. Cas. 455; 22 C. L. J. 380, referred to.

Mr. *Sin Hla Aung*, for the Appellant.

JUDGMENT.—The property in suit consists of three items, a pair of bullocks, 40 baskets of paddy and another 11 baskets of paddy. As regards the bullocks it is argued that Po Tin having sold the original pair (one of them having since been replaced by Ma Shwe) to Tok Paw on credit, and having given Tok Paw possession of them, the ownership passed to Tok Paw the judgment-debtor, and could not subsequently be transferred by Po Tin to Ma Nyein. A perusal of the evidence makes it clear to my mind that when Tok Paw was unable to pay for the cattle, the entire transaction was rescinded, and he let Po Tin have them back again. Po Tin then sold them to Ma Nyein who hired them to Tok Paw. The District Court has accepted the evidence to this effect, and the finding is not open to appeal. As to the 40 baskets, the finding of the District Court was sought to be impugned on the grounds that the paddy had recently been taken from the judgment-debtor's bin that the plaintiff is a relative of his, that the witnesses appear to be siding with him and that the judgment-debtor is said to have absconded. It is, however, not permissible to re-open matters of fact in this appeal.

Lastly as to the 11 baskets, it is admitted that it was attached in Ma Nyein's possession, and that by *Kadappa Chetty v. Maung Shwe Bo* (1) she was entitled to succeed, but I am asked to hold that in this case the burden of proving her ownership was on Ma Nyein under section 102, Evidence Act, and the case of *Narak Lal v. Thagoo Lal* (2). The latter says that the burden of proof in a suit under section 283 of the Civil Procedure Code, 1882, is upon the unsuccessful.

(1) 2 L. B. R. 152.

(2) 13 Ind. Cas. 455; 22 C. L. J. 380.

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ful claimant in the claim case, and taking this to mean the initial burden of proof I find nothing antagonistic to the Burma case in this ruling. In the present case, Ma Nyein having failed to get the attachment removed, the initial burden of proof in the regular suit was upon her under section 102, Evidence Act. Upon her proving possession, the burden of proving that she was not the owner shifted to the appellant under section 110 of the Evidence Act and the finding that he failed to discharge it is not open to appeal. The appeal is dismissed.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 2229 OF 1914.

August 3, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan

BHUVARAGHA IYENGAR—DEFENDANT—

APPELLANT

versus

NATESA IYER AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Alienation by widow—Reversioners, remote, right of, to question—Lapse of time—Legal necessity, proof of—Recitals in documents—Adequacy of proof—Torts of widow, expenses for, whether can be charged on estate—Maintenance and kist, debt incurred for payment of, when legal—Burden of proof

The fact that the next reversioner is time-barred from claiming a widow's estate is no ground for allowing a remoter reversioner to do so, when the reversion has fallen in. [p 769, col 1.]

More recitals in a sale-deed as to the existence of legal necessity for an alienation are not of themselves any evidence of necessity; there must be evidence aliunde. [p. 769, col 2.]

Brij Lal v. Inda Kumari, 23 Ind. Cas. 715; 36 A. 187; 18 C. W. N. 649; 26 M. L. J. 443; (1914) M. W. N. 405; 15 M. L. T. 395; 19 C. L. J. 469; 12 A. L. J. 495; 16 Bom. L. R. 352; 1 L. W., 794, followed.

In the case of alienations by a Hindu widow made a long time ago, Courts should not insist on as strict proof of legal necessity as in the case of recent transactions. In such cases, though the burden of proof which lies on the purchaser is not shifted on to the reversioner, the Courts should approach the evidence with a much more indulgent mind than when the alienation took place a few years before suit. But where evidence as to the purposes for

which the debts were incurred which led to the alienation is actually before the Court, it must be satisfied that such purposes amount to legal necessity before the alienation is upheld. [p. 769, col. 2; p. 770, col. 1.]

Kanthu v. Dist. Upadhyay, 26 Ind. Cas. 376 at p. 378, referred to.

The private expenses of the widow are not a legal necessity and expenses incurred by her in litigation that arose out of her own tortious acts cannot legally be charged on her husband's estate. [p. 770, col. 1.]

Prima facie the conversion of a charge payable from the income to a charge on the *corpus* is an improper act on the part of the widow. [p. 770, col. 2.]

Maintenance charges and *kist* should be paid, where possible, from the current income of the estate, and, in the absence of good reason why they should not be so paid, a debt borrowed for this purpose is not a proper charge on the estate in the widow's hands. [p. 770, col. 1.]

Kotta Ramasami Chetti v. Bingu Seshima Nayaniar, 3 M. 45; 1 Ind. Dec. (N. S.) 69, referred to.

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 797 of 1913, preferred against that of the Subordinate Judge, Tanjore, in Original Suit No. 31 of 1911.

The Hon'ble Mr. S. Srinivasa Aiyangar, (Advocate-General) and Mr. C. Krishnama-chariar, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

SPENCER, J.—The difficulties which a purchaser of property must have in proving that alienations made some fifty years ago by a Hindu widow were for necessary purposes, have in arguing this appeal been vividly represented to us. But in the present case I must accept the findings of the lower Courts for the reasons given by them. The appellant did not succeed in proving the minimum required in such cases. The consideration for Exhibit VI is four prior debts and a sum of ready cash received by Valu Ammal for her own use. One of these debts was according to the recital of Exhibit VI-D incurred by the widow for paying the arrears of *kist* and for meeting her private expenses. Another was incurred for permanently settling the claim of a maintenance holder of her husband's family. A third was borrowed for a purpose unspecified and the fourth was due upon a compromise decree obtained by the decree-holder of a usufructuary mortgage whose rights of possession she invaded.

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It has not been shown that the income of the estate was insufficient to meet the demands for Government revenue and the maintenance of the family.

As it consisted of 73 acres of wet land in Tanjore District, the natural presumption would be rather that the widow must have been fairly well off. It is argued in respect of the third debt that, as it appears from one of the documents that the widow was put in possession of the mortgaged land by an order of a Magistrate, it is not likely that she acted *mala fide*. On the other hand it is clear that she had no *prima facie* right to appropriate the income which the *othidar* had a right to enjoy, and that the estate should not be made responsible for litigation arising out of her torts.

I agree with the finding of the lower Courts as to Exhibit IV.

The second appeal is dismissed with the costs of 2nd and 4th respondents.

KRISHNAN, J.—This second appeal arises from a suit brought by plaintiffs as the next reversioners to one Sivasankara Vythinatha Iyer, who died about 1854, to set aside certain alienations made by his widow and recover the properties alienated. The lower Courts have set aside the alienations under Exhibits VI and IV subject to a payment of Rs. 350, and interest by the plaintiffs, and given a decree for the properties sued for with mesne profits deducting the amount found due by the plaintiffs. The 1st defendant, who was in possession of the properties and who claimed title through the alienations now set aside, appeals to us.

It is first argued for the appellant that there is no proper finding by the District Judge that the plaintiffs are the next reversioners entitled to the property. The District Judge has found that "there are no nearer reversioners", agreeing with the Munsif on the point. It is true he says "if there were, their claim is time-barred." This is, as pointed out, erroneous, as the fact that the next reversioner is time-barred is not a ground for allowing a remoter reversioner to claim the estate as the reversion has already fallen in. He has, however, discussed the evidence on this issue and come to the conclusion that

the plaintiffs are the next reversioners. I do not think the sentence quoted really affects his finding on the point or throws any doubt on it. The appellant's objection on the point must be disallowed. The next point argued was that the lower Appellate Court was wrong in law in its finding that there was no legal necessity for Exhibit VI except for Rs. 350. Exhibit VI was an alienation in 1861. The sale was for Rs. 4,950, made up as follows according to the recital in the deed: Rs. 1,280-1-6, said to be due by the widow and her husband to one Narasimha Iyengar on a hypothecation bond; Rs. 228, due to one Meenakshi Ammal; Rs. 500, due to one Rajangam Subbiah; Rs. 1,000, due on a mortgage and Rs. 1,941-14-6 paid in cash. The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. Mere recitals in a sale-deed as to the existence of legal necessity for an alienation are not of themselves any evidence of necessity; there must be evidence *abunde*. These propositions have been recently re-affirmed by the Privy Council in the case of *Brij Lal v. Inda Kunwar* (1). Except the recital in Exhibit VI of there being a debt due to Rajangam Subbiah, there is no other evidence as to it. That was, therefore, rightly disallowed. There is also no evidence to show why Rs. 1,941 14 6 was borrowed by the widow. That item also fails.

As regards the other three items of consideration for Exhibit VI, there is further evidence. In considering the evidence with reference to an alienation so old as Exhibit VI, which is one of 1861, I agree with the appellant's contention that Courts should not insist on as strict a proof as in the case of recent transactions. I agree with the observation of the learned Judges of this Court in the case of *Kantlu v. Dasa Upadhya* (2) that though the burden of proof is not shifted on to the reversioner, the Courts should approach the evidence as to necessity adduced in respect of old

(1) 23 Ind. Cas. 715; 36 A. 157; 18 C. W. N. 649; 26 M. L. J. 413; (1914) M. W. N. 405; 15 M. L. T. 395; 19 C. L. J. 469; 12 A. L. J. 495; 16 Bom. L. R. 352; 1 L. W. 794

(2) 26 Ind. Cas. 376 at p. 378.

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alienations with a much more indulgent mind than when the alienations attacked took place a few years before suit. The authorities on the point are considered in that case and it is not necessary to refer to them again. Where, however, there is evidence, as in this case, of the purposes for which the debts were incurred which led to the alienation, the Court must be satisfied that such purposes amounted to legal necessity before the alienation is upheld.

The hypothecation bond to Narasimha Iyengar is by the widow alone and is filed as Exhibit VI-D. This document recites that Rs. 500 was borrowed for paying arrears of *kist* and for the widow's private expenses. There is nothing to show how much of the consideration went to each item. It is clear that private expenses of the widow will not be a proper necessity. It is not shown that there were any arrears of *kist* to be paid as recited. *Kist* should ordinarily be paid from the income of the property, unless there was some good reason why it could not be so paid. There is no such reason made out here. Assuming there were arrears of *kist* to be paid, *prima facie* the debt borrowed for it is not a proper charge on the estate in the widow's hands. If borrowing for charges which should be met out of the current income is treated as legal necessity, it will enable the limited estate holder to ruin the estate and take for himself moneys which ought to be applied for paying those charges. See the observations of this Court in *Kotta Ramasami Chetty v. Bangari Seshama Nayanivaru* (3). The 1st defendant must, therefore, show by some evidence, however slight, that the *kist* in question could not be paid from the current income. The estate in question was fairly large and now produces an income of not less than Rs. 1,500, a year. There is no evidence as to what the income was in 1858, the date of Exhibit VI-D; but we cannot assume it was too small to pay *kist* and other charges from it. It is argued that Exhibit XXIII shows that there were some magisterial proceedings soon after the widow became

entitled to possession, which rendered it likely that the widow was short of funds. But the evidence is too vague, even if admissible, to base any conclusions on it. We have only the recital in Exhibit XXIII, which is a plaint by a third party, that the widow took possession of a property mortgaged by her husband before his death "through the Magistrate." It must, therefore, be held that no valid charge was created on the property by Exhibit VI-D; and Exhibit VI, so far as it went to pay off this debt, must be held not to be binding on the estate.

It was urged that a creditor was not bound to see to the application of his money if he has made *bonafide* enquiries and satisfied himself of the necessity for the loan, and reliance is placed on the well-known case of *Hunoomanpersaud Panday v. Musammatt Babooee Murraj Koonweree* (4). This question does not arise in this case as there is no plea of this nature raised in the lower Courts; and as the plea depends on evidence it cannot be allowed to be raised now. It was next suggested that the existence of a debt under Exhibit VI-D was sufficient to justify Exhibit VI and that the alienee need not go beyond Exhibit VI-D to see if there was necessity for that transaction also. I am unable to agree with this argument. As the alienee under Exhibit VI was referred to Exhibit VI-D as creating a necessity for his sale, he ought to show that Exhibit VI-D was itself for a proper necessity. There is nothing to show it.

The next item is the amount due to Meenakshi Ammal. She had apparently a claim for maintenance from the estate and Exhibits VI-A and VI-C show that in 1855 her claim was commuted for a lump sum of Rs. 200. Maintenance charges stand on the same footing as *kist*, as they should be paid from the current income; and similar considerations apply. *Prima facie* the conversion of a charge payable from the income to a charge on the *corpus* is an improper act on the part of the widow. There is no evidence whatever in the case to show there was

(4) 6 M. J. A. 393; 18 W. R. 81 note; Sevestre 253n.; 2 Sath. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(3) 8 M. 145 at p. 152; 1 Ind. Dec. (N. S.) 659.

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necessity for it. It was rightly disallowed by the lower Courts.

The last item is a debt due on a mortgage. The lower Court has rightly allowed Rs. 350, the amount of the usufructuary mortgage by the husband, as a valid charge. The balance of the amount claimed under this head was the result of the widow wrongfully taking and keeping possession of the property mortgaged and taking the produce thereof; it was partly the price of produce cut and removed by her and partly interest in lieu of mesne profits and partly costs of the suit by the mortgagee. The widow's act was *prima facie* an unlawful act of trespass and we cannot presume that it was in the interest of the estate. If she was made to pay over the profits for the time she was in wrongful possession, she would have got those profits herself and should, therefore, have paid out of what she got. The lower Courts were right in disallowing all except Rs. 350 of this item as not being a valid charge on the estate. The last question argued has reference to the alienation under Exhibit IV. It is not necessary to discuss the various items of consideration recited in it. They stand on a similar footing as the items in Exhibit VI. I accept the finding of the lower Court that no portion of the consideration for this document, which is a sale-deed in favour of the widow's brother, is shown to be binding on the reversioners or the estate.

I agree that this second appeal fails and should be dismissed with costs of 2nd and 4th respondents.

Appeal dismissed.

V.R.P.

ALLAHABAD HIGH COURT.
CIVIL MISCELLANEOUS REFERENCE NO. 150
OF 1916.

October 17, 1916.

Present:—Mr. Justice Walsh and

Mr. Justice Stuart.

MISS ISABELLA JACKSON—PETITIONER
versus

SARJIT SINGH AND OTHERS—

OPPOSITE PARTIES.

Agra Tenancy Act (II of 1901), ss. 177 to 180—

Appeal—Decree severable—Question of proprietary title—Jurisdiction of Civil and Revenue Courts.

Where the decree of a Revenue Court in a case in which the question of proprietary title is raised is severable, an appeal as to that part which raises the question of proprietary title lies to the Civil Court while the appeal as to the other portion which raises no such question lies to the Commissioner. [p. 773, col. 1.]

Gajraj Mati Tewarin v. Shami Nath, 36 Ind. Cas. 307; 14 A. L. J. 853, referred to.

Civil miscellaneous reference made by the Commissioner, Meerut Division, dated the 20th April 1916.

Mr. Nihal Chand, for the Petitioner.

JUDGMENT.

WALSH, J.—It is unfortunate that there is nobody here to argue this question on behalf of the respondent or to support the view of the learned Commissioner. We must, therefore, deal with the case without that assistance.

These two cases (I will adopt the enumeration of the original suits, namely Nos. 543 and 544 in the Revenue Court of Meerut) have been referred to the High Court under section 195, sub-section (1), of the Tenancy Act of 1901 by the learned Commissioner. In form the matter comes before us as one of reference. In substance there are two distinct cases, and although the question which arises in each case is precisely the same, it is desirable to keep them distinct for the purpose of this judgment. I, therefore, propose to deal with suit No. 544 and the decision in this case will govern suit No. 543. Suit No. 544 was brought by Miss Isabella Jackson against one Sarjit, the plaintiff claiming to be the landlord and also *lambardar* of certain property specified in the suit, twenty plots of which were in *khewat* No. 1, and one plot, the identification of which is important, namely No. 2113, in *khewat* No. 2. The plaintiff merely alleged that the plaintiff was the landlord and the *lambardar* and that the defendant was the tenant, and asserted facts entitling the plaintiff to eject the defendant. So far it was a mere ejectment suit between a landlord and tenant, which was properly cognizable by the Revenue Court. The written statement, however, alleged totally different issues with respect to the two classes of property to which I have already referred. It is true that the opening paragraph set up a defence to the whole action, but paragraph 3 alleged that

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with regard to No. 2113 the defendant was a proprietor, and in paragraph 4 it set up a defence as a tenant and not as a proprietor which, if established in fact, would have been an answer to the claim in ejectment, but which was clearly distinct from the plea in paragraph 3 raised in regard to No. 2113, and raised an entirely different question of fact with regard to a totally distinct portion of the subject-matter for which the plaintiff sued. The result of that was to cut up the controversy, which the plaintiff had amalgamated, into two separate and distinct suits and inasmuch as the decree which was ultimately passed by the Assistant Commissioner on these pleadings on the 29th of October 1915 not only dismissed the whole action but also went out of its way to make a declaration in favour of the defendant upon the issue raised by him in paragraph 3, I think it must be taken that there were in substance two decrees, or at any rate two distinct parts of the decree dealing with two distinct subject-matters. Now it is obvious that if the plaintiff desired seriously to challenge the decision against her upon the question of proprietary title, it was necessary for her to raise that question formally in some way or another in the nature of an appeal. If she had appealed to the Commissioner merely upon that part of the decree which dismissed the suit as a whole and had not raised the question which had been decided with reference to No. 2113, even although she may have succeeded in reversing the order of the Assistant Commissioner on the hearing of the appeal, that portion of the decree declaring the defendant to be the proprietor of No. 2113 would have still stood. The course which she took was this. On the 8th of December 1915 she appealed to the District Judge against that part of the decree which had been passed against her on the question of the proprietary title of No. 2113. That appeal was numbered 651 in the Court of the District Judge, was heard by the District Judge and decided by him in favour of the appellant. Care was taken in the notice of appeal to make it clear that the appeal was brought only with regard to that portion of the decree which dealt with the question of proprietary

title and it was said that a further appeal would be brought with regard to the other portions of the decree to the Commissioner's Court. I would merely point out that the plaintiff was by no means bound to carry out that intention, and bring an appeal from the rest of the decree if she had chosen to be satisfied with the decision of that portion. She might have contented herself by appealing from the order against her on the question of proprietary title. In that case it could not be denied that the proper Court to go to by way of appeal would be the District Judge. Under section 177 it is provided that the appeal shall lie to the District Judge in all suits in which a question of proprietary title has been in issue, but on the 13th of January 1916 by notice of appeal to the Commissioner's Court, which appeal subsequently became known as No. 63, she carried out her original intention of appealing against the other part of the decree. By paragraph 2 of her notice of appeal she made it quite clear that her appeal was confined to the decision against her with reference to the tenancy of the plots other than No. 2113. The Commissioner denied himself jurisdiction to hear that appeal and referred the matter to this Court upon the ground that it was impossible to bifurcate an appeal, and he gave as his reason that it would be obviously undesirable if parties dissatisfied with the decision against them upon a particular subject-matter appealed to Court A on some ground or another, and to Court B on some other ground. But that is not this case. The sum and substance of this case is that the plaintiff had two decisions against her neither of which she liked. Each of them related to a totally different plot of land and each of them raised absolutely distinct and inconsistent questions of fact and law. It seems to me that where that occurs it is just as though the suits were two distinct suits, although for the purpose of convenience and economy the procedure of the Code permits them to be tried and decided as one. In my opinion we are bound by, or if not bound by it, speaking for myself I am disposed to follow, especially as I was a party to it, a decision of this Court which is reported as *Gurraj Mati Tewarin v. Shami*

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Nath (1). The decision there was that where a decree has been passed against several defendants including some absent ones, *ex parte* and there has been an appeal by those who were present at the original hearing of the suit, so that as regards these defendants the decree has become merged in a subsequent decree of an Appellate Court, nonetheless the absent defendants against whom a decree had been passed *ex parte*, if they wished to get the decree set aside, must apply in the original Court which determined the suit against them. The effect of that is, of course, that as between separate parties to the same suit a decree is severable and there is a long and exhaustive judgment of Mr. Justice Sundar Lal on the subject referring to all the principal authorities and pointing out the inconvenience of holding otherwise. To my mind that case determined the question of principle, namely whether a decree is severable. We think it is and we think that this decree ought to be treated as a decree on two separate subject-matters, an appeal as to the one which raised the question of proprietary title lying to the Civil Court, the appeal as to the other subject-matter which raised no such question, lying to the Commissioner. It is only necessary to add that it is important to bear in mind that this decision relates only to the special facts and procedure in this particular case. The result is that the order of the Court will be to send the case back to the learned Commissioner with directions to entertain the appeal in appeal No. 63 and hear it according to law. The same order will be passed with regard to appeal No. 64, which is also referred to us under the name of suit No. 543.

STUART, J.—The procedure adopted by the appellant is open to no objection. With regard to the plots in respect of which the other side asserted a proprietary title, she was obliged to contest the decision in the Court of the District Judge, who alone could determine the question of proprietary title, but with regard to the remaining plots where no such assertion was made, the District Judge was not invested with the power to determine the points raised in the suit. There is nothing in the language of the Act

which prohibits an appeal as to one portion of the subject-matter being decided by one Court and an appeal as to the other portion being decided by another Court. I agree to the order proposed.

Answer accordingly.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS APPEAL No. 18
OF 1916.

October 4, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Krishnan.

MUJULURI SIVARAMAYYA—COUNTER-
PETITIONER No. 1—APPELLANT

versus

SINGUMAHANTI BHUJANGA RAO AND
ANOTHER—PETITIONER AND COUNTER-
PETITIONER No. 2—RESPONDENTS.

*Provincial Insolvency Act (111 of 1907), s. 22—
'Aggrieved person,' meaning of—Order directing Receiver
to execute release deed on behalf of insolvent—Jurisdiction.*

A 'person aggrieved', within the meaning of section 22 of the Provincial Insolvency Act, means a person against whom a decision has been pronounced, which wrongfully deprives him of something or wrongfully refuses him something or wrongfully affects his title to something. The decision should be such as to affect the right claimed, not merely to impede the person concerned in his assertion of it. [p. 775, col. 1.]

Ex parte Sidebotham, In re Sidebotham, (1880) 14 Ch. D. 458; 43 L. J. Bk. 4; 42 L. T. 783; 28 W. R. 715; Thiruvenkatachariar v. Thangayi Ammal, 29 Ind. Cas. 294; 39 M. 479; 17 M. L. T. 432; 29 M. L. J. 755; Haneswar Ghosh v. Rakhal Das Ghose, 20 Ind. Cas. 688; 18 C. W. N. 366; 18 C. L. J. 359; Kumaramappa Chettiar v. Murugappa Chettiar, 36 Ind. Cas. 771, referred to.

A having been declared an insolvent, his property vested in the Official Receiver. On 24th May 1908, he executed a promissory note and an agreement in favour of B, his father, providing that in case the former was not discharged within a year, he would convey certain property to B. On 6th October 1913, B applied to the Court to give leave to the Receiver to execute a release deed. The Court passed the order as prayed for. In an appeal by C, the 10th creditor, who held a mortgage over this property but with notice of agreement to convey in favour of B made by A:

Held, (1) that the order was passed without jurisdiction, being unauthorized by section 22 or any other provision of the Provincial Insolvency Act; as the application to execute a release deed was made to the Court, and not to the Receiver in whom the insolvent's estate vested and who alone was competent to

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give him the conveyance he required; [p. 774, cols. 1 & 2.]

(2) that B was not an "aggrieved person" within the meaning of section 22 of the Act, as the omission or failure of the Receiver to execute the release deed was in no way a binding adjudication on his right and did not affect his remedy by suit; [p. 775, col. 2.]

(3) that the order was not justified even under the Court's general powers of superintendence over the Receiver, as the Receiver was neither asked to explain nor to adduce evidence. [p. 775, col. 2.]

Haneswar Ghosh v. Rakhal Das Ghose, 20 Ind. Cas. 683; 18 C. W. N. 366; 18 C. L. J. 359; *In re Rassul Haji Cassum*, 9 Ind. Cas. 344; 13 Bom. L. R. 13, distinguished.

Appeal against the order of the District Court, Godavari, at Rajahmundry, in Insolvency Appeal No. 551 of 1913, in Insolvency Petition No. 8 of 1909.

Mr. B. Narasimha Rao, for the Appellant.

Mr. T. Prakasam, for the Respondents.

JUDGMENT.

OLDFIELD, J.—One Veeraraghava Row having been adjudicated insolvent, his property vested in the Official Receiver of Godavari District. Veeraraghava Row had on 24th May 1908 executed in favour of his father, the respondent, a promissory note and an agreement, Exhibit E, the latter providing that, in case the former were not discharged within a year, it should be discharged by the conveyance of certain property. On 6th October 1913 respondent moved the lower Court to grant leave to the Receiver to execute a release deed to him in respect of this property, as it had been treated as vesting with the insolvent's other property in consequence of the order of adjudication. The lower Court dealt with this petition first in circumstances referred to in this Court's order of remand in Appeal against Order No. 155 of 1914. On re-hearing it, it passed the order, against which 10th creditor, who alleges that he holds a mortgage over the property subsequent to Exhibit E, appeals.

The main objection to this order is that it was passed without jurisdiction, being unauthorized by section 22 or any other provision of the Provincial Insolvency Act. It is accordingly necessary to go further into the circumstances. The petition of 6th October 1913 did not ask that any act or decision of the Receiver should be set aside, but it was accompanied by an affidavit, setting forth that (1) on 22nd December

1911 respondent filed an affidavit, reciting the facts and praying for the execution of a conveyance by the Court or the Receiver; (2) as the Court passed no orders and time for suing would begin to run (meaning presumably—"would expire") on 24th May 1912, he filed a petition on 8th April 1912 under section 16 (b) of the Act, asking for permission to sue the Receiver on Exhibit E, (3) as no orders had been passed on either his affidavit or petition, he now asked the Court to order the Receiver to execute the necessary conveyance. It appears from the evidence of respondent and from the affidavit to be referred to later that this affidavit and this petition, the only ones referred to in the petition, on which the order under appeal was passed, were filed in the Court and that the former was withdrawn, as the right to sue for execution of a document was barred, before it came on for orders. In the judgment under appeal the lower Court has, as I understand it, found that the mortgage to appellant was for consideration, but was taken with notice of respondent's agreement, Exhibit E, which, therefore, prevailed against it as regards all three items of the property in dispute. There is, however, nothing regarding respondent's prayer for a conveyance, the only relief granted being that the property was exempted from sale; that is, as appears from the formal order drawn up, from "sale by the Receiver of the insolvent's assets." The form of the order is to some extent intelligible on reference to a petition and affidavit dated 18th November 1913, which we have found in the record and in which respondent again asked for a document and also for a stay of the sale, which the Receiver was about to hold of the property. The petition of 18th November 1913, however, it should be noted, was not statedly disposed of or even referred to in the lower Court's order and is presumably still pending. The application of 6th October 1913, with which the lower Court dealt in the order under appeal, was, therefore, founded on the failure of respondent's petition to the Court and not to the Receiver, in whom the insolvent's estate vested and who alone was competent to give him the conveyance he required.

Attempts have been made to support the

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lower Court's order on two grounds. First, it is urged that it should be treated as passed under section 22 of the Act, because respondent is a creditor or a person aggrieved by the Receiver's omission to give a conveyance in accordance with Exhibit E. One objection to this is that an application under section 22 must be founded on an act or decision of the Receiver, and none is alleged in the petition. For his mere omission to give a conveyance, when no request to him is mentioned, cannot be treated as an act or decision; and the suggestion that an averment, which we have found only in the petition above referred to of 18th November 1913, of a request to the Receiver on 1st October 1913 can be treated as having been made in the petition of 6th October 1913 cannot be accepted. There is, however, a broader objection, which must in any case prevail, that section 22 would even so not cover the application which respondent made, because he was not entitled to apply under it, as a creditor or person aggrieved. He is no doubt described as a creditor. But that is only because the insolvent so described him in his petition, his debt in fact having been discharged, when under Exhibit E his right to the insolvent's property matured. The question is then whether he was "a person aggrieved" within the meaning of the section.

In the leading authority on the subject, *Ex parte Sidebotham*, *In re Sidebotham* (1), which has been followed in *Thiruvengkatachariar v. Thangayi Ammal* (2) and other Indian cases, a person aggrieved was defined as "a man against whom a decision has been pronounced, which wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something;" and this definition may be accepted for the purpose of the present case, the material point being that the decision in question shall have been such as to affect the right claimed, not merely to impede the person concerned in his assertion of it. That is the view

taken in *Haneswar Ghosh v. Rakhal Das Ghose* (3) and a case recently decided in this Court, *Kumarappa Chettiar v. Murugappa Chettiar* (4). To apply it to the facts before us, respondent attempted to obtain from the Receiver through the Court a recognition of his alleged rights and a conveyance in pursuance of it; but if the Receiver's failure to grant either implied his refusal to do so, that refusal was in no way a binding adjudication on that right and affected neither it nor respondent's remedy by suit. In these circumstances respondent was not entitled to apply to the lower Court under section 22 and the lower Court had no jurisdiction to deal with his application thereunder.

Section 22 failing and it not having been suggested that any other is relevant, respondent's remaining contention is that the lower Court was competent to make its order without reference to any provision of law and in the exercise of its general powers of superintendence over the Receiver, its officer. And no doubt in *Haneswar Ghosh v. Rakhal Das Ghose* (3), already referred to, though the Court's order was set aside as unsustainable with reference to section 22, the case was remanded in order that these powers might be exercised and an enquiry be held. So also in *In re Rassul Haji Cassum* (5), the Court itself held an enquiry, though it recognized that the ultimate remedy by suit of the petitioner before it would be unaffected by the result. That, however, was not the nature of the enquiry held in this case by the lower Court, as appears from the facts that neither it nor the respondent originally made the Receiver a party and that when he had been made a party, though he apparently did not attempt to justify his conduct, the proceedings were continued on the evidence adduced by the 10th creditor, the present appellant. It is accordingly impossible to support the lower Court's jurisdiction as resting on this foundation.

The result is that the order under appeal must be set aside as passed without

(1) (1880) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 788; 28 W. R. 715.

(2) 29 Ind. Cas. 294; 39 M. 479; 17 M. L. T. 432; 29 M. L. J. 755.

(3) 20 Ind. Cas. 693; 18 C. W. N. 366; 18 C. L. J. 359.

(4) 36 Ind. Cas. 771.

(5) 9 Ind. Cas. 344; 13 Bom. L. R. 13.

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jurisdiction, the appeal being allowed and respondent's petition being dismissed with costs in both Courts.

KRISHNAN, J.—I fully agree.

Appeal allowed.

V. R. P.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1674 OF 1914.

October 16, 1916.

Present:—Mr. Justice Spencer and

Mr. Justice Phillips.

MARUDANAYAGAM PILLAI—PLAINTIFF

—APPELLANT

versus

MUNUSAMY PILLAI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Vendor and purchaser—Contract to sell, specific performance of—Delay—Discretion of Court—Purchaser, duty of—Contract Act (IX of 1872), s. 55.

Defendant agreed to execute a sale-deed of some lands to the plaintiff by 30th April 1908. On 1st May 1908 plaintiff intimated to defendant that the sale price was ready and asked defendant to go to a specified place, execute the sale-deed and receive the money. On May 7th, 1st defendant wrote to plaintiff that he had been waiting for him and would wait till 16th May 1908 to conclude the sale. The plaintiff did nothing after receipt of this notice and the defendant on 13th May 1908 intimated to the plaintiff that the contract was rescinded. On 29th April 1911 plaintiff instituted the present suit for specific performance.

Held, that, having regard to the lapse of time that had occurred, specific performance should be refused. [p. 776, col. 2.]

Nawab Begam v. A. H. Creet, 27 A. 678, A. W. N. (1905) 147; 2 A. L. J. 495 and *Jamshed Khodaram Irani v. Burjorji Dhunjabhai*, 32 Ind. Cas. 246; 40 B. 289; 10 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744 (P. C.), referred to.

Even where time is not of the essence of the contract, it is for the purchaser to show that he was ready and willing to perform the contract within a reasonable time after the agreed date. [p. 777, col. 1.]

Natesa Aiyar v. Appavu Padayachi, 19 Ind. Cas. 462; 38 M. 173; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391, referred to.

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 45 of 1913, preferred against that of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 26 of 1911.

Mr. T. R. Ramachandra Aiyar (with him Mr. T. R. Krishnaswami Aiyar), for the Appellant.

Dewan Bahadur L. A. Govindaraghava Aiyar (with him Messrs. K. S. Krishnaswami Aiyangar and W. Chakrapani Naidu), for the Respondents.

JUDGMENT.—We think that under the circumstances, this is a case in which the plaintiff's conduct practically amounted to a waiver by acquiescence of performance of the contract to sell. Admittedly there was an oral understanding that the sale-deed should be executed by April 30th, 1908. On May 1st the plaintiff wrote that the sale-price was ready and asked 1st defendant to come to Dharapuram where plaintiff lived, execute the sale-deed and receive the money. On May 7th, 1st defendant having come to Dharapuram gave notice to the plaintiff that he had been waiting from April 17th to 21st and from May 5th to 7th and that he would give him time till the 10th to conclude the sale. The plaintiff received this notice on the 8th but did nothing towards performing his part of the contract. On the 13th, the 1st defendant intimated to the plaintiff that the contract had been put an end to. Nearly three years afterwards, *viz.*, on April 29th, 1911, the plaintiff instituted this suit to enforce specific performance. The facts thus resemble the facts in *Nawab Begam v. A. H. Creet* (1), where it was held that when plaintiffs had notice that the contract was at an end and yet did nothing till nearly three years later when they filed a suit for enforcing performance, the Court had sufficient reason in the exercise of its discretion to refuse relief. In *Jamshed Khodaram Irani v. Burjorji Dhunjabhai* (2) the Privy Council observe that equity will not assist when there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete within a definite time. We are asked to say that the time from May 8th to the 10th was not reasonable, but seeing that on May 1st plaintiff announced that he had the money ready and seeing that the Registration Office was in the same village where plaintiff resided

(1) 27 A. 678; A. W. N. (1905) 147; 2 A. L. J. 495.

(2) 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 9 M. L. T. 184; 14 A. L. J. 225; (1915) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744 (P. C.).

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and whither the 1st defendant had come, we are not prepared to say that he should have been given any more time.

Mr. Ramachandra Aiyar argued that there was no obligation on his client to produce the money until the defendant produced the sale-deed ready for registration, as this was part of the agreement, but the plaint shows that the cost of the stamp was admittedly to be borne by the plaintiff and it appears from 1st defendant's evidence, which has been believed by both Courts, that plaintiff had not even the money for the purchase of the stamp and it does not appear that he took any step to signify his willingness to accept the performance of the contract when performance was offered.

It is further contended that the Courts below were in error in dismissing the suit without finding that time was of the essence of the contract, but we do not find there was any contention on this point in the pleadings. The parties went to trial on the footing that there had been a breach of the contract on one side or the other and the 1st issue in the case was, therefore, directed to discovering which party was responsible for non-performance.

Even in a case where time is not of the essence of the contract, if the vendor rescinds after the agreed time, it is, as observed by the Chief Justice in *Natesa Aiyar v. Apparu Padayachi* (3), for the purchaser to show that he was ready and willing to perform the contract within a reasonable time after the agreed date.

We, therefore, think that the lower Courts were justified in refusing to decree specific performance after the lapse of time that had occurred.

The second appeal is dismissed with costs (one set between the legal representatives of 1st defendant and the 2nd defendant and the 6th defendant).

Appeal dismissed.

V.R.P.

(3) 19 Ind. Cas. 432; 38 M. 178; (1913) M. W. N. 341; 24 M. L. J. 484; 13 M. L. T. 391.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 520 OF 1914.

February 2, 1917.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Shadi Lal.

NIRANJAN NATH—PLAINTIFF—

APPELLANT

versus

AFZAL HUSSAIN—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3
—*Suit for ejectment and arrears of rent—Death of co-*
plaintiff—Legal representative, failure to bring, on record
—*Abatement of suit.*

Two brothers, B. and N., who were not members of a joint Hindu family, sued for ejectment of defendant from a house and for arrears of rent due from him. During the pendency of the suit B died and his legal representatives were not brought on record within the statutory period.

Held, that inasmuch as the suit could proceed in the absence of B's legal representatives, it abated only in respect of his share, and not in respect of the share of N. [p. 778, col. 1.]

Hadu v. Lala, 2 Ind. Cas 51; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 19 4, distinguished.

Second appeal from the decree of the District Judge, Delhi, dated the 16th December 1913, affirming that of the Munsif, 1st class, Delhi, dated the 30th April 1913, dismissing the suit.

Mr. Kanwar Narain, for the Appellant.

Dr. Muhammad Iqbal, for the Respondent.

JUDGMENT.—The suit out of which the present appeal arises was for the ejectment of the defendant-respondent from a house and for arrears of rent due from him. The suit was brought by two brothers, Pandit Bishambar Nath and Niranjana Nath. While the suit was pending Bishambar Nath died and no application to bring his legal representatives on the record was made within the statutory period. The suit as regards Bishambar Nath, therefore, abated under Order XXII, rule 3, Civil Procedure Code. The first Court held that the suit abated as a whole, because the right to sue was joint and could not be separated. The lower Appellate Court agreed with the view of the first Court and dismissed the appeal, and Niranjana Nath has filed a second appeal to this Court.

The question whether the order appealed against was a decree was referred to a Full Bench, which has decided it in the affirmative. We now proceed to decide the

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appeal on the merits. It is admitted before us that the original plaintiffs were not members of a joint Hindu family, but it was contended that each of them had a specific share in the property in dispute. Appellant's Counsel urges that the suit could proceed as regards his client's share. The Full Bench in its order laid down that if the suit was of such a nature that it cannot proceed in the absence of the deceased's legal representative, the partial abatement will result in the total abatement or dismissal of the suit. We have, therefore, to consider whether the present suit could proceed in the absence of Bishambar Nath's legal representative. If it could not so proceed then the order of the lower Court is correct. Rulings such as *Hadu v. Lala* (1) do not help us much in the present case. The facts of the present case are distinguishable from those of that case. In the latter the shares of the parties in the joint property had to be determined and it was held that the Court must have all the co-sharers before it. It was also pointed out that the suit could not have been instituted and prosecuted until all the co-sharers had been made parties. In the present case if Niranjan Nath is a co-sharer in the property in dispute, we see no reason why the suit cannot proceed as regards his share. Suppose in the first instance his brother Bishambar Nath deceased had not joined him in suing, it cannot be held that Niranjan Nath could not have sued alone. In our opinion he could certainly have sued as regards his share in the property, although the Court would have probably ordered his brother to be made a defendant. Proceeding with the suit in the absence of Bishambar Nath's legal representative will not prejudice the defendant in any way. No doubt Niranjan Nath cannot get a decree for ejectment of the defendant from the whole of the house in dispute, but he can get a decree declaring his own rights such as would entitle him subsequently to sue for partition of his share.

We, therefore, accept the appeal and setting aside the order of the lower Courts remand the case to the Court of first instance for

decision on the merits. Stamp in this Court and in the lower Appellate Court will be refunded and other costs will be costs in the cause.

Appeal accepted: Suit remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2386 OF 1914.

October 12, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

POOSARLA CHINNASWAMY—PLAINTIFF

—APPELLANT

versus

KATTAMOORI VENKATARAMA-
KRISHNAYYA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Redemption—Payment of mortgage-debt, whether extinguishes sub-mortgage—Notice.

A sub-mortgage is extinguished by the payment of the mortgage-debt by the mortgagor to the mortgagee, if the former has no notice or knowledge of the sub-mortgage and acts in good faith. [p. 779, col. 1.]

Narayana Mudali v. Raghavammal, 18 M. L. J. 462, *Sahadeo Rarji Baga'e v. Shekh Papa Miya*, 29 B. 199; 6 Bom. L. R. 838, followed.

Second appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 133 of 1913, preferred against that of the District Munsif, Vizagapatam, in Original Suit No. 135 of 1911.

Mr. P. Somasundaram, for the Appellant.
The Hon'ble Mr. B. N. Sarmu and Mr. A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.—The plaintiff, who is a sub-mortgagee of the 1st defendant's mortgage-interests in the property of 2nd and 3rd defendants, has been given a personal decree against the 1st defendant's legal representative, but he appeals on the ground that the lower Courts have refused his claim to enforce his security against the mortgaged property. The original mortgage was redeemed before plaintiff instituted this suit.

Plaintiff neither alleged nor proved that the mortgagors had notice of his sub-mortgage before the redemption took place. His Vakil now argues that the lower Appellate Court should not have found against

(1) 21 Ind. Cas. 95; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

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the fact of notice without an issue on the point, but we cannot allow this objection to be raised when the plaintiff himself was responsible for this defect, if any.

We have no hesitation in confirming the view taken by the lower Courts on the point of law that a sub-mortgage is extinguished by the payment of the mortgage-debt by the mortgagor, if he had no notice or knowledge of the sub-mortgage and acts in good faith. An observation to this effect occurs in *Narayana Mudali v. Raghavammal* (1) and we have not been referred to any authority for the contrary view. *Sahadev Ravji Bagade v. Shekh Papa Miya* (2) is to the same effect. The second appeal fails and is dismissed with costs (one set of costs.)

Appeal dismissed.

V. R. P.

(1) 18 M. L. J. 462.

(2) 29 B. 199; 6 Bom. L. R. 836.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 60
OF 1916.

January 15, 1917.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Newbould.

Sheikh ALI MAMUD—PLAINTIFF—

APPELLANT

versus

Sheikh MIARISH—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 3—Mortgage—Decree for foreclosure—Computation of time for payment—Appellate decree, effect of.

In a decree for foreclosure the period of time allowed to the mortgagor to redeem runs from the date of the decree of the Court of first instance, unless in an appeal from the decree the Appellate Court enlarges the time. [p. 780, col. 1.]

Bhola Nath Bhuttacharjee v. Kanti Chundra Bhuttacharjee, 25 C. 311; 1 C. W. N. 671; 13 Ind. Dec. (N. S.) 209 *Faijuddi Sardar v. Asimuddi Biswas*, 11 C. W. N. 679, referred to.

The Trial Court cannot in the exercise of its discretion under Order XXXIV, rule 3 (2), accept payment after the final decree has been passed. [p. 780, col. 1.]

Appeal against the order of the Sub-Judge, Mymensingh, dated the 30th November 1915, reversing that of the Munsif, Iswarganj, dated the 5th June 1915.

FACTS of the case will appear from the judgment,

Babu Birendra Kumar De, for the Appellant.—The first question in this case is whether the six months' time allowed by the first Court for redeeming the mortgage should run from the date of the first Court's decree or from the date of the Appellate Court's decree. The authorities are clear on this point, *vide Bhola Nath Bhuttacharjee v. Kanti Chundra Bhuttacharjee* (1), *Faijuddi Sardar v. Asimuddi Biswas* (2).

Secondly, a final decree was passed on the 11th February 1915 and thereafter the Munsif had no power to enlarge the time and to accept the deposit. A decree absolute for foreclosure discharges the mortgage-debt and the mortgagee becomes the absolute owner of the property, *vide* Order XXXIV, rule 3, clause (3).

As a rule foreclosure cannot be re-opened.

Babu Surendra Nath Das Gupta, for the Respondent.—In this case the learned Munsif accepted the deposit and no objection was raised by the decree-holder at the time. The decree-holder ought to have made a formal petition to set aside the Munsif's order.

The appellant's Vakil was not called upon to reply.

JUDGMENT.—The decree-holder, who is the appellant in this case, obtained a decree for foreclosure upon a mortgage. The decree gave six months' time to the mortgagor to redeem. The latter preferred an appeal. The appeal was dismissed and there was no direction in the decree of the Appellate Court that the six months' time would run from the date of that decree. The date of the original decree was 27th August 1913 and the appeal against that decree was dismissed on 1st December 1914. On 11th February 1915, the decree-holder applied for the decree being made absolute, and a final decree was passed. Subsequently on 24th May the mortgagor deposited the money in Court and that was accepted by the Munsif. Subsequently that order was set aside at the instance of the decree-holder, when it was pointed out to the Court that the final decree had already been passed.

(1) 25 C. 311; 1 C. W. N. 671; 13 Ind. Dec. (N. S.) 208.

(2) 11 C. W. N. 679.

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The order of the Munsif was set aside by the lower Appellate Court, on the ground that the six months' time had run from the date of the Appellate Court's decree. We think that the view taken by the lower Appellate Court is erroneous. In the absence of any direction in the decree of the lower Appellate Court, the period of six months would run from the date of the decree of the Court of first instance. See *Bhola Nath Bhattacharjee v. Kanti Chandra Bhattacharjee* (1) and *Faijuaai Sardar v. Asimuddi Biswas* (2). It is true that the Court has the power, under Order XXXIV, rule 3, proviso, to enlarge the time for redemption. But the final decree had been passed before the judgment-debtor deposited the money. Under the circumstances, we do not think that the Court had any power to accept the money long after the expiry of the time within which the judgment-debtor was to put in the money. The appeal must accordingly be allowed, the order of the lower Appellate Court set aside and that of the Court of first instance restored. Each party will bear its own costs in all the Courts.

Appeal allowed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEALS NOS. 64 AND 65 OF 1915.
September 7, 1916.

Present:—Mr. Justice Ormond and
Mr Justice Twomey.

MAUNG CHIT MAUNG—PLAINTIFF—
APPELLANT
versus

MA YAIT AND OTHERS—RESPONDENTS.

Burma Laws Act (XIII of 1895), s. 13—'Hindu', meaning of—Hindu Law, applicability of—Kais, law applicable to—Caste reputations, force of—Court, duty of.

In order that Hindu Law should apply to a person it is not necessary that he should have been born a Hindu. [p 782, col 1.]

The word 'Hindu' in section 13 of the Burma Laws Act bears the same meaning as it does in section 331 of the Succession Act and section 2 of the Probate and Administration Act and does not necessarily mean an orthodox Hindu or one who is a member of one of the four castes. [p. 781, col 2.]

Hindu Law is applicable to a Hindu until he definitely renounces or abandons his religion. [p 783, col. 1.]

Bhagwan Keor v. Bose, J. C., 30 L. A. 249; 31 C. 11; 7 C. W. N. 835; 5 Bom. L. R. 845; 13 M. L. J. 381; 84 P. R. 1903; 135 P. L. J. R. 1903; 8 Sar. P. C. J. 543 (P. 10.), followed.

Anandamay Pillay v. Po Lan, 3 L. B. R. 228; Charlotte Abraham v. Francis Abraham, 9 M. I. A. 195 at p. 239; 1 W. R. (P. C.) 1; Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716; Lingappa Goundan v. Esudasan, 27 M. 13; Myna Boyee v. Ootaram, 8 M. I. A. 490; 2 W. R. (P. C.) 4; 2 M. H. C. R. 196; 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 582; Meenakshi Anni v. Appakutti, 4 Ind. Cas. 299; 33 M. 226; 7 M. L. T. 26; 20 M. L. J. 359; Muthusami Mudaliar v. Masilamani, 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49; Dagree v. Pacotti San Jao, 19 B. 783; 10 Ind. Dec. (N. S.) 525, referred to.

Raj Bahadur v. Bishen Dayal, 4 A. 343; A. W. N. (18-2) 74; 6 Ind. Jur. 659; 2 Ind. Dec. (N. S.) 963, distinguished.

Per Ormond, J.—Where an enactment speaks only of the three communities, viz, Hindu, Muhammadan and Buddhist, it is intended to embrace all communities which have a religion which is an offshoot of any one of these three religions. Thus the term "Hindu" includes all who are called Hindus in common parlance. [p. 78, col. 2.]

Per Twomey, J.—It is not within the province of Civil Courts to determine questions of orthodoxy. [p. 783, col. 1.]

In order to determine whether a certain person is a Hindu, it is immaterial whether he is recognised as a Hindu by the orthodox caste Hindus, the only question being whether he himself adheres to some form of Brahminical worship and belief. [p. 785, col. 1.]

Caste regulations do not constitute Hinduism though they flourish among Hindus. [p. 788, col. 1.]

Mr. Giles, for the Appellant.

Mr. Cowasji (with him Mr. Banerji), for the Respondents.

JUDGMENT.

ORMOND, J.—Maung Ohn Ghine, C. I. E., a prominent citizen of Rangoon, died on 10th June 1911. On 15th December 1913 his eldest son Maung Chit Maung filed a suit against the widow Ma Yait, administratrix, for the administration of the estate; and another suit against Ma Yait and the eldest daughter Ma Nao, trustees of a settlement executed by Ohn Ghine on 5th May 1908, for a declaration that such settlement was void.

In both cases the question arose as to what law was applicable under section 13 of the Burma Laws Act, XIII of 1895. That section is as follows:—

1. Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

(a) the Buddhist Law in cases where the parties are Buddhists,

(b) the Muhammadan Law in cases where the parties are Muhammadans, and

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(c) the Hindu Law in the cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

2. Subject to the provisions of sub-section (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

3. In cases not provided for by sub-section 1 or sub-section 2, or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

The learned Judge on the Original Side has held that Ohn Ghine was neither a Hindu nor a Buddhist within the meaning of that section, and that the cases must be decided according to justice, equity and good conscience.

The plaintiff appeals in both cases and contends that Ohn Ghine was a Hindu. It is agreed that the decision of this question shall govern both cases; and that if Ohn Ghine was not at the time of his death a Hindu, within the meaning of the above section, the Succession Act and the Transfer of Property Act apply to the two cases respectively.

Mr. Giles for the appellant contends that a Hindu, within the meaning of the section, is one who professes the Hindu religion; and that it is not for the Court to enquire whether such person is orthodox or not.

Mr. Cowasjee for the respondent contends that a 'Hindu' must be a Hindu both by birth and by religion and must belong to one of the four recognised castes; and that Ohn Ghine fulfilled no one of these conditions.

Unless a Hindu is recognised by the members of a caste as a caste-fellow, he cannot be said to belong to that caste. It is clear that Ohn Ghine was not recognised by Hindus as belonging to any one of the four castes; and it is not now contended that he did.

In the case of *Anamalai Pillay v. Po Lan* (1) it is stated that a fifth caste is not known to orthodox Hinduism; and a person who is outside the four recognised castes is not within the pale of Hinduism, according to the orthodox tenets of the Hindu faith. The case decided that the Hindu caste law relating to marriage does not apply to a person who is outside the four recognised castes. It does not decide that such a person cannot be a Hindu within the meaning of section 13.

The learned Judge on the Original Side has apparently relied on the case of *Raj Bahadur v. Bishen Dayal* (2), where it was held that the parties were neither orthodox Hindus nor Muhammadans and that under section 24 of the Bengal Civil Courts Act VII of 1871, the case must be governed by the rules of justice, equity and good conscience. But in the case of *Bhagwan Koer v. Bose, J. C.* (3) it was held by the Privy Council that a Sikh, who has no caste and is certainly not an orthodox Hindu, is a Hindu within the meaning of section 331 of the Succession Act and section 2 of the Probate and Administration Act and that a Sikh who became a Brahmo, would not necessarily cease to be a Hindu. The word "Hindu" in section 13 of the Burma Laws Act bears the same meaning that it does in section 331 of the Succession Act and section 2 of the Probate and Administration Act.

Section 13 itself seems to expressly contemplate the case of unorthodox Hindus: for it provides, as I understand the section, that where Hindus have so far departed from Hinduism proper, as to set up customs which are opposed to the orthodox rules of Hindu Law, they shall still be governed by Hindu Law so far as it has not been thus departed from by custom.

In my opinion the word "Hindu" in section 13 does not necessarily mean an orthodox Hindu or one who is a member of one of the four castes.

The next question is, must he be a Hindu by birth? Mr. Cowasjee relied upon *Charlotte*

(1) 3 L. B. R. 228.

(2) 4 A. 343 A. W. N. (1882) 74; 6 Ind. Jur. 659; 2 Ind. Dec. N. S. 968.

(3) 30 I. A. 249; 31 C. 11; 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L. J. 341; 84 P. R. 1903; 135 P. L. R. 103; 8 Sar. P. C. J. 543 (P. C.).

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Abraham v. Francis Abraham (4), where it is said that the Regulations which prescribe that Hindu Law shall be applied to Hindus, must be understood to refer to Hindus "not by birth merely, but by religion also." In that case their Lordships were dealing with the succession to the property of a Protestant native of India, whose ancestors had for several generations been Christians, and who is described by their Lordships as "by birth a Hindu of pure native blood, being descended from a family of Hindus." What is meant by the above passage is that it is not sufficient to be of a Hindu race or stock, but that the person must be a Hindu by religion. The word "also," is, I think, inserted by mistake; the passage does not, in my opinion, mean that for Hindu Law to be applicable, the person must be a Hindu by birth: for at page 238 their Lordships refer with approval to the case of a Hindu converted to Muhammadanism, where it is said the devolution of his property would be governed by the Hindu Law as regards all the property that the deceased had at the time of his conversion, and by the Muhammadan Law as to all subsequently acquired property; the deceased in such a case could not be said to have been a Muhammadan by birth in any sense of the word.

It is contended for the respondent that Ohn Ghine cannot be a Hindu; because his paternal grandfather, who is said to have belonged to the twice-born class, married a Talaing lady; and by Hindu Law such a marriage is void. It is unnecessary to decide whether that marriage was void or not under Hindu Law proper. As I understand the argument, it means that no one can be a Hindu within the meaning of section 13, whose ancestors were not all born in lawful wedlock and were not all of pure Indian or rather Hindu blood—a startling proposition which could be very far-reaching and unsettling in its effect. No authorities have been cited which support such a proposition. The case of *Lingappa Goundan v. Esudasan* (5) only decides that the illegitimate child of

a Hindu by a native Christian woman was not a Hindu by birth, i.e., was not "by birth, a Hindu by religion;" and, therefore, could not recover maintenance against his father under Hindu Law. The question there was whether Hindu Law applied at the time when the claim to maintenance arose, i.e., when the child was born; and it was decided that the child was not a Hindu by religion at the time of his birth. In the case of *Myna Boyee v. Ootaram* (6) their Lordships of the Privy Council held that the illegitimate children of an Englishman by a Brahmin woman—who were brought up as Hindus—should be governed by Hindu Law. Hindu Law unlike English Law recognises the relationship of an illegitimate child to its father; and in some cases the illegitimate son of a Hindu father has a right of inheritance to his father, *Meenakshi Anni v. Appakutti* (7). The children, therefore, of an English father by a Brahmin woman could not be Hindus by birth. The case of *Myna Boyee v. Ootaram* (6) is, therefore, an authority to show that a person may be a "Hindu" within the meaning of section 13, although he is illegitimate and not a Hindu by birth, and is not of pure Hindu blood, provided he is a Hindu by religion.

On the other hand the *Sikh* case (3) cited above shows that a person can be a "Hindu" for the purposes of the present case, even though he does not profess the Hindu religion. The case is instructive: it shews that where an enactment speaks only of the three communities *viz.*, Hindu, Mahomedan and Buddhist, it is intended to embrace all communities which have a religion which is an offshoot of any one of these three religions. Thus the term "Hindu" includes a Sikh; and all who are called Hindus in common parlance. The case also decided that a Sikh or Hindu, by becoming a Brahmo, did not necessarily cease to belong to the community in which he was born i.e., cease to be a Hindu—not because the Brahmo religion was an offshoot of, or was in any way connected with, the Hindu religion, but because of the relation

(4) 9 M. L. A. 195 at p. 239; 1 W. R. (P. C.) 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

(5) 27 M. 13.

(6) 8 M. L. A. 400; 2 W. R. (P. C.) 4; 2 M. H. C. R. 196; 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 582.

(7) 4 Ind. Cas. 229; 33 M. 226; 7 M. L. T. 26; 20 M. L. J. 359.

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of the principles and the organisation of the Brahmos to the Hindu system.

Now if a Hindu, can become a Brahmo, which is a monotheistic religion, and still be a Hindu; I see no reason why a Hindu should not adopt Buddhism, a religion or philosophy from which all theism is simply absent, and still remain a "Hindu." He would not become a Buddhist within the meanings of section 13, until he has definitely renounced or abandoned Hinduism; and until he has done so, Hindu Law would be applicable to him: otherwise, during the transition stage of becoming a Buddhist and before he becomes subject to Buddhist Law, he would lose the benefits of section 13, which was clearly not intended.

Ohn Ghine was known in Burma as a "Kalai": which, according to Mr. Cowasjee, means the offspring of a Hindu and Burmese woman and their descendants.

Ohn Ghine's parents are both said to have been Kalais, his paternal grandfather was a Hindu and is said to have married a Talaing lady; and Ohn Ghine married a Kalai.

A Hindu temple in Phayre Street which has the images of Ganesh and Krishna was built by the Kalais; the priest is the son of a Brahmin by Ohn Ghine's sister and Ohn Ghine was a trustee of the temple up to the time of his death. Ohn Ghine and his family, and his family before him, visited that temple twice a year on certain occasions; and once a year they visited the Kalai temple in Fraser Street. The temple in Phayre Street is known as the Kalai temple. It is contended that the Kalai temple is not an orthodox Hindu temple; but it is admitted that the temple in Fraser Street is a proper Hindu temple. Ohn Ghine and his family adopted Burmese names, dress and customs; but they also had Hindu names given to them according to Hindu rites and they were married with Hindu ceremonies. Ohn Ghine was cremated according to Hindu rites and his ashes were sent to Benares. He refused to eat beef and refused to have his sons *shinbuey* because they were being brought up as Hindus. An image of Buddha and Ganesh were kept in the house close together, but the Buddha is said to have been placed on a higher level than Ganesh. Ohn

Ghine and his wife Ma Yait stated on oath they were Hindus in Ma Nu's case in 1906—a criminal prosecution for the abduction of their daughter Ma Nu. The widow and daughter filed affidavits and petitions in connection with their application for Letters of Administration to Ohn Ghine's estate, from September 12th to February 14th, in which they stated in the first affidavits that Ohn Ghine was a Hindu and in later ones that he was a Hindu by religion only. In the written statements in these suits filed on 18th February 1914 Ohn Ghine is said to have been "a Kalai and professed the Hindu religion and also observed Buddhist rites," and in the amended written statements filed on 15th November 1914, he is stated to have been a "Kalai who was not a Hindu and he professed both the Hindu and Buddhist religions." It is admitted, therefore, in the pleadings that Ohn Ghine had not ceased to be a Hindu by religion.

Ohn Ghine no doubt built a *kyaung* and a *zayat*. He is said to have observed the Buddhist fasts, to have worshipped at the pagoda, to have said prayers in Buddhist fashion and he had a Buddhist spiritual adviser. In 1907 he sent a printed post-card of Buddhist precepts to his son in London and in 1910 he went to Moulmein to attend his son's marriage with a Burmese lady. In petitions to Government he posed as a leader and co-religionist of the Burmese Buddhists in Rangoon and he was a Vice-President of the Buddha Gya Missionary Society, which collected funds for a suit against a Mohunt in India in order to safeguard Buddhists' rights. On the other hand U Po Tha, a witness for the defence and an elder among the Burmese community, says that because Ohn Ghine was a Hindu he was not elected a trustee of the Shwedegon Pagoda. Ohn Ghine was known as a Kalai and not as a Buddhist and "Kalai", according to Stevenson's Burmese Dictionary, means a Hindu without caste.

The defence in these two cases is not that Ohn Ghine was a Buddhist, but that he was a Kalai and professed both the Hindu and Buddhist religions and was, therefore, not a Hindu within the meaning of section 13.

Ohn Ghine came of a Hindu stock and neither he nor his forefathers had given

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up Hinduism. The Hindu Law which governed the family must, in my opinion, continue to govern Ohn Ghine's estate. Costs of both sides to come out of the estate, ten gold *mohurs* for each day of hearing, five days on each side.

TWOMEY, J.—The question in this appeal is whether the deceased Maung Ohn Ghine, a wealthy resident of Rangoon, was a Hindu within the meaning of section 13, Burma Laws Act, 1898, so that under the section, the Hindu Law should form the rule of decision regarding succession or inheritance to his estate. The contending parties are his son Maung Chit Maung on the one hand and his widow Ma Yait and daughter Ma Nu on the other, the former maintaining that Ohn Ghine was a Hindu while the latter deny it and claim that he professed both the Hindu and the Buddhist religions and that the Hindu Law is inapplicable to his estate.

Ohn Ghine belonged to a community known as Kalais formed by the descendants of Hindu immigrants, mostly of the lower orders from Madras, who made permanent alliances with women of Burma. The frequency of these alliances is mentioned in the case of *Anamalai Pillay v. Po Lan* (1), in which it was held that the ordinary presumption of marriage should be applied to these alliances, though they would not be treated as valid marriages according to the caste regulations of the recognised Hindu castes. The Settlement Reports and the Gazetteers give no information about the Kalais. The word Kalai in Stevenson's Dictionary is translated "Hindu", with the added explanation "Hindu Kalai race, without caste." The fact that the Kalais are of mixed Hindu and Burmese (or Talaing) origin is not mentioned in the dictionary but there is no dispute as to this. The exact status of persons belonging to the Kalai community is now for the first time the subject of judicial consideration. They are mostly persons of small means and any questions of inheritance have been decided by agreement or arbitration among themselves. That they are a well-recognised community is shown by the fact that they have been allotted a separate burial ground by the Municipality. They speak the Burmese language and they

dress and live like Burmese, but the evidence shows that they profess the Hindu religion though in a modified and perhaps attenuated form. The Kalais of Rangoon have their own temple to Krishna and they also worship at the Kalai temple in Fraser Street. In their marriages they usually follow Hindu rites, though instances are given of Kalais marrying according to the Burmese fashion. When they die their bodies are cremated and in families that can afford the expense, the ashes are sent to Benares to be thrown into the river Ganges. They have Hindu names as well as Burmese names, though the Hindu names appear to be brought out only on religious occasions. In matters of diet they appear to be more tolerant than ordinary Hindus. They eat with Burmese and eschew only beef. Ordinary Hindus do not associate with them, though the evidence shows that ordinary Hindus do worship at the Kalai temple. Re-marriage of widows is allowed and Kalais intermarry freely with the women of the country, though there appears to be a tendency to seek wives among the Kalai community. As might be expected in a community formed by the admixture of Hindus with Buddhists, the Kalais or many of them, side by side with their Hindu observances, follow many practices of the surrounding Buddhist population. They worship at the pagodas, make offerings of food to the *phongyis* and observe the Buddhist lent. But it appears to be very unusual for a Kalai to put his sons through the crucial Buddhist ceremony of *shinbui* or initiation into the Sacred Order. Where a Kalai has gone to this length in his adoption of Buddhist practices it would perhaps be difficult to regard him as a Hindu any longer. There are probably Kalais whose Hinduism has become so attenuated by successive intermarriages with Buddhists for several generations that they cannot properly be regarded as professing Hindus at all. But, on the other hand, it is clear that up to the time of this litigation the Kalai community generally have been regarded as a Hindu community.

We may regard the Kalais as Hindus without caste (as the Dictionary describes them) or they may be looked upon as a new sect or caste formed by the intermarriage of

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Madrasi Hindu immigrants with women of this province. On the former assumption it would not follow that a Kalai would be beyond the scope of the term Hindu in section 13. For it is nowhere laid down that a man cannot be a Hindu unless he belongs to one of the recognised castes and conforms to caste regulations as to marriage, etc. A learned Hindu Judge of the Madras High Court (Sankaran Nair, J.), in *Muthusami Mudaliar v. Masilamani* (8), speaking of marriages among Hindus, said: "There is nothing to prevent a man from giving up his caste or community. He is bound by the caste rules only on account of his voluntary submission and, therefore, if the marriage is valid under the ordinary Hindu Law they will be legally married even if such marriage is opposed to the rules of the caste or community to which they belong." In the same judgment it is said that Hindu Law means the law of the *Dharmasastras* as distinguished from caste rules or the caste law. In the Bombay case of *Dagree v. Pacotti San Jao* (9). Parsons, J., accepted the definition of Hindu in Stokes' Anglo Indian Codes, Volume I, page 483, as a theological term denoting any person professing any form of the Brahminical religion or the religion of the Puranas. It would seem, therefore, immaterial whether the Kalais are recognised as Hindus by caste-Hindus from India, the only question being whether they themselves adhere to some form of Brahminical worship and belief. It appears beyond doubt that the Kalais comply with this requirement, however much they may have relaxed the restrictions imposed by Indian caste regulations as to intermarriage and domestic life.

It may be permissible as an alternative to regard the Kalais as forming a distinct caste or sect of their own. The formation of new castes by migration is noticed in the Imperial Gazetteer of India, Volume I, page 319, from which the following passage is taken:—"If the members of a caste leave their original *habitat* and settle permanently in another part of India, they tend to develop into a distinct caste. The stages of the process are readily

traced. In the first instance it is assumed that people who live in foreign parts must of necessity eat forbidden food, worship alien gods, and enter into relations with strange women. Consequently when they wish to take wives from among their own people, they find that their social status has been lowered and that they must pay for the privilege of marrying within the parent group. This luxury grows more and more expensive, and in course of time the emigrants marry only among themselves and thus become a sub-caste, usually distinguished by a territorial name, such as Jaunpuria, Tiruhutia, Barendra, and the like."

It appears, therefore, that the Kalais are not the only instance in the Indian Empire of Hindus migrating to distant parts and establishing a new community by intermarriage with the women of the country, and every member in such a new community would presumably retain the personal status of the founder of his family as a Hindu. In fact the restrictions of caste appear to disappear gradually when Hindus migrate to a non-Hindu country, and there is a further illustration by another passage from the same work, page 330, which informs us that in Baluchistan which is like Burma a non-Hindu country, even now a Hindu when asked to what caste he belongs will often describe himself by the name of the tribal group i. e., the Baluchi tribe to which he holds himself attached.

The Kalai community being a Hindu community and Maung Ohn Ghine having been a member thereof, it follows that he was *prima facie* a Hindu. In his daughter Ma Nu's abduction case 1906 he swore that he was a Hindu. He said: "I am a Hindu. I am a trustee of the Hindu temple. My Hindu name is Muthusami Pillay. Ma Nu's name is Chellama. We were married by Brahmins by Hindu rites. I was married in that way. We do not recognise marriage with non-Hindus. If a member of our class married a non-Hindu I won't eat with him." He had a strong motive for making himself out to be a Hindu in that case and he certainly exaggerated his Hindu exclusiveness. But apart from this open profession of faith the evidence in the present case furnishes strong grounds for regarding him as a Hindu by religion. He admittedly professed that re-

(8) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

(9) 19 B. 783; 10 Ind. Dec. (N. S.) 525.

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ligion throughout his life and was a trustee of the Kalai Hindu temple to Krishna in Phayre Street, of which temple he was one of the founders. He was married according to Hindu rites and his wife is also a Kalai. His daughter Ma Mya was married to another Kalai according to the Hindu rites. After his death his body was cremated. The funeral ceremony was performed according to Hindu rites and his ashes together with the ashes of his daughter Ma Mya were sent to Benares to be thrown into the Ganges. In matter of dress, diet and social intercourse he followed the ordinary practice of the Kalai community. Like other members of the community he did not associate with Hindus from India, having more in common with his Burmese fellow-townsmen than with Indians. Although the more stalwart witnesses called by Ma Yait state that Ohn Ghine was a Burmese Buddhist, Ma Yait herself described him as a Hindu up to the time of the present litigation and also said that she herself was a Hindu, and she admitted that none of their sons were *shinbuey* because they were brought up as Hindus. Although in this case she said that she "professed the Buddhist religion as well as the Kalai religion," she also admitted that she worshipped periodically at the Kalai temple. She said that Ohn Ghine had an image of Ganesh in his house as well as an image of Buddha. She said that the only ceremony performed at Ohn Ghine's funeral was the Hindu ceremony and this statement is borne out by the newspaper account of the ceremony (Exhibit H). In various affidavits Ma Yait and her daughter Ma Nu described themselves as Hindus and made solemn affirmations instead of being sworn like Buddhists. Ma Yait's father and grandfather were Kalais. It was only on the suggestion of a lawyer and in connection with the litigation that she began to describe herself and her husband as Kalais instead of Hindus, the object clearly being to give colour to any doubts that might arise as to the application of Hindu Law to Ohn Ghine's estate.

In the first written statement in the present case Ma Yait said that "Ohn Ghine was a Kalai and professed the Hindu religion and also observed Buddhist rites," but in an

amended written statement this was altered to "Ohn Ghine was a Kalai and was not a Hindu and he professed both Hindu and Buddhist religions."

It is not contended now that Ohn Ghine was a Buddhist by religion. But it is argued that his Hinduism was so overlaid and interlaced with Buddhist practices and beliefs that he cannot properly be regarded as a Hindu for the purposes of section 13. A large portion of the evidence, oral and documentary, is directed to establishing this contention. It shows that Ohn Ghine like other Kalais had strong leanings towards Buddhism. He built a Buddhist Paya-kayaung or image house and placed a figure of Buddha in it. He received regular visits from a Buddhist Sayadaw, U Kawthala, D. W. No. 11, who says that Ohn Ghine was a Buddhist. This witness says he knows that Ohn Ghine was a Buddhist because he was Ohn Ghine's religious preceptor and Ohn Ghine did what he told him. He admits that Ohn Ghine rejected his advice to have his sons *shinbuey*. He tries to explain Ohn Ghine's worship of Ganesh *Maha peinne* as a sort of *nat* worship. Ohn Ghine knew Buddhist prayers and recited them. He used to feed *pongyis*. *Pongyis* attended the funeral ceremonies of his family and preached the Buddhist law to those who were present. Ohn Ghine observed the Buddhist fasts. He asked U Kawthala "to teach his sons what they should do while in England and he, *i.e.*, the *pongyi* instructed them according to the Buddhist religion." Exhibit 7 is a printed card of "advice to my son." Most of the precepts in it are such as a father of any religion might send to his son but it includes an admonition to think daily of the Buddha, the law and the congregation and to repeat certain Pali prayers, and this is, of course, a purely Buddhist admonition. Ohn Ghine used to send cards like this to his son who was being educated in England. U Kawthala like certain other witnesses for the defence tries to prove too much, for he says that Ohn Ghine professed Buddhism and nothing else.

Ohn Ghine was a Municipal Commissioner of Rangoon. He was one of the Burmese representatives but no religious qualifications are required for that. In matters of daily life apart from his religion, Ohn Ghine was

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hardly distinguishable from the Burmese community in general and it appears that it was as a prominent member of the Burmese community that he was sent to England at the time of King Edward's Coronation. Great stress has been laid on the leading part taken by Ohn Ghine in supporting various important Buddhist interests. In 1900 he wrote to the Governor of Madras (Exhibit 4), urging that certain Buddhist relics lying in the Madras Museum should be made over to him to be placed in a shrine which he was preparing at Rangoon and he referred in this letter to his Buddhist co-religionists. In a letter dated 18th February 1901 to the Colonial Secretary, Ceylon, Exhibit 1-A, he joined with several others in advocating the cause of the Burmese Buddhist pilgrims to the Buddhist temple of the sacred tooth relic at Kandy, and the writers of this letter describe themselves as "Burmese pilgrims now on a visit to Ceylon." As one of the community of the Buddha Gaya Missionary Society, Exhibit 6, he also championed the cause of the Burmese Buddhists against the Mohunt of a Hindu temple at Gaya with reference to a certain *zayat* erected there by King Mindon for the use of Burmese pilgrims. He was one of the residents of Rangoon who presented an address on behalf of the Buddhist community to the Viceroy Lord Curzon on his visit to Rangoon in 1901.

At first sight these incidents in his career appear to support the contention that Ohn Ghine was as much a Buddhist as a Hindu. To understand their real meaning it is necessary to look at Ohn Ghine's career and aspirations as a whole. He was a man of ambition who had amassed a considerable fortune by his business capacity and industry. Sprung from an obscure class he had little prospect of taking a leading place so long as he was identified merely with the Kalais. Caste prejudices kept Indian Hindus aloof from him and would prevent him from any kind of leadership among the Hindus generally. But by throwing in his lot with the tolerant Burmese who formed the bulk of the population of the province, he could hope to attain some distinction. He was as much Burmese as Indian by blood, and in dress, language and manner of life he was more Burmese than Indian. He admired the Buddhist doctrines and found much that was attractive

in Buddhist religious practices. Material interests chimed in with his inclinations and Ohn Ghine stood forth as a representative of the Burmese. He received more than one mark of distinction from Government and probably hoped for more. In these circumstances no special significance can be attached to his posing as a member of the Burmese Buddhist community, by associating with which he had achieved most of his success in life. His readiness to figure as a co-religionist of Buddhists in 1901 may be compared with his attitude of conservative Hinduism in Ma Nu's case five years later. On each occasion there was exaggeration with a purpose, and neither incident affords a safe guide to Ohn Ghine's actual religious status. The evidence shows that he never renounced or repudiated his membership of the Kalai community and in spite of his liberality to Buddhist monks and his liking for Buddhist prayers and practices he drew the line at having his sons *shinbuey*. He continued his Hindu worship at the Kalai temple and when he died, it did not occur to his family to have his obsequies conducted according to any rites except those of the Hindus, and his ashes were sent to Benares. The marriage of his son Chit Maung with a Burmese girl (see Exhibit 8) according to Burmese custom in 1910 was no doubt a serious lapse from rectitude for a Hindu, but this incident can only be regarded as an example of the general laxity of the marriage customs of the Kalai community as compared with those of the recognised Hindu castes. I, therefore, think that there can be no doubt that Ohn Ghine was a Hindu by religion.

It has been argued that in their use of the term "Hindu" in section 13 the Legislature contemplated that the person whose estate is the subject of the litigation should be of the Hindu religion not only by actual profession but by birth also, i.e., that he should be the lawful issue of a Hindu marriage, and that Ohn Ghine was not a Hindu by birth because his Hindu grandfather was not united in lawful wedlock to his Talaing wife and, therefore, that Ohn Ghine's father was illegitimate and was not born a Hindu.

My learned colleague in his judgment has shown that the passage in *Charlotte Abraham v. Francis Abraham* (4),

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on which this argument rests, is incapable of the interpretation which the respondent's Counsel seeks to put upon it and that it is not necessary for a man to have been born a Hindu in order to have the Hindu Law applied to him. But even assuming that the term Hindu should be restricted to persons who are born Hindus, I think this condition is satisfied in Ohn Ghine's case. The validity of his grandfather's marriage was never questioned till this litigation began. It may have infringed the caste regulations to which he was subject in India, but caste regulations do not constitute Hinduism though they flourish among Hindus. Apart from caste regulations there is nothing to show that the marriage was invalid. It was presumably recognised as a good marriage by the class in which Ohn Ghine's grandfather lived in this country and I think it would be preposterous for the Courts to stigmatise it now as invalid according to Hindu Law. The ordinary presumption of validity should prevail.

The learned Judge on the Original Side accepted the view that section 13 is applicable only to orthodox Hindus and he decided that Ohn Ghine's observance of Buddhist practices was inconsistent with orthodox Hinduism. It would be an invidious, not to say an impossible, task for the Civil Courts to determine questions of orthodoxy. If the learned Judge's decision on this point were to prevail, the Courts would become the arena of warring sects and schools and would scarcely ever be free from the *odium theologicum*. But it is happily beyond doubt that the Courts have not to concern themselves with such abstruse matters. In the case of *Bhagwan Koer v. Bose, J. C.* (3) their Lordships of the Privy Council laid down that "mere departures from orthodoxy in matters of diet and ceremonial observances could not have the effect of excluding from the category of Hindu one who was born within it and who never became otherwise separated from the religious communion in which he was born." When we find a member of a dissenting sect such as the Sikhs included authoritatively within the term Hindu even when the Sikh has gone a step further and has joined the Brahmo Samaj, we need have no compunction in applying the term Hindu to people like the Kalias who in

spite of their Buddhist leanings are certainly of Hindu stock and worship the Hindu gods and have never renounced the faith of their fathers.

I, therefore, agree with my learned colleague in holding that Maung Ohn Ghine was a Hindu as contemplated in section 13. I also concur in the proposed order as to costs.

Appeal allowed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1573 OF 1913.
July 3, 1916.
Present:—Mr. Justice Shadi Lal.
SUNDAR AND OTHERS—DEFENDANTS—
APPELLANTS
versus
NAG AND OTHERS—PLAINTIFFS,
BAKHSHI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Limitation Act (IX of 1908), s. 26—Easement, acquisition of—Water-mill, right to work—"As of right," meaning of.

In order that the enjoyment of a right should ripen into an easement, it should be peaceable, open and as of right. [p. 789, col. 1.]

If the servient owner can, whether the dominant owner likes it or not, put a stop to the enjoyment, there is really no easement, because the very idea of right, which necessarily underlies an easement, is negatived. [p. 789, col. 1.]

Burrows v. Lang, (1901) 2 Ch. 502 at pp. 510, 511; 70 L. J. Ch. 607; 84 L. T. 623; 49 W. R. 564; 17 T. L. R. 514, followed.

User as of right means a user claimed against the will of the person over whose property it is sought to be exercised. [p. 789, col. 2.]

Gardner v. Hodgson's Kingston Brewery Company, Limited, (1903) A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458, followed.

Plaintiffs had worked a water-mill on the land of the defendants for over fifty years, paying Re. 1 annually to the latter for the use of the mill:

Held, that the fact of the payment proved that the plaintiffs' user was at the will and pleasure of the defendants and was not as of right, and, therefore, could not ripen into an easement. [p. 789, col. 2.]

Second appeal from the decree of the District Judge, Kangra, at Dharmsala, dated the 30th April 1913, affirming that of the Munsif, 2nd class, Nadaun, District Kangra, dated the 9th December 1912, decreeing the claim.

Bakhshi Tek Chand, for the Appellants.

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Mr. Nand Lal, for the Respondents.

JUDGMENT.—The facts of this case are set forth in the order of remand made by the Hon'ble Mr. Justice Chevis on the 2nd of May 1914. The learned Judge, after holding that the plaintiffs, who claimed the right to work a water-mill on the land of the defendants, had failed to establish a grant, directed further enquiry into the point whether they had worked the mill as an easement, and as of right, without interruption for twenty years. Now, the report submitted by the Munsif shows that the plaintiffs have been enjoying the right for nearly fifty years, but the question is whether all the conditions laid down by section 26 of the Indian Limitation Act as to the acquisition of an easement by prescription have been fulfilled.

It is a firmly established doctrine that the enjoyment of the right on the part of the dominant owner should be *nec vi, nec clam, nec precario*, that is, should be peaceable, open and as of right. From the facts proved in this case it may be safely inferred that the user was neither forcible nor clandestine; but can it be said that it was not precarious? Now the plaintiffs in their plaint allege, and to the same effect is the evidence given by their witnesses, that they have been paying Rs. 1 per annum in lieu of the privilege of working the water-mill. This payment leaves no doubt whatever that the enjoyment was not as of right. The words "as of right" connote that the person claiming the easement must have exercised it as if he had been the true owner, without permission or license from any one. The enjoyment in this case depended, not on right, but on the will of the servient owner. As observed by Farwell, J., in *Burrows v. Lang* (1), "If the servient owner can... whether the dominant owner likes it or not—put a stop to the easement, there is really no easement, because the very idea of right which necessarily underlies an easement is negatived."

The payment made periodically may be evidence that the user of the alleged easement was not user as of right, but with the license of the owner of the servient tenement. "One of the most common modes of preventing such a user growing into

a right," observed Lord Halsbury in *Gardner v. Hodgson's Kingston Brewery Company, Limited* (2), "is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words 'as of right,'"

"I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parole license, it might be withdrawn, and her action would be for damages, but she would have no right to the way. And in no sense could the right be the right contemplated by the Act. That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean an user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought."

The fact of payment is fatal to the plaintiffs' case. They have certainly proved that their enjoyment has not been either *vi* or *clam*, but they have failed to establish that it has not been *precario*. Accordingly I accept the appeal, and setting aside the decrees of the Courts below dismiss the suit. In view of all the circumstances I leave the parties to bear their own costs in all the Courts.

Appeal accepted.

(2) (1903) App. Cas. 229; 72 L. J. Ch. 555; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458.

(1) (1901) 2 Ch. 502 at pp. 510, 511; 76 L. J. Ch. 607; 84 L. T. 623; 49 W. R. 564; 17 T. L. R. 514.

JAGABANDHU DUTT v. RAJANI KANTA PAL.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 324 AND 337 OF 1915.

January 25, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

IN No. 324

JAGABANDHU DUTT—PLAINTIFF—

APPELLANT

versus

RAJANI KANTA PAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

IN No. 337

RAJANI KANTA PAL—DEFENDANT—

APPELLANT

versus

JAGABANDHU DUTT—PLAINTIFF AND

OTHERS—RESPONDENTS.

Land Revenue Sales Act (XI B.O. of 1859), s. 36, object of—Benami purchase, right of third party to raise question of—Appeal, dismissal of—Discussion of matters affecting respondents, propriety of.

The object of section 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing his claim against the true owner in respect of the *benami* property. [p. 791, col. 1.]

Therefore, in a suit by a third party to enforce his right in respect of property sold under Act XI of 1859, the question whether the defendant purchased the property *benami* is not excluded from the consideration of the Court by reason of section 36 of the Act. [p. 791, col. 1.]

Chundra Kaminy Debea v. Ram Ruttun Pattuck, 12 C. 302; 6 Ind. Dec. (N. S.) 205, referred to.

In an appeal by a defendant in which he is found to be a mere *benamidar*, it is not open to the Court to go into other matters that affect the rights of the respondents. [p. 791, cols. 1 & 2.]

Appeals against the decrees of the District Judge, Chittagong, dated the 13th November 1914, modifying that of the Munsif, 1st Court, at Satkhira, dated the 17th July 1913.

FACTS of the case appear from the judgment.

Babu Prabodh Kumar Das, for the Plaintiff. Appellant.—It has been found by the learned Judge that the defendant No. 2 was merely a *benamidar* for the defendant No. 1 and that he had no interest in the subject-matter in dispute. This has been found in the appeal to the District Judge, which was preferred only by the defendant No. 1. My submission is that in that appeal it was not competent to the learned Judge to adjust the respective rights of the respondents, *viz.*, the plaintiff and the defendant No. 1. My

next point is that the appeal by the defendant No. 2 to the lower Appellate Court was not competent.

Babu Khitish Chandra Sen, for the Defendant-Respondent.—Having regard to section 36 of Act XI of 1859 under which the estate was sold for arrears of revenue, the plaintiff was not competent to bring a suit to oust a certified purchaser at a revenue sale on the ground that he was a *benamidar* for somebody else. So the learned Judge was not competent to come to a finding that the defendant No. 2 was a *benamidar* for somebody else. Section 36 is a complete bar to the plaintiff's suit.

Babu Probodh Kumar Das, in reply.—Section 36 of Act XI of 1859 does not at all affect the present suit.

The object of section 36 is to prevent the true owner from disputing the title of his *benamidar*. It does not preclude the plaintiff, a third party, from enforcing his claim against the true owner as regards the *benami* property. See section 53 of Act XI of 1859; *Chundra Kaminy Debea v. Ram Ruttun Pattuck* (1).

JUDGMENT.—These are two appeals preferred against a decision of the learned District Judge of Chittagong, dated the 13th February 1914, reversing the decision of the Munsif of Satkhira. The plaintiffs brought the suit to recover a share in a certain revenue-paying estate sold at a revenue sale for arrears of revenue and said to have been purchased by the defendant No. 1 in the *benami* name of the defendant No. 2 and alternatively he asked that if the sale was a valid sale, he might be given his share in the surplus sale-proceeds which had been withdrawn from the Collectorate by the defendant No. 1. The case came on for trial before the Munsif who found, first of all, that the defendant No. 2 was a *benamidar* of the defendant No. 1 and that the real purchaser was, in fact, the defendant No. 1. The learned Munsif also found, for reasons which commended themselves to him, that as between the plaintiff and the defendant No. 1, the plaintiff was entitled to recover the share he sued for, less a particular share which the plaintiff alleged he acquired title to by a document called a *mukh-*

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tiarnama. Against that decision the defendant No. 2 appealed to the learned District Judge. The learned District Judge on hearing the appeal agreed with the finding of the Munsif that the defendant No. 2 was a *benamidar* of the defendant No. 1, and that, therefore, he had no interest in the property. *Prima facie*, therefore, directly the learned District Judge came to the conclusion that the defendant No. 2 had no interest in the property, provided the point was capable of being entered into in the suit, the rest of his judgment was unnecessary and improper because no appeal had been filed by the defendant No. 1, and having come to a clear conclusion that the defendant No. 2 had no interest in the property, it was not necessary for the Judge to enquire into the other matters in order to adjust the rights of the parties before him. The case that has been made before us is that the finding as to the defendant No. 2 being a *benamidar* was a matter which was excluded from the consideration of the Court, having regard to section 36 of Act XI of 1859, under which these revenue-paying estates are sold for arrears of revenue. That section is in these terms: "Any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." The matter has been the subject of judicial decisions and the matter is concluded so far as this Court is concerned. In the case of *Okundra Kamini De'ea v. Ram Ruttun Puttuck* (1) it was held that section 36 of Act XI of 1859 was passed in order to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing his claim against the true owner in respect of the *benami* property. That is exactly the case here. Section 36 is, therefore, no bar to the plaintiff's right in the present suit. That being so, directly the Judge came to the conclusion on the appeal before him that the defendant No. 2 had no interest in the subject-matter in dispute and was merely a *benamidar*, it was not open to him in that appeal to go into the other matters

that affected purely the rights of the respondents in that appeal and to vary the judgment of the first Court in the manner he has done in the course of his judgment. The result, therefore, is that the appeal of the plaintiff, namely Appeal No. 324 of 1915, must be allowed with costs and the appeal of the defendant No. 2, that is, Appeal No. 337 of 1915 must be dismissed with costs; that is to say, the decree of the Munsif will be restored with costs to the plaintiff in all Courts.

Appeal No. 324 allowed;
Appeal No. 337 dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 1444
OF 1916.

November 1, 1916.

Present:—Mr. Justice Shadi Lal.

THE AMRITSAR NATIONAL BANKING
COMPANY, LTD., IN LIQUIDATION,
THROUGH F. E. BANGHAM, LIQUIDATOR—
APPELLANT

versus

MOHAN LAL AND OTHERS—

RESPONDENTS.

Companies Act (VII of 1913), ss. 171, 225—Suit against company after order of winding-up—Permission—Appellate Court, power of—Suit for declaration of non-liability—Jurisdiction.

An Appellate Court does not ordinarily interfere with the discretion of a Court in the matter of granting leave to continue an action against a company which is being wound up, but where the order of the lower Court is wholly wrong it will not be sustained. [p. 792, col. 1.]

Thames Plate Glass Co. v. Land and Sea Telegraph Construction Co., (1871) 6 Ch. App. Cas. 643; 25 L. T. 236; 19 W. R. 764, referred to.

Persons alleged to be contributories of a company which is being wound up cannot, after the order of winding up, be allowed to have recourse to an action for the purpose of having an adjudication upon their liability to pay calls on their shares. Such a matter is peculiarly within the jurisdiction of the Court conducting the liquidation and cannot be decided by any other Court. [p. 792, cols 1 & 2.]

Semle.—An order granting permission to proceed with an action against a company, after the winding-up order has been made, does not amount to a permission to institute the suit. [p. 792, col. 1.]

Miscellaneous first appeal from the order of the Additional Judge, Lahore, dated the

PERALA KRISHNAYYAN CHETTIAR v. PADMANATHAN CHETTIAR.

6th May 1916, directing the suit to proceed in the Court of the Munsif, at Muktsar, District Ferozepore.

Mr. Herbert, for the Appellants,
Mr. Gullu Ram, for the Respondents.

JUDGMENT.—The suit by the respondents against the Amritsar National Banking Company, Limited, was instituted on the 13th of January 1916, after an order directing the liquidation of the company subject to the supervision of the Court had been passed by this Court. There can be no manner of doubt that under section 171 read with section 225 of the Indian Companies Act, VII of 1913, no suit or other legal proceeding could be commenced against the company except by leave of the Court, and it is manifest that no such leave was obtained by the respondents prior to the institution of their suit. The order of the Additional Judge grants them leave to proceed with their suit, but the question whether it should have been instituted has never been determined by the Liquidation Court.

It appears that the object of the suit is to obtain a declaration that the respondents did not in the eye of law become share-holders of the company. This is, however, a matter which can be satisfactorily determined in the winding-up, and no action is necessary for the purpose. Indeed, the settlement of the list of contributories is an important function of the Liquidation Court, and the business of winding-up would come to a standstill, if each contributory were allowed to institute a regular suit for the determination of his liability.

It is true that the Appellate Court does not ordinarily interfere with the discretion of the lower Court in the matter of granting leave to continue an action, *vide Thames Plate Glass Company v. Land and Sea Telegraph Construction Company* (1), but the order of the Additional Judge in this case is wholly wrong, and cannot be sustained. The Legislature never contemplated that the persons alleged to be the contributories of the company should, after the order of winding-up, be allowed to have recourse

to an action for the purpose of having an adjudication upon their liability to pay calls on their shares. Such a matter is peculiarly within the jurisdiction of the Court conducting the liquidation, and cannot be decided by any other Court.

Accordingly I accept the appeal, and revoking the leave granted by the Additional Judge I remit the case to the lower Court, with the direction that it should call upon the respondents to show cause why their names should not be placed upon the list of contributories. The Court should allow both the parties to adduce their proof and disproof and then adjudicate upon the liability of the respondents. I make no order as to costs in this Court.

Appeal accepted; Case remitted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 316 OF 1914.

July 11, 1916.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Phillips.

PERALA KRISHNAYYAN CHETTIAR—
DEFENDANT—APPELLANT

versus

G. PADMANATHAN CHETTIAR—

PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 2, 7 (2), 119—Proposal—Counter-proposal—Silence, when amounts to acceptance—Binding contract, when made—Order for goods—Consignment of larger quantity—Refusal to take delivery—Damages.

Where acceptance of a proposal is not absolute and unqualified, but is subject to reservations, it amounts to a counter-proposal. [p. 793, col. 2.]

Under sections 3 and 7 (2) of the Contract Act read together, a mere failure to reply to a counter-proposal would not *per se* amount to an acceptance of it. [p. 794, col. 1.]

Felthouse v. Bindley, (1862) 6 L. T. 157; 11 C. B. (n. s.) 869; 31 L. J. C. P. 204; 10 W. R. 423; 142 E. R. 1037; 132 R. R. 784, followed.

Quære.—Whether the omission to reply to a counter-proposal which conveyed an intimation that silence would be regarded as an acceptance of it, would amount to an acceptance, [p. 794, col. 1.]

(1) (1871) 6 Ch. App. Cas. 643; 25 L. T. 236; 19 W. R. 764.

PERALA KRISHNAYYAN CAETTIAR v. PADMANATHAN CHETTIAR.

The consignment of a larger quantity of goods than that ordered will not entitle the person ordering to refuse to take delivery of the consignment altogether, when the goods ordered can be easily separated from the quantity consigned. [p. 793, col. 1.]

Defendant wrote to plaintiff on 17th October 1909 to send 15 or 20 bags of areca nuts "at once." Plaintiff replied on 28th October 1909 that he would send the goods "within 15 or 20 days." On 1st December 1909 plaintiff, without waiting for a reply, sent 25 bags of areca nuts, which the defendant refused to accept. In a suit for damages for breach of contract:

Held, that under section 119 of the Contract Act, defendant was not justified in refusing to take delivery as the separation of 5 bags from the main consignment was not attended with risk or trouble. [p. 793, col. 2.]

Held, also, that the plaintiff's letter dated 20th October 1909 was in effect a counter-proposal, the defendant's omission to reply to it did not amount to its acceptance and there was no binding contract between the parties. [p. 793, col. 2; p. 794, col. 1.]

Haji Mahomed Haji Jiva v. Spinner, 24 B. 510; 2 Bom. L. R. 691; 12 Ind. Dec. (N. S.) 871, *Crossley v. Maycock*, (1874) 18 Eq. 180; 43 L. J. Ch. 379; 22 W. R. 387; *Jones v. Daniel*, (1894) 2 Ch. 332; 63 L. J. Ch. 562; 8 W. R. 579; 70 L. T. 588; 42 W. R. 687; *Jordan v. Norton*, (1838) 4 M. & W. 155; 1 H. & H. 234; 7 L. J. Ex. 281; 150 E. R. 1382; 51 R. R. 508, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Sadasiva Aiyar, dated the 7th August 1914, in Civil Revision Petition No. 347 of 1913, preferred against the decree of the Court of the Subordinate Judge, Palghat, in R. S. C. S. No. 765 of 1910.

Mr. T. Prakasam, for the Appellant.

Mr. P. V. Parameswara Aiyar, for the Respondent.

JUDGMENT.—The defendant wrote to the plaintiff on the 17th of October 1909 to Palghat, where the latter was permanently residing, to send 15 or 20 bags of areca nuts "at once". The letter also stated that the plaintiff should attend to other business only after sending this consignment. The plaintiff, who had left Palghat owing to plague, wrote on the 28th October that he would send the goods "within 15 or 20 days." No reply was admittedly received from the defendant in answer to this suggestion. 25 bags of nuts were finally sent by the plaintiff on the 1st of December. The defendant refused to take delivery of them. Hence this suit for damages for breach of contract. The Subordinate Judge dismissed the suit. In revision, the

learned Judge of this Court awarded damages to the plaintiff. We agree with the learned Judge that the Subordinate Judge was wrong in holding that because 25 bags were sent instead of 15 or 20 bags, the defendant was justified in refusing to take delivery. Under section 119 of the Contract Act, the test is whether the separation of the 5 or 20 bags from the main consignment was attended with "risk or trouble." We fail to see how the acceptance of 20 bags consigned would be risky or troublesome. On one other ground on which the Subordinate Judge's judgment proceeds, namely, that goods of cheaper value were not sent, we are in agreement with the learned Judge that the lower Court has not correctly understood the letter asking for goods.

On the main question whether there was a completed contract, we are constrained to differ from the learned Judge. The proposal of the defendant that there should be an immediate consignment was not accepted by the plaintiff. He apparently understood that time was of the essence of the contract, because he wrote back to say that he could send the goods only in 15 or 20 days. The acceptance was not absolute and unqualified as required by section 7, clause (1), of the Contract Act. According to the authorities both in England and in this country, the letter of the plaintiff promising to send the goods within the time specified by him amounted to a counter-proposal: *Haji Mahomed Haji Jiva v. Spinner* (1); per Jessel M. R. in *Crossley v. Maycock*, (2) and *Jones v. Daniel* (3); also *Jordan v. Norton* (4).

The remaining question is whether this counter-proposal of the plaintiff was accepted by the defendant. It is true that under section 3 of the Contract Act, the conduct of the acceptor or 'an omission' on his part to communicate may under certain circumstances amount to an acceptance. But to imply such an acceptance, the counter-proposal must have conveyed at least an in-

(1) 24 B. 510; 2 Bom. L. R. 691; 12 Ind. Dec. (N. S.) 871.

(2) (1874) 18 Eq. 180; 43 L. J. Ch. 379; 22 W. R. 387.

(3) (1894) 2 Ch. 332; 63 L. J. Ch. 562; 8 W. R. 579; 70 L. T. 588; 42 W. R. 687.

(4) (1838) 4 M. & W. 155; 1 H. & H. 234; 7 L. J. Ex. 281; 150 E. R. 1382; 51 R. R. 508.

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timation that silence would be regarded as an acceptance of the proposal. Reading section 3 and section 7, clause (2), together, it appears to us clear that a mere failure to reply to a counter-proposal would not *per se* amount to an acceptance of it. Willes, J., in *Felthouse v. Bindley* (5) went the length of saying that a person making a counter-proposal "had no right to put upon the nephew (acceptor) that he should consider his offer accepted, if he did not write." It may be open to argument whether under section 7 (2) read with section 3, an intimation of the kind referred to by the learned Judge, when not replied to, may not amount to an acceptance. However that may be, in the present case there was no such intimation in the counter-proposal as rendered it obligatory on the defendant to reply to it. We are, therefore, of opinion that neither the first proposal nor the counter-one was accepted by the respective parties so as to establish a binding contract between them. In this view, the refusal of the defendant to take delivery was not wrongful. We reverse the decree of the learned Judge and restore that of the Court below with costs.

Appeal allowed.

V.R.P.

(5) (1862) 6 L.T. 157; 11 C.B. (N.S.) 869; 31 L.J. C.P. 204; 10 W.R. 423; 142 E.R. 1037; 132 R.R. 7:4.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1852 OF 1914.

January 8, 1917.

Present:—Mr. Justice Walsh.

MUHAMMAD KAMIL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

HABIBULLAH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Evidence Act (I of 1872), s. 65 (a).—*Secondary evidence*—*Original document in possession of defendant*—*Adverse possession*—*Pleadings*—*Burden of proof*.

Semble.—Where an original document is in the possession of the defendant who knows from the plaint that he would be required to produce it but does not produce it, and the plaintiff's evidence that he searched for it remains uncontradicted, the latter is entitled to give secondary evidence of the contents of the document under section 65 (a) of the *Evidence Act*. [p. 796, col. 2.]

In a suit for declaration of title upon the allegation that the defendant had repudiated it, the onus is on the defendant both to plead and to prove adverse possession for the statutory period. [p. 797, col. 1.]

Secretary of State v. Chelikani Rama Rao, 35 Ind. Cas. 902; 31 M.L.J. 324; 20 C.W.N. 1311; (1916) 2 M.W.N. 224; 39 M. 617; 20 M.L.T. 435; 4 L.W. 486; 18 Bom. L.R. 1007; 25 C.L.J. 69; 14 A.L.J. 1114, followed.

Second appeal from a decision of the District Judge, Azamgarh, dated the 17th September 1914.

FACTS.—This was a suit for a declaration that the house in dispute belonged jointly to the plaintiffs and defendants Nos. 4 to 6 and that defendant No. 3 was in possession thereof as a tenant.

The plaintiffs came into Court on the allegation that the house in dispute belonged to defendants Nos. 1 and 2 who sold it to Farhat Ali, the predecessor-in-title of plaintiffs and defendants Nos. 4 to 6, by means of a registered sale-deed dated the 26th of November 1901, and that the said document was in possession of defendants Nos. 4 to 6. The plaintiffs further alleged that the house in dispute was given on rent by Farhat Ali to defendant No. 3, who now denied the plaintiffs' title.

Defendant No. 3 alone contested the suit and contended *inter alia* that the house in dispute belonged to him, and that he was not in possession thereof as a tenant.

Besides other evidence, oral and documentary, the plaintiffs produced in evidence a certified copy of the sale-deed dated the 26th of March 1901. The learned Munsif held that the plaintiffs had proved that the original sale-deed was missing and admitted the certified copy in evidence, and relying upon it and other evidence produced by the plaintiffs decreed the suit. On appeal by defendant No. 3, the learned District Judge held that the evidence adduced by the plaintiffs to prove the loss of the original sale-deed was not convincing and as they had not issued any notice to defendants Nos. 4 to 6 calling upon them to produce the original sale-deed, the certified copy was inadmissible in evidence. He further held that the plaintiffs had failed to prove their possession over the house in dispute within twelve years prior to the institution of the suit, and on these findings he allowed the appeal and dismissed the suit.

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The plaintiffs appealed.

Mr. *Iqbal Ahmad*, for the Appellants.—The plaintiffs' allegation was that the original sale deed was in the possession of defendants Nos. 4 to 6, and as from the nature of the case they must have known that they would be required to produce it, it was not at all necessary for the plaintiffs to give a notice to the said defendants to produce the original. [He referred to sub-clause 2 of the proviso to section 66 of the Evidence Act.] Moreover no objection should have been allowed to be taken in the lower Appellate Court as to the admissibility of a copy of a document which was admitted in evidence by the Court of first instance without any objection: *Kishori Lal Goswami v. Rakhal Das Banerjee* (1).

Therefore the copy produced by the plaintiffs should not have been rejected as inadmissible in evidence. Again, the finding of the Court of first instance, that title was with the plaintiffs, was based not only upon the copy of the sale-deed, but upon other evidence as well, which the learned Judge in the Court below had neither discussed nor disbelieved. The mere fact that the copy of the sale-deed was admissible in evidence was no ground for reversing the decree of the first Court, as independently of the said document there was sufficient evidence upon the record to justify the decision of that Court.

He relied on section 167 of the Evidence Act.

The cardinal point to be decided in the case was, whether or not defendant No. 3 came in possession of the house in dispute as the plaintiffs' tenant. If he did, section 116 of the Evidence Act was in his way, and he was estopped from denying the plaintiffs' title, and the question whether or not the plaintiffs were really the owners of the house in dispute was absolutely immaterial for the decision of the case.

No question of limitation arose in the case. It was common ground that physical possession was with the defendant, but the plaintiffs' case was that the possession of the defendant was in the capacity of a tenant. Moreover, if the plaintiffs were

originally the owners of the house in dispute, they need not have proved their possession within twelve years prior to the institution of the suit. The burden of proving that the plaintiffs' title had been extinguished by reason of adverse possession of the defendant was upon the defendant-respondent: *Secretary of State v. Chelikani Rama Rao* (2).

The numerous cases in India that laid down that at the date of the suit the plaintiff must prove what was termed as subsisting title, had been inferentially overruled by the said decision of their Lordships of the Privy Council.

Mr. *S. M. Y. Hasan*, for the Respondent.—The plaintiffs were not originally the owners of the house in dispute. They asserted that they had purchased the house from the original owner. Under these circumstances it lay upon them to prove the sale-deed alleged by them. It was for the plaintiffs to prove that the original sale-deed was missing before they could adduce secondary evidence of the sale-deed. According to the finding of the Court below, this the plaintiffs had failed to do. Therefore, the copy of the sale-deed was rightly rejected by the learned Judge in the Court below.

The finding of the Court below that the plaintiffs had failed to prove their possession within the statutory period was a finding of fact based upon evidence and was fatal to the plaintiffs' case.

It was for the plaintiffs to prove that they had a subsisting title not extinguished by the operation of limitation before the defendant could be called upon to substantiate a plea of adverse possession. He relied on *Inayat Husein v. Ali Husein* (3).

Mr. *Iqbal Ahmad* was not heard in reply.

JUDGMENT.—This is an action brought for a declaration of title, possession and arrears of rent of a certain house and trees. The plaintiffs alleged that they, together with the defendants Nos. 4 to 7, who have

(2) 35 Ind. Cas. 902; 14 A. L. J. 1114 at pp. 1125, 1126; 31 M. L. J. 324; 20 O. W. N. 1311; (1916), 2 M. W. N. 224; 39 M. 617; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1037; 25 C. L. J. 69.

(3) 20 A. 182; A. W. N. (1898) 19; 9 Ind. Dec. (N. S.) 478.

(1) 31 C. 155,

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been made *pro forma* defendants, are the heirs of Sheikh Farhat Husain, that the said property was sold by the defendants Nos. 1 and 2 to the said Farhat Husain for Rs. 99-15-0 by a sale-deed dated the 26th of March 1901, that the defendant No. 3 was a tenant at Rs. 1-8-0, that no rent had been paid since April 1913 and that the defendant No. 3 repudiated the plaintiffs' title on the 15th of April 1914. They further alleged that the defendant No. 1 had brought a collusive suit against defendants Nos. 2 and 3 to which the plaintiffs were no party, and by which defendant No. 3 obtained in March 1914 a decision in his favour that he was the owner. They further alleged that the original sale-deed was in the possession of defendants Nos. 4 to 7. The defence of the defendant No. 3 in substance denied the plaintiffs' title and alleged that he himself was the owner. No other written statement appears on the record. There was no plea of adverse possession nor was any question pleaded as to the Statute of Limitation. So far the dispute appears to be a very ordinary and a simple one of title. The Munsif found that the original sale-deed was missing and that the plaintiffs were entitled to put in a certified copy, which is not suggested to be otherwise than genuine. The Munsif found that it was genuine and that it transferred title to the property in question to the plaintiffs' father. He also found that the defendant No. 3 was a tenant, that he had received a notice to quit from the plaintiffs' father in 1904, that the said notice was sent on a post card which was traced to the possession of the defendant on the 15th of June 1914, and that the defendant, when questioned about the same, denied all knowledge of it. He found also that the defendant was put back in possession by the plaintiffs' father on promising to pay rent regularly, that the plaintiffs had been realising rents and although the defendant was able to produce receipts for payment of house-tax, he could produce none for 1904, the year when he had been ejected. He found himself unable to believe the relevant evidence called on the defendant's behalf, most of which was irrelevant. Under the circumstances it is not surprising that the Munsif gave judgment for the plaintiffs. It is difficult to see what else he could have done. On

appeal the District Judge said that two questions arose: the *first*, one of title, and the *second*, whether the plaintiffs had been in possession within the last twelve years. No such question as the second arose at all. It was not pleaded and it was not raised in the memorandum of appeal.

On the question of title, he held that the copy of the sale-deed was inadmissible. In this I think he was wrong. Even if paragraph 8 of the plaint, alleging that the defendants Nos. 4 to 7 had got the original, was not a sufficient notice to produce, their possession of it as co-heirs would be both lawful and natural and the uncontradicted testimony of the plaintiffs that they had searched for it seems to me sufficient to entitle the plaintiffs to put in their copy. The plaintiffs' position would no doubt be stronger, if they could show who last had it and if they had summoned them as witnesses to produce it. But I think the copy was admissible under section 65 (a) of the Indian Evidence Act, inasmuch as the original appears to be in the possession of the defendants Nos. 4 to 7 who knew from the plaint that they would be required to produce it. This, however, is of no importance. The District Judge clearly overlooked the provisions of section 167 of the Evidence Act. There was abundant evidence if the lower Appellate Court believed it (the Munsif had already believed it) to justify the decision. The District Judge appears to have ignored it. At any rate he has come to no decision upon it.

It was, however, argued before me that there was a finding of fact which was fatal to the plaintiffs' case, namely, that the plaintiffs had not been in possession within limitation. I have no idea what this finding means. If it was intended to be a finding that the defendant had been in adverse possession for more than twelve years, it was not competent for the Judge to find it. The point was never raised by the defendant who pleaded his own title. But before the point can in any case be decided, it is necessary first to dispose of the question of the plaintiffs' title. If that failed, the suit failed. If the plaintiffs succeed in establishing their title, the question, if raised by the defendant, would then arise whether the plaintiffs

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had been dispossessed and whether the defendant No. 3 was their tenant, and whether his possession had become adverse and, if so, how and when. If the District Judge meant physical possession the finding is irrelevant. It was common ground that the defendant No. 3 was in physical possession. The plaintiffs alleged that they had been in receipt of rent up to April 1913 and that in 1904 their father was in actual physical possession. The District Judge has not addressed his mind to this point at all, nor has he dealt with the very clear finding of the Munsif. If the District Judge meant that even if the plaintiffs proved title they had still to prove what has been called "subsisting title" within twelve years, I find myself unable to agree with him. The plaintiffs did not allege that they had been dispossessed. They claimed a declaration of title upon the allegation that the defendant had repudiated it. If they established their title, the onus was on the defendant both to plead and to prove adverse possession for the statutory period. This has always been the law in England, and was recently re-affirmed by the Privy Council in the case referred to by Mr. Iqbal Ahmad and reported as *Secretary of State v. Chelikani Rama Rao* (2). The relevant passages are to be found at page 1126*. It overruled four decisions of the Madras High Court, and the cases in this country which have laid down the contrary must be taken to be no longer the law. When a plaintiff admits dispossession, different considerations arise. I am of opinion that the expression in the judgment of the District Judge relied upon by the respondent before me is not a finding of fact at all. It is a mistaken statement of fact and law founded upon a misdirection upon a point which was not before him. I have no alternative but to refer issues to the lower Appellate Court in order that final findings may be arrived at. I was asked to remand the whole case; but I see no real advantage to the parties in doing so. It is an unfortunate result. The whole value of the property in dispute is below Rs. 100. The case raised by the pleadings and decided by the Munsif appears to have been a simple and straightforward one. The plaint was filed nearly three years ago. This is the

*Page of 14 A. L. J.—Ed.

third Court in which it has been litigated. The costs must already exceed the whole value of the property and there are still issues of fact undecided. I refer the following issues:—

(1). Does it appear that the original sale-deed was in the possession of the defendants Nos. 4 to 7, or one or other and which of them?

(2). Have the plaintiffs made all reasonable search for the original?

(3). Is the original sale-deed lost, or have the plaintiffs been prevented for any reason, not arising from their own default or neglect, from producing it before the Munsif?

(4). Did the defendant No. 3 become the tenant of the plaintiffs' father sometime before 1904 at a rent of Rs. 1-8-0 or at some other and what rent?

(5). Was the defendant No. 3 ejected by the plaintiffs' father in or about the year 1904?

(6). Did the defendant No. 3 become the tenant of the plaintiffs' father at any and what time after 1904?

(7). Did the defendant No. 3 pay rent of Rs. 1-8-0 or any other and what rent to the plaintiffs' father or to the plaintiffs or any of them at any and what time after 1904?

(8). Is there sufficient evidence to establish the plaintiffs' title independently of the certified copy of the sale-deed?

The parties will be at liberty to tender any additional evidence on these issues. On return of the findings ten days will be allowed for objections.

Issues remitted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3045 OF 1911.

December 11, 1916.

Present:—Mr. Justice Jwala Prasad,
Syed MOHAMAD JAN AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

THE COMMISSIONER OF PATNA AND
OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 29, scope of—Compromise decree enhancing rent more than two annas in rupee, validity of—Limitation Act (IX of 1908), Sch. I, Art. 95—Suit to set aside decree obtained by fraud—Limitation.

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Section 29 of the Bengal Tenancy Act applies only to the case of a money rent of an occupancy *raiyyat* and not to that of a tenant at fixed rate. There is nothing in that section or in any other provision of the Act to prevent a landlord or tenant from entering into any agreement whereby the status of the tenant is raised from an occupancy *raiyyat* to that of a tenant at fixed rate, and as a consideration by the tenant for acquiring a higher status the rent is enhanced more than two annas in the rupee. [p. 798, col. 2.]

A suit to set aside a compromise decree alleged to have been obtained by fraud is governed by Article 95 of the Limitation Act Schedule I and must be brought within three years from the date of the knowledge of such fraudulent decree. [p. 799, col. 1.]

Appeal from the decision of the District Judge, Darbhanga, dated the 29th August 1911, reversing the decree of the Munsif, 2nd Court, Darbhanga, dated the 29th August 1910.

Mr. *Lachmi Narain Sinha*, for the Appellant.

Mr. *Fakhruddin*, for the Respondents.

JUDGMENT.—The appellants in this case are the tenants in respect of a holding of 13 *bighas* and odd in *Mauza* Barhampore. The Record of Rights recorded the holding in the name of the ancestor of the appellants, who was entered as a tenant at fixed rate with a rental of Rs. 16. The record was finally published in June 1900. About a year after, in May 1901, the landlord brought a suit for a declaration that the tenant was only an occupancy *raiyyat* and that the rental was Rs. 25-5-6.

The suit was decided on the basis of a compromise entered into between the parties, whereby the status of the tenant was declared to be that of a tenant at fixed rate and the rental was fixed at Rs. 25-5-6. This compromise decree is dated the 8th of July 1901. The estate of the landlord subsequently came under the Court of Wards of the District of Patna.

In 1905 a certificate for arrears of rent was issued and enforced against the tenant. The tenant, that is the ancestor of the appellants, brought a suit, out of which this appeal arises, in the Court of the Munsif of Patna on the 10th of July 1909 for a declaration that he was a tenant at fixed rate and that the rental was Rs. 16 as entered in the finally published Record of Rights, and that the compromise decree of July 1901 referred to above was not binding upon him and was null and void.

As a result of the above declarations, if found in his favour, the plaintiff prayed that the compromise decree of July 1901 be set aside as having been obtained by fraud.

In the plaint it is alleged that the plaintiff came to know of the fraudulent compromise decree on the 25th of November 1907, on which date it is said the cause of action for this suit arose.

The Munsif decreed the suit of the plaintiff. The landlord appealed to the District Judge, who by his judgment dated the 29th August 1911 reversed the decision of the Munsif and dismissed the suit brought by the plaintiff. The appellants, as heirs of the original tenant-plaintiff, have preferred this appeal against the said decree of the District Judge.

It is contended on behalf of the appellants that the compromise decree is void, inasmuch as it has contravened the provisions of section 29 of the Bengal Tenancy Act in enhancing the rent from Rs. 16 to Rs. 25-5-6, that is, more than two annas in the rupee.

In the compromise decree the status of the tenant has been declared to be that of a tenant at fixed rate and the rental has been fixed to be Rs. 25-5-6. The landlord had claimed in that suit that the tenant was only an occupancy *raiyyat*, but by the compromise the status of the tenant has been altered from an occupancy *raiyyat* to that of a tenant at fixed rate. There is nothing in section 29 of the Bengal Tenancy Act, or under any other provision of the Act, to prevent a landlord or tenant from entering into any agreement whereby the status is raised from an occupancy *raiyyat* to that of a tenant at fixed rate and the rent is altered from Rs. 16 to Rs. 25, that is, more than two annas in the rupee as a consideration by the tenant for acquiring a higher status in the land. Moreover as by the terms of the compromise the status has been declared to be that of a tenant at fixed rate, section 29 of the Act, which applies only to the case of a money rent of an occupancy *raiyyat*, does not at all apply to this case. Nor does section 147-A in any way affect the compromise lawfully entered into by the landlord and tenant. There was a dispute between the parties both as to the status of the tenant and the rent payable by him. The parties were at liberty to settle

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by agreement their dispute in the manner in which they have done in the compromise petition on the basis of which the decree was passed.

The contention on behalf of the respondent in this case is that upon the findings of the lower Appellate Court the suit is clearly barred. The suit virtually is a suit to set aside a compromise decree alleged to have been obtained by fraud. The setting aside of the decree is the essence and substance of the action. Hence Article 95 of the Limitation Act will apply to this case and the suit should have been brought within three years from the date of the knowledge of the fraudulent decree. No doubt in the plaint this date of knowledge is alleged to be on the 8th of July 1901. The lower Appellate Court has held as a matter of fact that the summons was properly served upon the defendant in the first suit and that the compromise was entered into by him and that actually the defendant was a party to that compromise. The compromise petition is dated the 1st July 1901 and the decree was passed on the 8th July 1901 on the basis of that compromise petition. The plaintiff in this case, therefore, knew full well of the decree in 1901.

Upon these findings of the lower Appellate Court it is clear that the suit has been brought more than three years from the date of the knowledge of the fraudulent decree and as such is barred by Article 95 of the Limitation Act.

I, therefore, hold that the suit has been rightly dismissed by the lower Appellate Court. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SECOND APPEAL No. 6 OF 1915.

August 30, 1916.

Present:—Mr. Abdur Rahim Officiating Chief Justice, and Mr. Justice Seshagiri Aiyar.

V. VENKATARAMIAH PILLAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

P. V. SUBRAMANIA PILLAI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Compound interest, stipulation for—Penalty—Compensation in lieu of penalty, award of.

The addition of the words "or if the contract contains any other stipulation by way of penalty" to section 74 of the Contract Act by the Indian Contract (Amendment) Act of 1899 has considerably enlarged the scope of that section and has the effect of getting rid of all subtle technicalities on the application of the equitable principle regulating the duty of the Court to relieve against penalties. [p. 800, col. 2.]

In contracts stipulating for payment of compound interest in default of payment of interest, there are generally two contracts, one primary and the other subsidiary, and wherever the intention of the parties appears to be that the object of the subsidiary stipulation is to enforce or secure the performance of the primary contract, that subsidiary stipulation will be regarded as a penalty. [p. 800, col. 2.]

Avathani Muthukrishniah v. Sankaralingam Pillai, 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135; *Khagaram Das v. Ram Sunkar Das Pramanik*, 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775, followed.

A provision for payment of interest on interest overdue may be a penalty within the meaning of section 74 of the Contract Act. And it makes no difference in principle whether the interest payable on default is a higher rate of interest or the same rate of interest. [p. 800, col. 2.]

Where the parties stipulated for payment of compound interest at 18 per cent. per annum in default of payment of interest each month, the rate on loans secured by an equitable mortgage of properties being also the same:

Held, that the provision for compound interest was penal and should be relieved against. [p. 8 col. .]

Ghantasala Seetharamiah v. Tadepalli Pitchayya, 28 Ind. Cas. 860, explained.

Per Seshagiri Aiyar, J.—There may be cases where enhanced interest is secured in contemplation of a possible loss or damage; in such cases it would not be penal; but where the object of the stipulation is to secure punctual payment the provision would ordinarily be regarded as penal. [p. 802, cols. 1 & 2.]

Abdul Majid v. Ksheroode Chandra Pal, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809; *Velchand Chhaganlal v. Flagg*, 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18; *Kutub-ud-Din Ahmad v. Bashir-ud-Din*, 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394, referred to.

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, in the exercise of the Ordinary Original Civil Jurisdiction of the Madras High Court, in Civil Suit No. 190 of 1912.

Mr. T. Ramachandra Rao, for the Appellants.

Messrs. Branson and Branson, for the Respondents.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—In this appeal the only question is whether compound interest should not have been allowed on the

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debts due on the two promissory notes dated 1st October 1904. These two notes were executed for Rs. 14,500 and Rs. 15,000 respectively, payable with interest at 18 per cent., and on the dates of their execution two memoranda were drawn up by which it was stipulated, among other things, that in default of payment of interest each month, compound interest would be payable with monthly rests. The promissory notes themselves do not expressly provide that interest was payable every month. Exhibits H and J also contain other stipulations, among which is the stipulation that there will be an equitable mortgage on certain properties of the executants of the promissory notes.

Mr. Justice Kumaraswami Sastri who tried the suit has disallowed compound interest, holding that the contract in this respect was brought about by undue influence. As I am clearly of opinion that the stipulation contained in the agreement Exhibits H and J as to the payment of compound interest is by way of penalty, I shall deal with it first, as it might become unnecessary that the question of undue influence should be gone into by us. The interest provided is at the rate of 18 per cent. per annum and as I have already mentioned, the money was also secured by equitable mortgage of immoveable property. It appears that about Rs. 20,000 has already been paid by the defendant and the decree given by the learned Judge is for Rs. 64,000, that is to say, the plaintiffs receive altogether Rs. 84,000 for Rs. 30,000 advanced by them. If compound interest at 18 per cent. be allowed as claimed by the appellants, that would increase the amount by another Rs. 62,000. Of course if they are entitled to receive compound interest according to the strict terms of the agreement, the mere fact that they have already received a large return for the money lent by them and their claim is for another very large sum, can make no difference.

The question is governed by section 74 of the Contract Act. That section has been considered in a number of cases and very fully by a recent Full Bench of this Court in *Avathani Muthukrishniah v. Sankaralingam Pillai* (1) and also by Mr. Justice

Mookerjee, the learned Judge of the Calcutta High Court, in *Khagaram Das v. Ram Sankar Das Pramanik* (2). The addition of the words "or if the contract contains any other stipulation by way of penalty" to section 74 by the Indian Contract (Amendment) Act of 1899 has, undoubtedly, considerably enlarged the scope of that section and it has the effect, as has been pointed out by more than one learned Judge, of getting rid of all subtle technicalities in the application of the equitable principle regulating the duty of the Court to relieve against penalties. It is stated by Mr. Justice Sundara Aiyar in the Full Bench case in *Avathani Muthukrishniah v. Sankaralingam Pillai* (1) that in cases of this character there are generally two contracts, one primary and the other subsidiary, and wherever the intention of the parties appears to be that the object of the subsidiary stipulation was to enforce or secure the performance of the primary contract, that subsidiary stipulation will be regarded as a penalty.

Mr. T. R. Ramachandrier, the learned Vakild for the appellants, has argued with great emphasis that no stipulation for payment of compound interest at the same rate as the original rate of interest should be treated as a penalty within the meaning of section 74 and he contends that this proposition is laid down by the Privy Council in *Sundar Koer v. Rai Sham Krishen* (3).

As I read that decision, there is no such proposition to be found there. All that the Judicial Committee held in that case was that a stipulation to pay compound interest at a higher rate than what was originally agreed upon might be regarded as penalty. They do not say that in no case the stipulation to pay compound interest, if at the same rate, can be regarded as penalty. The exact point has been exhaustively dealt with by Mr. Justice

(1) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

(2) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.

(3) 34 C. 150; 5 C. L. J. 106; 34 I. A. 9; 4 A. L. J. 109; 11 C. W. N. 243; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75.

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Mookerjee in *Khagaram Das v. Ram Sankar Das Pramanik* (2), and I agree with him that having regard to the very general words of section 74, the Court can treat any stipulation, the object of which is to secure the performance of the main contract between the parties, as a penalty and a stipulation for payment of compound interest may be, though it need not always be, by way of penalty. In this case the promissory notes provide for the payment only of simple interest at the rate of 18 per cent. It is by an agreement arrived at between the parties, on the same day separately, that payment of compound interest with monthly rests is stipulated for in default of payment each month of the simple interest mentioned in the promissory notes. I am of opinion that in this case, applying the test laid down in *Avathani Muthukrishniah v. Sankaralingam Pillai* (1), the contract evidenced by the promissory notes was the primary contract and the contract in Exhibits H and J was intended to be a subsidiary stipulation or contract the object of which was to secure the due performance of the principal contract. All that section 74 says is: "When a contract has been broken, if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive reasonable compensation." Here it is perfectly clear to my mind that, having regard to the rate of interest originally provided for, the stipulation providing for compound interest was by way of penalty. No doubt, as pointed out by Mr. Ramachandra Aiyar, compound interest means interest payable on the amount of interest which has not been paid. That is the substance of such a contract. But I fail to see why the stipulation for payment of interest on interest in default of regular payments of interest, as contemplated by the parties in this case, cannot be considered 'by way of penalty' within the meaning of section 74 if the parties so intended it. I do not see any distinction in principle between such a case and a case where a higher rate of simple interest is provided for. Take another case; where compound interest is stipulated for in default of payment of interest regularly for one year, I fail to understand why such a

stipulation must be excluded from the scope of section 74. Nor do I see any difference in principle between such a case and this.

The appellants are, however, entitled to some reasonable compensation under section 74. Having regard to the high rate of interest which is provided for by the promissory notes, I think that Rs. 100 would be ample and reasonable compensation. That amount will, therefore, be added to the decree passed by the learned Judge. Otherwise the appeal will be dismissed. I may mention that Dr. Pandalai, having regard to the view which we expressed as to the stipulation for compound interest being by way of penalty, did not raise the question of undue influence; and we have, therefore, thought it unnecessary to deal with it. The appellants must bear the costs of this appeal.

SESHAGIRI AIYAR, J.—I entirely agree with the judgment of the learned Officiating Chief Justice. I wish to add a few words, as a recent judgment of Sadasiva Aiyar, J., and myself has been quoted in support of the proposition contended for by Mr. T. R. Ramachandra Aiyar. To my mind, it is clear that there is no distinction on principle between a provision for compound interest at the same rate as the original rate of interest and a provision for a higher rate of interest than the original rate. Under section 74 of the Contract Act the question in each case will be whether the stipulation is penal. The explanation to the section seems to cover this case. It is there provided that a stipulation for increased interest from date of default may be a stipulation by way of penalty. In the present case there is a provision in the promissory notes for payment at a particular rate of interest. The provision in the memoranda is that if this interest is not paid monthly, compound interest at 18 per cent. should be paid. This case, therefore, is covered by the explanation and consequently the provision to pay compound interest is penal. Very great reliance has been placed by the learned Vakil upon the decision in *Sundar Koer v. Rai Sham Krishen* (3); certain observations of the Judicial Committee have been quoted as deciding that if the rate of compound interest is the same as the original rate of interest it should not be regarded

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as a penalty. I do not think that the language employed by the Judicial Committee justifies the construction placed upon it. The observation commented upon is this: "Compound interest is, in itself, perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." Lord Davey does not say that under no circumstances would compound interest at the same rate as simple interest be penal. The decision to which I was a party, namely *Ghantasala Seetharamiah v. Tadepalli Pitchayya* (4), lays down "that a provision for compound interest on default is not by itself penal, but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default may be penal." In that case the original rate was 9 3/16 per cent.; the compound interest was at 12 per cent. and yet we regarded that stipulation as penal. In the present case it is 18 per cent. compound interest. Applying the test which we applied to the case of *Ghantasala Seetharamiah v. Tadepalli Pitchayya* (4), there can be no doubt that the stipulation is penal. As has been pointed out by the learned Chief Justice, this is not a case of simple loan for which there is no security. It is a loan which is secured upon immoveable property, and as held in *Abdul Majid v. Ksheroode Chandra Pal* (5), the Court might very well regard any stipulation, where there is security which secures more than 10 per cent. interest, as an exorbitant rate. One may not lay down definitely that whenever a secured debt is made payable with more than 10 per cent. interest, the stipulation will be penalty. But the observation of the learned Judges is entitled to great weight in construing contracts like the present one where interest at 18 per cent. with a stipulation to pay compound interest at the same rate is provided in favour of a person who has obtained security as well. The provision in the document to my mind is certainly penal. There may be cases where enhanced interest is secured in contemplation of a possible loss or damage;

in that case it would not be penal, but where the object of the stipulation is to secure punctual payment, the provision would ordinarily be regarded as penal. That is the view taken by Mr. Justice Mookerjee in *Khagaram Das v. Ram Sankar Das Pramanik* (2). That is also the view taken by the Bombay High Court in *Velchand Chhaganlal v. Flagg* (6) and in Allahabad in *Kutub-ud-din Ahmad v. Bashir-ud-din* (7). The matter has been very fully considered, if I may say so with respect, in an exhaustive and lucid judgment of Mr. Justice Sadasiva Aiyar in *Avathani Muthukrishniah v. Sankaralingam Pillai* (1). The forcible language employed by the learned Judge that the Court should, as far as possible, try to save needy persons from the clutches of money-lenders and that it is in the interests of public policy that this protection should be afforded, has my full support. Under these circumstances, I agree with the Officiating Chief Justice that more than Rs. 100 should not be given to the appellants as compensation. I also agree in the order proposed as to costs.

Appeal dismissed; Decree modified.

V. R. P.

(6) 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18.
(7) 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 534
OF 1915.

January 9, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

SASHI BHUSAN DAS—PLAINTIFF—
APPELLANT
versus

PRATUR CHANDRA ROY AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sec. I, Arts 181, 182—
Mortgage, suit for foreclosure of—Consent decree, whether preliminary decree—Final decree, application for—Limitation.*

A consent decree in a suit for foreclosure, which provides that unless payment is made before a certain date the mortgagor's right to redeem would be barred, is a preliminary decree to be followed under the provisions of the law by a final decree for foreclosure. Therefore, an application to obtain the final

(4) 28 Ind. Cas. 860.

(5) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

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decree is governed by Article 181 and not by Article 182 of the Limitation Act.

Appeal against the order of the District Judge, Chittagong, dated the 12th August 1915, affirming that of the Munsif, North Rouzan, dated the 8th April 1915.

Babu *Khitish Chandra Sen*, for the Appellants.

JUDGMENT.

FLETCHER, J.—This is an appeal from an order of the learned District Judge of Chittagong, dated the 12th August 1915, affirming the order of the Munsif of North Rouzan, dated the 8th April of the same year. The application out of which the present appeal arises was an application for a decree absolute in a suit for foreclosure. The first decree was made by consent on the 28th December 1909. The date for payment under the terms of that decree was February 1910 and it was provided that, unless payment was made before that date, the mortgagor would be debarred from the right to redeem the property. Subsequent to that, on the 13th January 1912, an application was made for substitution and execution of the decree. That application was dismissed as no affidavit of service was filed in Court. The present application was made on the 7th April 1915. As already stated, the application was made for a final decree in a suit for foreclosure. That is how the parties treated the matter and that is how the matter came before the Court. The learned Judges in both the lower Courts held that the application was barred under the provisions of Article 181 of the Indian Limitation Act. Against that decision the present appeal has been preferred.

The only point that has been argued in this appeal is that there was no preliminary decree for foreclosure but that the parties by consent agreed to a final decree for foreclosure, and that this is an application for execution coming under the provisions of Article 182 of the Indian Limitation Act. To that view, I am unable to assent. The decree that was drawn, namely, unless payment was made before February 1910 the mortgagor would be debarred from his right to redeem the property, was in the common form of a

preliminary decree, for foreclosure; and subsequent to that, as is always done, there should be a final decree for foreclosure where it is made to appear to the Court that default has taken place in the payment of the decretal amount within the time limited by the preliminary decree. The decree in this case is clearly a preliminary decree to be followed under the provisions of the law, as it stands under the present Code, by a final decree for foreclosure. That being so, that final decree for foreclosure would have to be applied for under the provisions of the Civil Procedure Code and, under Article 181 of the Indian Limitation Act, an application for such a decree must be made with the period of three years from the time when the right to apply accrues. The learned District Judge, following the observations made by Sir Lawrence Jenkins in the course of his judgment in the case of *Amolak Chand Parak v. Sharat Chandra Mukherjee* (1), came to the conclusion that this was an application for a final decree and not an application in execution. In that view I agree. The present appeal, therefore, fails and must be dismissed. As nobody appears for the respondent, we make no order as to costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(1) 11 Ind. Cas. 943; 16 C. W. N. 49; 38 C. 913.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 161 OF 1916.

November 16, 1916.

Present:—Mr. Justice Ormond.

RAMAN CHETTY AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

MA HMU—DEFENDANT—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 16—Adjudication—Suit for declaration by decree-holder, maintainability of.

After a judgment-debtor has become an insolvent, the decree-holder has no longer the right to attach his property nor to sue for a declaration in respect of it without the leave of the adjudicating Court. [p. 804, col. 1.]

BANKU CHANDRA BOSE v. MARIUM BEGAM.

Mr. *McDonnell*, for the Appellants.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT.—This was put down as an application for an order to withhold payment of money out of Court; but by consent of parties the appeal has been heard. The plaintiff Chetty obtained a decree against one Maung Po Te and attached in July 1915 a house and land. The defendant applied for the removal of the attachment and succeeded. The plaintiff then filed a suit for a declaration that the house and land was the property of his judgment-debtor, Po Te, at the time of the attachment, and he succeeded in the Sub-Divisional Court. On appeal to the Divisional Court the defendant raised the point that under section 16 of the Provincial Insolvency Act this suit would not lie because the judgment-debtor had become an insolvent on the 5th June 1915, on which date his property vested in the Court or the Receiver, and without the leave of the Court the creditor could not take any remedies against the judgment-debtor's property.

It is contended for the plaintiff-appellant that in a suit against a third party for a declaration that the property was the property of the judgment-debtor, he is not taking any remedy against the judgment-debtor's property. On the face of it that is true; but the defendant is entitled to shew that even if the property belonged to the judgment-debtor, the plaintiff has no *locus standi* to bring this suit. A plaintiff cannot sue for a declaration in respect of another person's property unless he has an interest in the property. If he is a judgment-creditor he can bring a suit for a declaration that the property belonged to his judgment-debtor, only because he has the right to attach it. After his judgment-debtor has become an insolvent, he no longer has the right to attach his judgment-debtor's property and, therefore, he has no right to sue for a declaration in respect of his judgment-debtor's property. He cannot sue on behalf of the Court. The plaintiff-appellant was given an opportunity in the Divisional Court of obtaining leave from the District Court to proceed against the property of the judgment-debtor, but that was refused. This appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 73
OF 1915.

February 10, 1916.

Present:—Sir Laneelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe,
Kt., and Justice Sir Asutosh Mookerjee, Kt.
BANKU CHANDRA BOSE AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MARIUM BEGUM AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII, r. 1—Appeal, right of—Acceptance of benefit under order appealed against—Estoppel—Evidence Act (I of 1872), s. 115.

When a party has unconditionally accepted and taken advantage of an order, which directs the payment to him of a certain sum of money by the other party, he is precluded from appealing against that order. [p. 805, col. 1.]

A party who has adopted an order of the Court and acted under it cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. [p. 805, col. 1.]

Mani Lal Guzrati v. Harendra Lal Roy, 8 Ind. Cas. 79; 12 C. L. J. 556, followed.

Tinkler v. Hilder, (1849) 4 Exch. 187 at p. 191; 7 D. & L. 61; 18 L. J. Ex. 429; 13 Jur. 684, applied.

A suit was dismissed for want of prosecution and on the application of the plaintiff was ordered to be restored to its file, on the plaintiff's paying to the defendants a sum of money towards their costs of and incidental to the application. The defendants accepted the said sum paid by the plaintiff without recording their intention to appeal against the order.

Held, that the defendants, after having accepted the money without protest, were precluded from appealing against the order. [p. 805, col. 2.]

Appeal against the order of Mr. Justice Imam, dated the 20th July 1915.

Mr. *B. C. Mitter* (with him Mr. *R. K. Lahiri*), for the Appellants.

Mr. *N. N. Sarkar* (with him Mr. *S. N. Sen Banerjee*), for the Respondents.

JUDGMENT.

SANDERSON, C. J.—I am of opinion that the preliminary point which Mr. Sarkar took on behalf of the respondents, the plaintiffs, is a good one.

The order is set out at pages 25 and 26 of the paper-book, and the material part of it is in these terms:—"It is ordered that upon the said Syed Ashrufuddin Ahmed within three weeks from the date hereof paying to the defendants' attorney Babu Birendra Nath Mitra the sum of Rs. 250 towards the defendants' costs of and incidental to this application on the said Babu Birendra

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Nath Mitra undertaking to refund any surplus that may be found to have been paid in excess upon taxation of the said costs and within one month from the date hereof giving security for 2,500 to the satisfaction of the Registrar the said order in so far as it dismissed this suit for want of prosecution be set aside and this suit be restored to its file." Then, "it is further ordered that the said Syed Ashrufuddin Ahmed do pay to the defendants their costs of and incidental to this application to be taxed by the Taxing Officer of this Court." In pursuance of that order the Rs. 250 was paid by Ahmed to the defendants' Solicitor, and was accepted by him. It is said by the learned Counsel for the appellant that his client could not help himself, as under the order Ahmed was bound to pay the Rs. 250, and the defendants' Solicitor was bound to accept it. Well that may be; but personally, I cannot help thinking that the defendants would have been in a much better position if, upon that transaction, they had said, "we intend appealing against this order and we only accept this sum of Rs. 250, under protest, because the order contains a direction that it shall be paid, but we place on record our intention to appeal and we accept the money under protest." But I do not base my judgment upon that ground only, because I think that when the defendants took advantage of the order which directed the payment to the defendants of their costs of and incidental to the application, they precluded themselves from appealing against that order. The principle upon which cases such as this must be dealt with was laid down quite clearly by my learned brother Mr. Justice Mookerjee in the case which has been cited and which is reported as *Mani Lal Guzrati v. Harendra Lal Roy* (1), and the passage which I am about to read begins at the bottom of page 558*: "That principle is that a party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another." In my judgment, when the de-

(1) 8 Ind. Cas. 79; 12 C. L. J. 556.

fendants adopted the order for taxation and payment of the costs, they did take a benefit under it, because they having obtained the allocatur, as far as I understand at present, there was nothing to prevent them from issuing execution, upon that allocatur, against Ahmed; and, for this reason I am of opinion that they did adopt the order of the Court, and more than that, they acted under it and enjoyed the benefit of it. That being so, upon the principle laid down in the case cited, which is the principle which has been in existence for many years since the case of *Tinkler v. Hilder* (2), the defendants cannot adopt the order for one purpose and their claim to have it set aside for another purpose.

For this reason I think this appeal should be dismissed with costs; such costs may be set off against any costs which are recoverable against Ahmed.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree.

Appeal dismissed.

(2) (1849) 4 Exch. 187 at p. 191; 7 D. & L. 61; 18 L. J. Ex 429; 13 Jur. 684.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1085
OF 1913.

July 29, 1915.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice, and Mr. Justice Holmwood.

RASH BIHARI DAS AND OTHERS—

APPELLANTS

versus

KUNJABIHARI PATRA AND OTHERS—

RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 116, 120,
132—Mortgage to secure loan of paddy, suit for enforce-
ment of.*

A suit to enforce a mortgage executed to secure a loan of paddy repayable with interest as paddy is not a suit to enforce payment of money charged on immoveable property to which Article 132 of the Limitation Act applies. The suit is governed either by Article 116 or 120.

Appeal against the decree of the District Judge, Bankura, dated the 7th February 1913, modifying that of the Munsif, Khatra, dated the 13th January 1912.

FACTS.—One K executed a mortgage bond to D. for return of certain quantity of paddy borrowed from the latter on 20th May 1896, stipulating to repay the same with interest in

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kind on 11th February 1899. The bond further recited that in default of payment of interest in *Magh* of each year the accumulated interest was to be added to the principal and interest paid on the total amount. On 11th February 1911, the mortgagee's representatives sued the representatives of the mortgagor for recovery of the amount due by sale of the mortgaged properties. The defendants were *ex-parte*, but representatives of one L, alleged to be the purchaser of the mortgaged property, were, on their application, added as defendants on 21st April 1911. They pleaded that the suit was barred as against them. The first Court dismissed the claim as barred. On appeal, the District Judge reversed the decision, holding that though the suit was barred as against the purchasers, the properties should be sold for the amount due to the plaintiffs. The contesting defendants appealed to the High Court.

Babus *Bipin Bihari Ghosh* and *Bijaykumar Bhattacharyya*, for the Appellants.

Babus *Dwarkanath Chakrabarti* and *Nakuleswar Mookerjee*, for the Respondents.

JUDGMENT.—This is not a suit to enforce payment of money charged upon immoveable property and so Article 132 cannot apply. Whether it be Article 116 or Article 120 that governs makes no difference. In our opinion, the suit would be barred with a very large margin to the lead. At the same time we are unable to subscribe to the law expounded by the learned District Judge. In disposing of the case on the ground that Article 132 is not applicable, we must not be taken as accepting that the learned Judge's view was otherwise correct. The decree of the lower Appellate Court is set aside and that of the Munsif restored with costs throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2107 OF 1913.

February 5, 1917.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Shah Din.

JAM HAMID ALI AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

KAIM DIN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 14—

Pre-emption—Decree based on compromise, compliance with.

Plaintiff in a pre-emption suit was given a decree in terms of a compromise, according to which he was *inter alia* to separate off and give to defendant a certain area of land within one month from the date of the decree. Before the expiration of that period plaintiff ceased to cultivate the area mentioned in the decree, with the intention to let the defendant have possession of the land.

Held, (1) that inasmuch as the decree was based upon a compromise, it was not a decree in a pre-emption suit to which the provisions of rule 14, Order XX, of the Civil Procedure Code could apply; [p. 807, col. 1.]

(2) that even if it was a decree in a pre-emption suit, plaintiff had substantially complied with its terms. [p. 807, cols. 1 & 2.]

Second appeal from the order of the Divisional Judge, Multan Division, dated the 19th May 1913, affirming that of the Munsif, 1st class, Muzaaffargarh, dated the 29th January 1913, accepting the application.

Dr. Muhammad Iqbal, for the Appellants.

Lala Hargopal, for the Respondents.

JUDGMENT.—This appeal has arisen out of execution proceedings relating to a decree for pre-emption, dated the 29th May 1912, which was passed in favour of the appellants against the respondent Goda Khan; and the sole question for decision in the appeal is, whether the terms of the decree were not complied with by the appellants within the period of one month mentioned in the decree, with the result that the decree became null and void and the suit stood dismissed with costs.

The facts are fully stated in the orders of the Courts below and it is unnecessary to repeat them. The decree was given to the appellants in terms of a compromise between the parties, according to which the appellants were to pay into Court, within one month from the date of the decree, Rs. 528-11-0, being part of the purchase-money, and also to separate off and give to the respondent Goda Khan within the same period of one month ten *bighas* of land on the eastern side of *Patti Sera Wali*. The contention on behalf of the respondent is that although the sum of money, Rs. 528-11-0, was paid into Court by the appellants within the period fixed, they did not separate off and hand over to the respondent possession of ten *bighas* on the eastern side of *Patti Sera*

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Wali within the said period; and it has accordingly been urged that the decree, not having been complied with according to its terms, became void and the suit stood dismissed with costs.

It seems clear to us that since the decree was based upon, and was passed in accordance with, a compromise, strictly speaking, it was not a decree in a pre-emption suit to which the provisions of rule 14 of Order XX, Civil Procedure Code, are applicable, and that the appellants, who are decree-holders, cannot get the benefit of the consent decree in question unless they shew that its terms were duly carried out. Upon this view of the case, the appellants had to separate off and give up possession of ten *bighas* on the eastern side of *Patti Sera Wali* for the benefit of the respondent; and the only point for decision is whether this was done by the appellants or not. It is, no doubt, true that no notice through the executing Court was given by the appellants to the respondent within one month from the date of the decree asking the latter to take possession of the land in question, nor were any mutation proceedings started at the appellants' instance within the period fixed. But it appears from the record that before the period mentioned in the decree had expired, the appellants had ceased to cultivate the ten *bighas* situate on the eastern side of the *patti*, the clear intention being to let the respondent have possession of the land as agreed upon between the parties. The parties reside in the same village; in fact, respondent Goda Khan is landlord of the land sold and of the land in possession of the appellants in *Patti Sera Wali*, of which the appellants are occupancy tenants; and in the circumstances indicated above, the respondent was clearly in a position to take possession of the ten *bighas* in question which had been left vacant by the appellants. He, however, never moved in the matter, and omitted to take possession within one month from the date of the decree, and this omission was doubtless due to his desire to defeat by a technical plea the provisions of the decree which had been passed in favour of the appellants. We have no hesitation in holding that by leaving the land uncultivated

within the period fixed in the decree, so as to enable the respondent Goda Khan to take possession of it, the appellants substantially complied with its terms; and that the decree has not become null and void.

We accept the appeal and setting aside the order of the lower Appellate Court, send the case back with a direction that execution of the decree be proceeded with at the instance of the appellants. The appellants will get their costs throughout.

Appeal accepted.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 275 OF
1915.

December 20, 1916.

Present:—Mr. Justice Rigg.

MA SEIN MYA—PLAINTIFF—APPELLANT
versus

SWAMI—DEFENDANT - RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Arbitration—Award—Arbitrators, authority of—Evidence, insufficiency of, whether ground for refusing to enforce award.

Unless otherwise restricted by the order of reference, arbitrators are the final judges of matters of fact and so long as they act within the authority conferred on them, with fairness, the parties are bound by their decision and it is not for a Court to say that in its opinion the evidence was not sufficient to establish the conclusion at which the arbitrators arrived. The mere fact that the Judge thought that the arbitrators had not given sufficient weight to the provisions of section 110, Evidence Act, is no ground for refusing to enforce an award. [p. 808, col. 2.]

In order to make out a case for impeaching an award on the ground that witnesses were not examined by the arbitrators, there must be evidence to shew that witnesses were distinctly tendered to them. [p. 808, col. 2.]

Second appeal against the decision of the Divisional Judge, Hanthawaddy, reversing the decree of the Sub-Divisional Court, Insein.

Mr. Hay, for the Appellant.

Maung Po Thit, for the Respondent.

JUDGMENT.—This is an appeal against the decision of the Divisional Judge of Hanthawaddy, reversing the decree of the Sub-Divisional Court, Insein, which gave effect to the award of certain arbitrators. The Divisional Judge held that the award ought not to be enforced, and after fixing further issues remanded the case for trial on its merits. He discussed the evidence recorded on remand and came to the

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conclusion that the mortgage to Swami had not been proved and dismissed the plaintiff's suit. The appeal is based on the contention that the Divisional Judge was wrong in holding that the award was not valid, and that the mortgage had not been proved. The question of the arbitrators is binding on the parties. The facts that raise on the question may be briefly stated. The appellant Ma Sein Mya is the purchaser of the right, title and interest of Maung Aung Ban in a parcel of land measuring 12.95 acres, situated in the Nyaungtabin Kwin Circle, Hlegu Township. It is not disputed that the land originally belonged to Aung Ban. The case for the plaintiff is that this land was mortgaged by Aung Ban more than twenty years ago to his brother Shwe Zin for Rs. 100 and by Shwe Zin to Swami for the same sum. Aung Ban returned in 1913 to claim the right of redeeming the land. His right was disputed by Swami, and the parties by a written agreement, dated the 15th May 1913, referred the matter to the arbitration of eight elders. On the 25th May, these elders gave their award. They said that the land had been mortgaged and fixed the amount at which it was to be redeemed at Rs. 115.

Sawmi's case is that he bought the land from Aung Ban and his wife for Rs. 100 and only referred to arbitration the question whether the land was to be transferred to his name or not. He further contended (1) that the name of Maung Shwe Zin had been added as one of the parties to the arbitration against his consent, and that he had refused to continue the arbitration proceedings in consequence of this addition; (2) that the award was not in accordance with law; (3) that some of the arbitrators did not agree to it; (4) that some of them were not present; and (5) that the witnesses were not examined. Each of the parties examined three of the arbitrators as witnesses about the course of the arbitration proceedings. The Trial Judge disbelieved the evidence of Swami and his witnesses, and held that no grounds for not enforcing the award had been made out. The Divisional Judge discussed the evidence, but came to no definite finding as to whether Swami's witnesses were speaking the truth or not. He rejected the award on the grounds (1) that it was

not the award of all the arbitrators appointed; (2) that it was unlikely that the award represented any agreement, as most of the arbitrators were partisans and (3) that the decision was not satisfactory, as in the opinion of the Judge it was based on insufficient evidence. The third ground given by the Divisional Judge for refusing to accept the award is not tenable in law. Unless otherwise restricted by the order of reference, arbitrators are the final judges of matters of fact and so long as they act within the authority conferred upon them, with fairness, the parties are bound by their decision, and it is not for a Court to say that in its opinion the evidence was not sufficient to establish the conclusion at which the arbitrators arrived. The mere fact that the Judge thought that the arbitrators had not given sufficient weight to the provisions of section 110, Evidence Act, is no ground for refusal to enforce an award.

In view of the fact that the plaintiff's case is that the absence of one of the arbitrators had been expressly waived by Swami and that all the other arbitrators had signed the award, it is of vital importance to come to a definite finding as to whether the award was the unanimous opinion of all the arbitrators except Maung Nyo, whose presence had been excused by Swami.

The story told by Swami and his witnesses is that at the second meeting, the arbitrators proposed to add Shwe Zin as a party, whereupon he protested, cancelled his agreement and left the house. The plaintiff's witnesses say that the two parties were examined on the first day of hearing, and that as Swami admitted that the land was sold by both Aung Ban and Shwe Zin, they deferred further proceedings to procure the attendance of Shwe Zin. At the second hearing Shwe Zin's statement was recorded and he then signed that he agreed to any order made by the arbitrators. The parties were asked whether they could produce any evidence, and the only evidence forthcoming was a *paytbaing* produced by Swami. The arbitrators then delivered their award, which was signed by all of them except Maung Nyo, and by Swami himself. The Trial Judge who had the advantage of seeing the witnesses rejected

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the evidence for the defence, and, in my opinion, he had good reason for doing so.

Swami denied that he had ever stated before the arbitrators that he had bought the land from Aung Ban and Shwe Zin, but his own witness Shwe Hmon contradicts him on this point. The reason for his denial is obvious; he is anxious to make out that Shwe Zin was imported into the proceedings at the second hearing, in spite of his objection. Myat San swears that no award was ever made, yet he has to admit that he signed it, and he is unable to explain how he came to do this. Po Ka, headman of Kannayingo, denied that he signed the award, but neither Court has believed him, and a comparison of the signatures on the award and his other signatures on the record leaves no room for doubt that Po Ka has given false evidence in denying his signatures. The Trial Judge made an unfavourable note on the way in which Swami's third witness gave his evidence. On the other hand two out of three witnesses examined by the plaintiff are village headmen who are not related to her; one of them was Swami's own nominee. They say that Swami agreed that the arbitration should proceed in the absence of Maung Nyo, that Shwe Zin was examined because it was found at the first hearing that he had been one of those who sold Swami the land, that the only evidence the parties had to produce was the *paytbain*, and that Shwe Zin signed the original agreement of reference merely to prevent further dispute. All the arbitrators with the exception of Maung Nyo then delivered and signed the award. Shwe Hmon had a sore hand, and was unable to sign. He, therefore, touched the pen. Shwe Hmon admits that he had a sore hand and pretends that this was the reason why his recollection of the proceeding is so vague. I have no doubt that the version of the plaintiff's witnesses represents the true facts of the case. Swami himself stated that he objected to the arbitration solely on the ground that Shwe Zin had been added as a party, and that he did not ask the arbitrators for an opportunity to produce evidence. After the lapse of so many years, it is improbable that any evidence was forthcoming about

a small transaction of the kind in dispute in this case.

I shall now deal with each of the objections to the award *seriatim*. The first objection, that Shwe Zin had been added as a party, is frivolous. He merely agreed to abide by the award, and it was obviously to the interest of both parties that he should make this declaration. The second objection on the ground that all the arbitrators did not agree to the award and were not present, is also untenable. It was not even urged by Swami when he gave evidence. He has waived his objection on this ground all through the proceedings in arbitration and in Court. It is no longer open to him to repudiate the position he has deliberately taken up, *Sheonoth v. Ramnath* (1), *Manindra Nath Mandal v. Mohanunda Roy* (2). The third objection to the award on the ground that the witnesses were not examined, has no substance in it whatever. In order to make out a case for impeaching an award, there must be evidence to show that a witness was distinctly tendered to the arbitrators. There is no such evidence in this case, and I have no doubt that the arbitrators took all the evidence before them.

I am of opinion that the Trial Judge came to a right conclusion in holding that the award was binding on Swami. The decree of the Divisional Court is set aside and that of the Sub-Divisional Court restored with costs in all Courts.

Appeal allowed.

(1) 10 M. I. A. 413; 5 W. R. 21 (P. C.); 1 Ind. Jur. (N. S.) 161; 1 Suth. P. C. J. 616; 2 Sar. P. C. J. 134; 19 E. R. 1029.

(2) 13 Ind. Cas. 161; 15 C. L. J. 360.

ALLAHABAD HIGH COURT.
CIVIL REVISION PETITION No. 76 OF 1916.
December 1, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

MUSAMMAT SUKHA AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

RAGHUNATH DAS—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24 (4)—

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"Court of Small Causes" interpretation of—Suit of Small Causes Court nature, transfer of, to Court not invested with Small Cause powers—Decision—Appeal.

The expression "a Court of Small Causes" in section 24 (4) of the Code of Civil Procedure, 1908, includes Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act IX of 1887. [p. 812, col. 2.]

Therefore, where a suit of Small Cause Court nature instituted in a Court lawfully empowered to try it as such is transferred by a District Judge under section 24 (4) of the Civil Procedure Code, 1908, to a Court not invested with the jurisdiction of a Court of Small Causes, the latter Court must, for the purposes of the suit, be deemed to be a Court of Small Causes and as such no appeal lies from its decision in such a case. [p. 811, col. 2.]

Civil revision against the order of the Subordinate Judge, Muttra, dated the 17th July 1915.

Mr. M. L. Agarwala, for the Appellant.

JUDGMENT.

PIGGOTT, J.—This is an application in revision which has been referred to a Bench of two Judges owing to a difficulty of the point of law raised. The facts are given in the referring order of Mr. Justice Rafique. A suit was instituted in the Court of the Subordinate Judge of Muttra. This was also a Court invested with the jurisdiction of a Court of Small Causes, within the meaning of sections 32, 33, 34 and other sections of the Provincial Small Cause Courts Act (IX of 1887). The suit in question was of a Small Cause Court nature, that is to say, had it been tried in the Court in which it was originally instituted it would have been tried as a Small Cause Court suit by a Court lawfully empowered to try it as such, and would have been subject to the provisions of the Provincial Small Cause Courts Act as to the right of appeal. The suit in question, however, along with certain others, was transferred by an order of the District Judge to the Court of the Munsif of Muttra for disposal. This was not at that time a Court invested with the jurisdiction of a Court of Small Causes. In his order of transfer the learned District Judge makes an express reference to the provisions of section 24, clause (4), of the Code of Civil Procedure. There can be no doubt, therefore, that the Court which ordered the transfer understood that the provisions of this sub-section would apply to the case and deliberately intended that it should be tried by the learned Munsif as a

Court of Small Causes. That Court having decreed the plaintiff's claim the defendants appealed to the District Judge and the appeal came up for disposal before the Subordinate Judge of Muttra. He held that, by reason of the provisions of section 24, clause (4), aforesaid, the suit had been tried by a Court which must, for the purpose of that suit, be deemed to have been a Court of Small Causes, and he accordingly held that no appeal lay. The defendants have brought the matter before this Court by means of an application for revision.

They contend that the learned Subordinate Judge was wrong, that an appeal did lie to his Court and that he has erroneously refused to exercise a jurisdiction vested in him by law. It is worth while to quote the words of the sub-section with which we are dealing. Section 24 of the Code of Civil Procedure confers certain powers of transfer on the High Court or the District Court, and then in sub-section (4) it is enacted that "the Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for purposes of such suit be deemed to be a Court of Small Causes." The question which we have to determine is, whether the words "a Court of Small Causes" as used in this sub-section mean only Courts constituted under the Provincial Small Cause Courts Act, 1887, or include also Courts exercising the jurisdiction of a Court of Small Causes under that Act. We have been referred to a good deal of case-law on the subject; but it is worth while to note at the very outset that many of the decided cases have no direct bearing on the question before us, because they do not involve any question as to the interpretation of section 24 of the present Code of Civil Procedure (Act V of 1908) or of the corresponding section 25 of Act XIV of 1882. For instance, in *Shyam Behari Lal v. Kali* (1) and also in *Sarju Prasad v. Mahadeo Pande* (2), the questions to be determined had to do with the case of a Munsif not invested with Small Cause Court powers succeeding to the office of a Munsif who was so invested. No question arose

(1) 22 Ind. Cas. 903; 12 A. L. J. 109,

(2) 29 Ind. Cas. 996; 13 A. L. J. 639; 37 A. 450.

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in either of these cases as to the interpretation of section 24 of the Code of Civil Procedure. Again is *Dulal Chandra Deb v. Ram Narain Deb* (3), the question for determination was essentially similar to that in the above two cases, and the reference made to the provisions of section 24 of the Code of Civil Procedure can only be regarded as substantially *obiter dicta*. There is an older case of this Court, that of *Mangal Sen v. Rup Chand* (4), in which the facts were more nearly similar to those now before us and in which reference was made to the provisions of section 25 of the Code of Civil Procedure of 1882. The learned Judges do not base their decision entirely upon the consideration of the terms of this section; but the case has always been quoted as an authority for the proposition that the words a "Court of Small Causes" as used in section 24 (4) of the present Code of Civil Procedure, or in section 25 of Act XIV of 1882, do include Courts invested with Small Cause Court jurisdiction. The only decision directly to the contrary seems to be that of the Bombay High Court in *Ramchandra v. Ganes*h (5). It has been contended before us that the authority of the decision in *Mangal Sen's* case (4) has been shaken by the more recent pronouncements of this Court to which reference has been made, and that the authority of the decision of the Bombay High Court with the reasoning upon which that decision is based, as also the line of reasoning adopted by the learned Judges of the Calcutta High Court in *Dulal Chandra Deb v. Ram Narain Deb* (3), should prevail with us. The proposition contended for is that the words "a Court of Small Causes" in the sub-section in question mean a Court properly and strictly so called, and do not include a Court invested with the jurisdiction of a Court of Small Causes. It seems to us that the plain *prima facie* meaning of the words as they appear in section 24 of the Code of Civil Procedure is against this contention, and that the burden lies

on those who maintain it. The learned Judges of the Calcutta High Court lay great stress upon the argument that the Legislature cannot be held to have intended that the mere order of a District Judge should have the effect of investing the presiding officer of a particular Court with certain powers, when such powers can only be conferred ordinarily by an order of the Local Government. To this argument there seems to be a twofold answer. To begin with, the provisions of section 24, sub-section (4), of the Code of Civil Procedure, do mean something. On any interpretation, they do mean at least this, that if a suit is pending in a Court constituted under the provisions of the Small Cause Courts Act of 1887, the District Court has power to transfer that suit to another Court which is neither a Court constituted under that Act, nor a Court invested with the jurisdiction of a Court of Small Causes, and that the Court to which the case is transferred will then be deemed, by virtue of the order of transfer, to be a Court of Small Causes for the purposes of that particular suit. It would seem, therefore, that the power which the learned Judges of the Calcutta High Court consider to be "nothing else than disastrous" does in fact exist in certain cases, and the only question is whether it exists in others. In the second place, the provisions of sections 24 (4) of the Code of Civil Procedure are strictly limited in extent. Their operation is limited to particular cases transferred by special order of the High Court or of the District Court. It is not unreasonable to suppose that the Legislature felt considerable confidence in the District Courts, in consideration more particularly of the intimate acquaintance which such Courts are likely to possess with the *personnel* and the working of all Courts subordinate to them; so that it was not deemed improper to invest District Courts with powers of transfer in respect of suits of a Small Cause Court nature, and to permit that power to be exercised for the transfer of a case from a Court of Small Causes to a Court which is neither a Court of Small Causes constituted under Act IX of 1887, nor a Court invested with the jurisdiction

(3) 31 C. 1057.

(4) 13 A. 324; A. W. N. (1891) 96; 7 Ind. Dec. (N. S.) 205.

(5) 23 B. 382; 12 Ind. Dec. (N. S.) 254.

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of a Court of Small Causes. It remains a matter of discretion with the District Court whether or not to pass an order of transfer in any suit; and the apparent intention of the Legislature was that, if a Small Cause Court suit is so transferred, it should not change its nature by reason of the transfer, but should continue to be tried as a Small Cause Court suit and subject to all the legal incidents of such a suit. We find there is one case directly in point which is in opposition to the view of the Bombay High Court and follows in principle the older decision of this Court in *Mangal Sen's* case (4). This is the case of *Sankararama Aiyar v. Padmanabha Aiyar* (6). The Bombay case of *Ramachandra v. Ganesh* (5) and the Calcutta case already referred to are therein expressly dissented from, and the principle laid down by the Allahabad High Court in *Mangal Sen's* case (4) is approved. The learned Judges of the Bombay High Court purport to base their decision upon a comparison of the wordings of certain sections in the Provincial Small Cause Courts Act, 1887, with the provisions of the Code of Civil Procedure now reproduced in sections 7 and 24 of Act V of 1908. They point out, truly enough, that Act IX of 1887 draws a clear distinction between Courts of Small Causes which are such exclusively and for all purposes, and Courts which are invested with the jurisdiction of a Court of Small Causes. They then refer to the wording of section 5 of the former Code of Civil Procedure (Act XIV of 1882). That section refers to "Courts of Small Causes constituted under Act IX of 1887" and "all other Courts exercising the jurisdiction of a Court of Small Causes" as two different kinds or descriptions of Court. From this the learned Judges argue that when, in a later section, reference is made to "a Court of Small Causes," those words should be read as if the entire expression "a Court of Small Causes constituted under Act IX of 1887" had been used, and that the Legislature did not intend to include in that expression other Courts exercising the jurisdiction of a Court of Small Causes. The point is a fine one;

but it would certainly appear as if any force it may ever have possessed has been greatly weakened by a slight alteration in the wording of the present Code. The section corresponding to section 5 of Act XIV of 1882 is section 7 of Act V of 1908. Instead of speaking of "Courts of Small Causes constituted under Act IX of 1887," the new Code speaks of "Courts constituted under the Provincial Small Cause Courts Act, 1887, or Courts exercising the jurisdiction of a Court of Small Causes under that Act." If any inference is to be drawn from the wording of this section, one would rather be inclined to suppose that when, in a later section, *i. e.*, section 24 (4), the general expression "a Court of Small Causes" is used, the intention of the Legislature was to make it an expression inclusive of the two classes of Courts referred to in section 7. On the whole, therefore, upon a consideration of the provisions of the Code of Civil Procedure and of Act IX of 1887 and of all the various authorities to which reference has been made, we think that the view on which the learned Subordinate Judge acted in the present case was correct. We agree with the learned Judges of the Madras High Court in holding that the expression "a Court of Small Causes" in section 24 (4) of the Code of Civil Procedure does include Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act IX of 1887. The Legislature apparently intended that the District Court should have power to make an order of transfer, such as has been made in the present case, trusting to the discretion of that Court, and its knowledge of local conditions, not to make an order of transfer to a Court not competent to make a proper exercise of the special powers which an order of transfer carries with it in respect of particular cases so transferred. There seems, therefore, no foundation for the plea on which this revisional application is based and we dismiss it accordingly, but without costs, as the opposite side is not represented.

WALSH, J.—I want to add a few words. I think the Subordinate Judge put the case very well in the judgment which is before us and I adopt what he says. It is desirable to emphasize that we are dealing

(6) 17 Ind. Cas. 425; 23 M. L. J. 373; (1912) M. W. N. 1086; 38 M. 25.

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with a case of transfer and not with a case of succession on which most of the decided cases have turned, and we are not differing from the decisions in *Shiam Behari Lal v. Kali* (1) and *Sarju Prasad v. Mahadeo Pande* (2) referred to above. On a point of practice of this kind it is desirable to avoid differences. But as the Madras High Court has differed irretrievably from the Bombay High Court, it is impossible for us not to differ from one of them. It seems to me that the distinction between a Court of Small Causes and a Court invested with the jurisdiction of a Court of Small Causes, which is preserved in the Provincial Small Cause Courts Act, has no bearing upon the question of transfer at all. And it is to be observed that section 33 of the Provincial Small Cause Courts Act, which was not referred to in argument because we had no argument on the other side, distinctly provides that a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction and the same Court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes shall, for the purposes of that Act and the Code of Civil Procedure, be deemed to be different Courts. As there is no such distinction provided between a Court of Small Causes and a Court exercising the jurisdiction of a Small Cause Court, the inference would be that they were not intended to be different Courts for the purpose of the Code of Civil Procedure. Finally one of the principal arguments addressed to us was that the result of our decision would be to invest a Court or rather an individual with jurisdiction to decide unappealable cases which the Legislature intended that he should not try. But that argument, which sounds plausible enough, deals with the question of a Court or person to whom a suit is to be transferred. The section we are construing deals with the Court from which a suit is to be transferred, and I am unable to see any reason, either in good sense or derived from an examination of the rest of the legislation on the subject, why in respect of this matter there should be any difference between a suit which is to be tried as a Small Cause Court suit by a Court invest-

ed with the jurisdiction of a Small Cause Court and a suit which is to be tried by a Court of Small Causes constituted under the Act.

Application dismissed

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 579 OF 1916.

December 6, 1916.

Present:—Mr. Justice Jwala Prasad.
BHAGWATI PRASAD—PLAINTIFF—
APPELLANT

versus

MAHBUB MOMIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B U. of 1885), 103B 147B, 74—Record of Rights, presumption as to correctness of entries in—Katihari, whether legal charge—Illegal cess.

Where *katihari* is entered in the Record of Rights as payable by a tenant, the presumption is in favour of the charge being legal. [p. 814, col. 1.]

A *katihari* charge payable by a tenant to the *zemindar* in respect of looms worked by the latter in his house, is not an illegal cess within the meaning of section 74 of the Bengal Tenancy Act [p. 814, col. 1.]

Mohammad Abdul Hai v. Nathu, 27 A. 183, A. W. N. (1904) 204, relied upon.

Appeal against the decree of the District Judge, Durbhanga, dated the 16th February 1916, confirming that of the Munsif, 1st Court, Durbhanga, dated the 20th July 1915.

Mr. Murari Prasad, for the Appellant.

Messrs. Nirsu Narain Sinha, and Purendra Narain Sinha, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for recovery of a certain sum as *katihari* (a charge upon looms) from the defendant first party who is said to be a weaver. The suit is based upon the basis of the finally published Record of Rights. The lower Appellate Court has dismissed the suit. In the Record of Rights the defendants' predecessor has been recorded as holding three plots, namely, Nos. 929, 963 and 1065. No. 1065 is the *kusht* land of the defendant with an area of 4 *kathas* 7 *dhoors*. The rent shown in the *khatian* is Re. 1-2-3 besides cesses. The plot No. 963 as shown is a house with

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a *sahan* in the possession of the defendant and is *belagan* (without rent).

The lower Appellate Court says, "the fact that the rent is recorded in the Record of Rights separately from the *katihari* indicates that the *katihari* is demanded not in respect of land, but in respect of the defendants' trade. On the whole I am not satisfied that *katihari* is legally recoverable." No doubt the *katihari* has not been demanded in respect of the land in plot No. 1065 in the cultivation of the defendants, which has been separately recorded and separate rent has been shown against it. The charge of eight-annas a year for every loom when the defendant weaves is entered in the Record of Rights against the plot No. 963. The charge of *katihari* is demanded for the defendants' working the loom on the premises situate within the *zamindari* of the plaintiff. The charge is not in addition to the actual rent payable by the defendant in respect of the agricultural land held by him in plot No. 1065 and does not, therefore, come under section 74 of the Bengal Tenancy Act, which prohibits an imposition of any *abwab* in addition to the actual rent, i. e., rent payable for the use or occupation of agricultural land. There is nothing, therefore, in the Bengal Tenancy Act or any other law to prevent the plaintiff from enforcing the payment of *katihari* in respect of the looms that the defendant works in his house in plot No. 963. The *katihari* has been entered in the Record of Rights as payable by the defendant. The presumption is in favour of the charge being legal. The record shows that the defendant is liable to Re. 1-2-3 as rent for the agricultural land in plot No. 1065 plus eight annas a year for every loom when he weaves in plot No. 963. The defendant is liable to pay what is entered in the Record of Rights unless the presumption raised by the entry is rebutted. *Vide* sections 103B and 147B of the Bengal Tenancy Act.

Even if it be said that the *katihari* is a charge upon the trade carried on by the defendant or a tax upon weaving, it cannot be said that it is illegal and not recoverable from the defendant. The *katihari* or charge on loom has been recognized by the Settlement authorities, *vide* the Government edition of the Survey Guide and Glossary

of 1907, page 12, and the Survey Settlement Guide by Nilmani De, pages 97-98. If it were an illegal cess it would not have been recognized and noted in the Record of Rights by the Survey authorities, for all illegal cesses and *abwabs* have been disallowed and are eliminated from the rents payable by tenants in the Record of Rights and are never shown in the entries in the Record of Rights. '*Mutharfa*' rents under different denominations as distinguished from rents for agricultural or horticultural lands are in vogue in the Province of Behar and in other parts of the country and have been recognized by the Survey and other authorities. The ruling reported as *Mohammad Abdul Hai v. Nathu* (1) seems to me to be exactly on all fours with this case. '*Mutharfa*' has been defined there as including a tax upon looms (as in this case), a trade tax, a tax upon certain occupations, and a tax upon tradesmen's shops. This ruling further shows that certain classes of people who occupy houses in the *abadi* and carry on the trade or profession of their caste in their houses pay '*mutharfa*' to the *zemindar*, and that such '*mutharfas*' are entered in the *wajib-ul-arz* of the village and are legally recoverable.

It is contended by the learned Vakil for the respondents that the *katihari*, a charge upon looms, would amount to a public tax which Government alone has a right to impose, and not private *zemindars*. It has not been shown, however, that *katihari* is prohibited by Government and that it is illegal for the landlord to impose or to realise it. I, therefore, differ from the view of the learned District Judge, and hold that the view taken by him is erroneous. The suit has been dismissed by him on the sole ground that the rent in respect of which the suit was brought is not legally recoverable. He has not, however, decided the other issue in the case, namely, "Does Mahbub Momin, the defendant in this case, weave cloths?" The defendant did not take up this plea in the written statement. The first Court came to the conclusion that the defendant does not weave cloths. In the grounds of appeal preferred before the District Judge a distinct objection to the

(1) 27 A. 183; A. W. N. (1904) 204.

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finding of the first Court on this issue was taken. As the Court below held that the *katihari* was not legally recoverable, apparently it did not consider it necessary to go into the other question whether the defendant weaves cloths or not. But as the finding on the first issue has been upset in this Court, I think it necessary to have an adjudication by the Court below of the second issue upon the evidence on the record. If the Court below comes to the conclusion that the defendant did weave the cloths in the years in suit, the defendant will be clearly liable to pay the *katihari* claimed in the suit. If on the other hand the Court finds that the defendant did not weave cloths, the suit will be dismissed. With these remarks I remand the case to the lower Court for a finding upon the issue referred to above and to dispose of the appeal in accordance with the remarks made above. Cost will abide the result.

Appeal allowed; Case remanded.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 258
OF 1915.

August 7, 1916.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Twomey.

MA MAI GALE—APPELLANT

versus

MAUNG TUN WIN—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, delay in presenting—Sufficient cause—Discretion—High Court, interference by—Pleader, bona fide mistake of.

A Judge has a discretion in admitting an appeal under section 5 of the Limitation Act, but the discretion must be judicially exercised and must be based on materials judicially cognizable. [p. 816, col. 2.]

High Courts are loth to interfere with the exercise of a discretion given by law to a lower Court, but if the discretion has been exercised without appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and without the application of the right principle to those facts, interference is called for. [p. 816, col. 2.]

Kichilappa Naicker v. Ramanujam Pillai, 25 M. 166, referred to.

A *bona fide* mistake of a Pleader, in order to afford sufficient cause for admitting an appeal after time, should be one made in spite of due care and

attention having been exercised. [p. 816, col. 2.]

Rakhal Chandra Ghosh v. Ashutosh Ghosh, 19 Ind. Cas. 931; 17 C. W. N. 807; *Sarat Chandra Bose v. Saraswati Debi* 34 C. 216, 5 C. L. J. 380, referred to.

Mr. *Palit*, for the Appellant.

Mr. *R. N. Burjorjee*, for the Respondent.

JUDGMENT.

Fox, C. J.—The first ground urged in the second appeal is to the effect that the learned Divisional Judge erred in admitting the appeal to his Court since it was plainly barred by limitation, and there were no materials before him on which he could rightly be satisfied that the appellant had sufficient cause for not preferring the appeal within the period of limitation.

The suit was one for redemption of mortgaged land valued in the plaint at Rs. 4,500.

A decree for an account of what was due on the mortgage was made on the 27th June 1913. This judgment determined that the plaintiff was entitled to only a portion of what he claimed.

An appeal against such decree was open to the plaintiff and it lay to the Divisional Court. If no appeal from it was made, section 97 of the Code of Civil Procedure would preclude its correctness from being disputed in an appeal from the final decree. The period of limitation for it was sixty days and the time taken in obtaining copies of the judgment and decree.

Another judgment and decree based on the result of taking the account ordered was made on the 28th July 1913.

Application was made on that day for copies of both judgments and decrees. The copies were ready for delivery on the 13th August and were delivered on the 14th of the same month.

No appeal was presented to the Divisional Court against the decree of the 27th June, and counting the time taken in obtaining a copy of that decree and the judgment, an appeal would be barred if presented after the 13th September 1913.

An appeal was filed in this Court on the 18th November 1913, which was the first day on which the Court opened after the vacation. This appeal came on for hearing on the 24th March 1915. The plaintiff's Advocate then asked that the memorandum of appeal might be returned to him for presentation to the Divisional Court, on the

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ground that the appeal had been filed in this Court by inadvertence.

The appeal was valued at Rs. 5,500 in the memorandum. It is difficult to understand how this valuation could have been entered by inadvertence. Mr. R. N. Burjorjee says it was done under the instructions of the plaintiff. The memorandum was returned and was presented to the Divisional Court on the 27th March 1915. The appeal was admitted provisionally subject to decision on the question of limitation. This question was argued and the learned Judge admitted, heard and determined the appeal.

All he says about the admission of the appeal is: "I have admitted the appeal as, after argument, I am of opinion that the mistake in filing the appeal in the Chief Court instead of in this Court was due to an error about the value of the land on the part of Maung San Pe, Pleader, who instructed Mr. Burjorjee."

No evidence on oath either oral or by affidavit is on the record, but a letter from Maung San Pe to Mr. Burjorjee dated the 13th September 1913 is filed. In this Maung San Pe says: "I thought of filing the appeal in the Divisional Court but owing to my finding that the land was on the date of filing of the suit worth over Rs. 5,000 I send it round to you to be filed in the Chief Court."

Nowhere is it explained how Maung San Pe came or could come to find that the land had been worth over Rs. 5,000.

If he had examined the plaint as he should have done, he could not have made the mistake. If the plaintiff untruly told him that it was worth over Rs. 5,000 after having valued it at Rs. 4,500 in the plaint, such untrue statement should clearly not have afforded a ground for relaxation of the law of limitation in the plaintiff's favour.

Not only the initial delay of over a month in applying for a copy of the judgment of the 27th June had to be explained, the gross delay in remedying the mistake of filing the appeal in this Court called for explanation.

The record was received in this Court on the 18th December 1913. Mr. Burjorjee had from that date until the case came on for hearing on the 24th March 1915 in which

to examine the record, even if it can be assumed that his client did not furnish him with a copy of the plaint. It was open to him at any time within the above period to make the application which he made on the 24th March 1915. A Judge has a discretion in admitting an appeal under section 5 of the Limitation Act, but the discretion must be judicially exercised and must be based on materials judicially cognizable. High Courts are loth to interfere with the exercise of a discretion given by law to a lower Court, but if the discretion has been exercised without appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and without the application of the right principle to those facts, interference is called for:—*Kichilappa Naicker v. Ramanujam Pillai* (1).

It has been held in some cases that a *bona fide* mistake of a Pleader affords sufficient cause for admitting an appeal after time, see *Rakhal Chandra Ghosh v. Ashutosh Ghosh* (2) and the cases referred to therein, but a *bona fide* mistake is one made in spite of due care and attention having been exercised.

In the present case there was nothing before the learned Judge to explain the plaintiff's apparent inaction up to or shortly before the time when an appeal from the decree of the 27th June 1913 would become barred, and there is nothing on the record to justify a finding that the plaintiff's Pleader's belief that an appeal lay to this Court was formed with due care and attention. This last alone would have justified refusal to admit the appeal after time, see *Sarat Chandra Bose v. Saraswati Debi* (3).

In addition, the very gross delay in taking any step to remedy a mistake which must have been obvious to any one who had taken the trouble to read the plaint was quite inexcusable.

The appeal should not have been admitted. This appeal is allowed, the decree of the Divisional Court is set aside and that of the District Court is restored.

(1) 25 M. 166.

(2) 19 Ind. Cas. 931; 17 C. W. N. 897.

(3) 34 C. 216; 5 C. L. J. 330.

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The respondent must pay the appellant's costs in this Court and in the Divisional Court.

TWOMEY, J.—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2403 OF 1914.

May 9, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

RAJANI NATH DAS—PLAINTIFF—

APPELLANT

versus

OFAJUDDI MULLAH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 47—Documents, registration of, at different times—Priority of title.

As soon as a *kabala* is registered, it operates from the date of its execution and, therefore, the title created by it will have priority over that created by a later *kabala* executed in favour of another person in respect of the same property, notwithstanding its prior registration and the delivery of possession to that person. [p. 818, col. 1.]

Hasha v. Ragho Ambo Gondhali, 6 B. 165; 3 Ind. Dec. (N. S.) 564 and *Santaya Mangaraya v. Narayan*, 8 B. 182; 4 Ind. Dec. (N. S.) 495, not followed.

Narayan Venkap Shetti v. Laxuman Shantaya Kini, 29 B. 42; 6 Bom. L. R. 687; *Kalidas Mullick v. Kanhaya Lal Pundit*, 11 J. A. 218; 11 C. 121; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839 and *Jadunandan Prosad Singha v. Koer Kallyan Singh*, 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612, followed.

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Backergunje, dated the 12th June 1914, affirming that of the Munsif, 5th Court, Barisal, dated the 27th November 1912.

FACTS.—Plaintiff purchased the disputed property from defendant No. 1 by a sale-deed which was executed on 27th April 1910, but was not registered before July 1910. In the meanwhile the defendant No. 1 again sold the property to defendant No. 2 by a sale-deed which was both executed and registered on 18th May 1910, and also delivered him possession of the property. Plaintiff's suit for recovery of possession on the strength of his sale-deed was dismissed by the lower Appellate Court, on the ground that the defendant No. 2 was a *bona fide* purchaser without notice of the prior sale-

deed, and "the fact that that *kabala* was subsequently registered cannot have the effect of nullifying his purchase, which had been already forfeited by a *kabala* registered long before the date of the registration of that of the plaintiff and by delivery of possession of land in dispute."

The plaintiff appealed to the High Court.

Babus *Atul Chandra Gupta* and *Tarakeshwar Pal Chowdhury*, for the Appellant.—The lower Appellate Court is wrong in holding that defendant No. 2, whose sale-deed was executed later but registered earlier than that of the plaintiff, had the preferential title. It has overlooked the provisions of section 47 of the Registration Act, which makes a registered document operate not from the date of its registration but from the date of its execution. See *Narayan Venkap Shetti v. Laxuman Shantaya Kini* (1) and *Jadunandan Prosad Singha v. Koer Kallyan Singh* (2). The fact that defendant No. 2 is found to be a *bona fide* purchaser without notice is immaterial, as in this case the competition is not between a registered and an unregistered document but between documents both of which are registered. So the principle of decisions like that reported as *Abool Hossein v. Raghu Nath Sahu* (3) has no application.

Babu *Surendra Nath Guha*, for the Respondent.—It has been found that the execution and registration of defendant's *kabala* were accompanied by delivery of possession, whereas the plaintiff obtained no possession. His title is, therefore, inferior to that of the defendant. See *Hasha v. Ragho Ambo Gondhali* (4).

Babu *Atul Chandra Gupta*, in reply.—The Bombay case cited proceeded on the peculiar view which obtained in the Bombay High Court that under Hindu Law delivery of possession is necessary for forfeiting title by sale. This view has since been overruled by the Privy Council in *Kalidas Mullick v. Kanhaya Lal Pundit* (5) and is no longer

(1) 29 B. 42; 6 Bom. L. R. 687.

(2) 13 Ind. Cas. 653; 15 C. L. J. 61 at p. 67; 16 C. W. N. 612.

(3) 13 C. 70; 6 Ind. Dec. (N. S.) 544.

(4) 6 B. 165; 3 Ind. Dec. (N. S.) 568.

(5) 11 J. A. 218; 11 C. 121; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839.

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law even in the Bombay Presidency. See *Narayan Venkap Shetti v. Laxuman Shantaya Kini* (1).

JUDGMENT.—This appeal has been very clearly and ably argued by Babu Atul Chandra Gupta, Vakil for the appellant, and we are quite satisfied that the learned Judge below was wrong in dismissing the suit of the plaintiff.

The defendant No. 1 in this case executed a *kabala* in favour of the plaintiff on receipt of consideration. Thereafter he executed a second *kabala* in respect of the same property in favour of defendant No. 2 and had the latter document registered first and placed the second purchaser in possession. The learned Judge below has held that because the defendant No. 2 acquired the property without any notice of the previous title of the plaintiff, his title ought to prevail against the prior title of the plaintiff, which was registered later. This view is clearly in violation of section 47 of the Registration Act, which provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

As soon as the *kabala* of the plaintiff was registered, it operated from the date of its execution, and, therefore, the title of the plaintiff is prior *notwithstanding* the prior registration and delivery of possession to the defendant.

The learned Vakil for the respondent relied upon two cases in the Bombay High Court, namely *Hasha v. Ragho Ambo Gondhali* (4) and *Santaya Mangarsaya v. Narayan* (6).

These cases, however, are no longer law in the Presidency of Bombay, because we find from the cases of *Narayan Venkap Shetti v. Laxuman Shantaya Kini* (1) and *Motichand Jivraj v. Sagun Jetharam* (7) that a different view has been held in that Court in consequence of a decision of the Privy Council in the case of *Kalidas Mullick v. Kanhaya Lal Pundit* (5), which held that in order to complete title under the Hindu Law, delivery of possession was not a necessary ingredient.

The same view with regard to *priority* of title between competing registered documents

was held in this Court also in the case of *Jadunandan Prosad Singha v. Koer Kallyan Singh* (2). We, therefore, think that the learned Judge was clearly wrong in his enunciation of law in this case.

This appeal, therefore, is decreed with costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 59 OF 1916.

January 12, 1917.

Present.—Sir Henry Richards, Kt.,

Chief Justice, and Justice

Sir P. C. Banerji, Kt.

MAHABAT RAI AND OTHERS—DEFENDANTS
—APPELLANTS

versus

BHARADDWAJ DAMODAR DAS—

PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 150, 152, 153, 173, 177, 180—Settlement Officer—Resumption, suit for—Question of proprietary title raised—Appeal to District Judge, maintainability of—S. 158, scope of—Limitation Act (IX of 1908), s. 5—Letters Patent Appeal—Delay in filing—Sufficient cause—Limitation.

An appeal lies from an order of a Settlement Officer, exercising the powers of a Collector, to the District Judge in a suit in which a question of proprietary title is raised by the defendant in the Court of first instance and is also involved in the appeal. [p. 820, col 2.]

Section 158 of the Agra Tenancy Act is not limited in its application to grants made subsequent to the passing of the Act. It confers certain rights upon certain individuals who have been in occupation of lands for the periods mentioned in the section, irrespective of when that occupation commenced. [p. 821, cols. 1 & 2.]

Plaintiff sued defendants for resumption of a rent-free grant in the Court of the Settlement Officer. The suit was decreed and the defendants appealed to the District Judge, who set aside the decree of the Settlement Officer and dismissed the suit. On an appeal by the plaintiff the High Court held that the District Judge had no jurisdiction to hear the appeal and directed that the memorandum of appeal to that Court be returned to the defendants for presentation to the proper Court. The Commissioner, before whom the appeal was next preferred, held that appeal lay to the District Judge. Defendants then applied to the High Court for review of its judgment, but their application was rejected. They then preferred a Letters Patent Appeal against the original order of the High Court, which was considerably beyond time.

Held, that there was sufficient cause for the delay in presenting the appeal, and that the appellants were entitled to the benefit of section 5 of the Limitation Act. [p. 820, col. 1.]

(6) 8 B. 182; 4 Ind. Dec. (N. S.) 495.

(7) 29 B. 46; 6 Bom. L. R. 690.

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Appeal, under section 10 of the Letters Patent, from the judgment of Justice Sir George Knox, dated the 20th of May 1915.

FACTS.—The plaintiff brought a suit against the defendants for resumption of a rent-free grant in the Court of Mr. E. S. Liddiard, who was described as the Record Officer. That gentleman heard the case and passed orders for resumption of the land. The defendants went in appeal to the Court of the Additional District Judge of Etawah, who held that the land was not resumable and that the defendants had acquired proprietary rights therein. The plaintiff then went in appeal to the High Court, on the ground that the Additional District Judge had no jurisdiction to hear the appeal as the order appealed against was one passed by a Record Officer. The High Court accepted this plea and ordered that the memorandum of appeal to the lower Appellate Court be returned to defendants for presentation to the proper Court.* The defendants presented it to the Court of the Commissioner. The Additional Commissioner held that though the Court of Mr. E. S. Liddiard was described as that of the Record Officer, it was actually the Court of the Settlement Officer. He further held that suits for resumption were maintainable only in a Revenue Court, viz., that of a Collector or Assistant Collector of the 1st class, except where a District was under Settlement (as Etawah was at the time after institution of the suit) when they had to be filed in the Court of the Settlement Officer who had the powers of a Collector for the purpose of trying such suits. (Section 152, Agra Tenancy Act, U. P. Act II of 1901.) He further held that appeals from the decrees of the Settlement Officer in such suits were governed by section 180 (1) of the Tenancy Act and lay under section 177 or 179 of the Act to the District Judge or to the Commissioner. He also held that Mr. Liddiard had decided a question of proprietary title in the case, and, therefore, an appeal properly lay to the District Judge. He thus came to the conclusion that no appeal lay in his Court and refused to admit the appeal. He directed that the party aggrieved might apply to the High Court to review

its judgment. The defendants then applied to the High Court praying for review of judgment but their application was rejected. The defendants then filed a Letters Patent Appeal.

Mr. Peary Lal Banerji (for Messrs. Abdul Raoof and Kailash Nath Katju), for the Appellants, submitted that from the judgment of the Additional Commissioner it was abundantly clear that an appeal lay to the District Judge and finally to this Court. The decision of this Court was incorrect and should be set aside.

Mr. M. L. Agarwala, for the Respondents, submitted that it was clear that an appeal from an order of the Record Officer lay before the Commissioner. Even if the order be taken to be that of the Settlement Officer no appeal lay before the District Judge. He referred to sections 175, 177 and 180 and submitted that under section 152 of the Tenancy Act the Settlement Officer had the powers of a Collector 'under the Chapter', but in Chapter X there was mention of the Collector's powers: Under section 177 an appeal lay to the District Judge from the decree of an Assistant Collector of the first class. Under section 180 an appeal lay from an original decree or order of a Collector in the same manner as one of an Assistant Collector, first class.

JUDGMENT.—This appeal arises out of a suit for resumption under sections 150 and 154 of the Tenancy Act. The case came before Mr. Liddiard, who was then "Record" and "Settlement" Officer. Section 152 provides that suits under section 150 should (when the local area in which the land is situate is under Settlement) be instituted in the Court of the "Settlement" Officer. Mr. Liddiard granted the plaintiff a decree. An appeal was taken to the District Judge, who held that the plaintiff was not entitled to resume the land and dismissed the suit. A second appeal was preferred to this Court, when a preliminary objection was taken that no appeal lay. The learned Judge of this Court upheld this plea and ordered the memorandum of appeal to be returned to the appellant, with a view to its being presented in the proper Court. It was accordingly presented in the Court of the Commissioner, who pointed out that an unfortunate error had arisen from the

*See *Bharat Duaj Damodar Das v. Mahabbat*, 29 Ind. Cas. 421.

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circumstance that Mr. Liddiard occupied the twofold office of Settlement Officer and Record Officer, and had described himself in his judgment as "Record" Officer. The learned Commissioner held that the appeal lay to the District Judge. Thereupon the defendants applied for a review of judgment to the learned Judge of this Court. This application was rejected, not on the merits, but because the learned Judge considered that the applicants had allowed too long a time to elapse between the decision of the Commissioner and the application for the review of judgment. A Letters Patent appeal has been preferred against the refusal of the learned Judge of this Court to entertain the application for a review of judgment. An appeal has also been preferred against the original decision of the learned Judge of this Court in which he held that no appeal lay to the District Judge. This last-mentioned appeal was filed beyond time and has been admitted subject to the objection of the other side, and the respondents now strongly object to the hearing of the appeal on the ground of limitation. We have considered this question. We think that there were certainly circumstances to explain the delay. Not unnaturally, this High Court, having decided against them, the defendants went to the Commissioner. After the Commissioner had pointed out how the error arose, it was not unnatural that the defendants should go to the learned Judge of this Court in review of judgment, hoping that when the error was pointed out he would allow the appeal to be considered on its merits. It was only when the learned Judge of this Court rejected the application for review that it became necessary to think of preferring an appeal against the original decision. Under all the circumstances of the case we consider that there is sufficient ground for admitting the appeal notwithstanding the delay, and we have accordingly decided to hear it.

The first question for consideration is whether an appeal lay to the District Judge. Had it not been for the fact that the area in which the land was situate was under Settlement, the suit for resumption would have come before an Assistant

Collector of the first class. Undoubtedly a question of proprietary title was raised by the defendants in the Court of first instance and was also involved in the appeal. Therefore, it is quite clear that had it not been that the suit was instituted in the Court of the Settlement Officer, an appeal would have lain to the District Judge. We have no doubt that the suit must be considered as having been instituted before Mr. Liddiard as "Settlement" Officer and not as Record Officer. As Record Officer he would have had no jurisdiction of any kind to entertain the suit. Section 152 provides that the Settlement Officer shall have all the powers of the Collector. Section 173 provides that a Collector shall have all the powers conferred on an Assistant Collector of the first class and of a Collector. Section 177 provides that appeals shall lie from the decree of the Assistant Collector of the first class in different classes of cases, and amongst others in all suits in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal. Section 180 provides that an appeal shall lie from an original decree or order of a Collector in the same manner and under the same conditions as from a decree or order of an Assistant Collector of the first class. Reading all these sections together we consider that an appeal lies from the Settlement Officer as if he was the Collector, to the District Judge. Mr. Agarwala has argued with great ingenuity that section 152 only provides that the Settlement Officer shall have the powers of a Collector under Chapter X, that is to say, he shall have only such powers as are conferred on the Collector by that Chapter. The drafting of the section is one more example of want of skill in the drawing up of the Tenancy Act. No powers of any kind are conferred upon the Collector by Chapter X. We must read it as if the words "under this Chapter" were either omitted altogether, or placed in another part of the section, or the words "who shall have the powers of a Collector" are read as in a parenthesis. We think that an appeal lay to the District Judge and that the learned

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Judge of this Court ought to have heard the appeal on its merits. We proceed to do so.

The plaintiff came into Court alleging that he was entitled to resume the land because it was held at the pleasure of the grantor. Section 154 provides that land held rent-free shall be liable to resumption *only when by the terms of the grant, or by local custom*, it is held (a) at the pleasure of the grantor or (b) for the performance of some specific service, religious or secular, which the proprietor no longer requires, or conditional, or for a term, and the condition is broken or the term expires. Clause 2 provides that every suit for resumption shall be brought within twelve years from the date on which the right to resume first accrued. The section proceeds to prescribe when the right is deemed first to have accrued. There is a further provision that in cases where the grant was made for the performance of some specific service, notice in writing has to be given by the proprietor to the grantee that the service is no longer required. It is not pretended in the present case that the plaintiff was entitled to resume the land on any other ground than that it was held "at the pleasure of the grantor." That is the only ground upon which the plaintiff came into Court. It has been found that the land has been held free of rent for five generations and more than 50 years. There was no evidence that by the terms of the grant or local custom the grantee held at the will and pleasure of the grantor. Under these circumstances it seems to us that the plaintiff entirely failed to establish such facts as entitled him to a resumption of the land. Section 158 provides that land which is not liable to resumption under section 154, and which has been held rent-free for 50 years, and by two successors to the original grantee, shall be deemed to be held in proprietary right. It is contended that this section can only apply to grants made subsequent to the passing of the Tenancy Act. We do not think that this contention is correct. It is quite clear that the Legislature intended to confer such rights upon certain individuals who

had been in occupation of the land for the periods mentioned in the section, irrespective of when that occupation commenced.

We think the view taken by the learned District Judge was correct and should be affirmed. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the District Judge with costs of both hearings in this Court.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 728 OF 1916.

December 7, 1916.

Present:—Mr. Justice Jwala Prasad.
Sri Sri RADHA KISHUNJI THAKUR,
THROUGH SEBAYAT Musammāt SHYAM
KUMARI—DEFENDANT 1ST PARTY—
APPELLANT

versus

LALJI SAHA—PLAINTIFF 1ST PARTY AND
MOTI JHA AND ANOTHER—

DEFENDANTS 2ND PARTY—RESPONDENTS.

Landlord and tenant—Occupancy tenancy—Co-sharer landlord, rent decree obtained by—Purchase of holding in execution—Mortgagee in possession, ouster of—Suit by mortgagee—Non-transferable holding, plea of, validity of—Estoppel.

It is not open to a fractional co-sharer, who purchases a holding in execution of a rent decree which only amounts to a money decree, to raise the question of non-transferability of the holding, as a defence to an action by a mortgagee whom he has ousted from possession, especially when the mortgagee has long been in possession and no objection has been taken by any of the landlords. [p. 822, col. 2.]

Asmatunness Khatun v. Harendra Lal Biswas, 35 C. 904, 12 C. W. N. 721; 8 C. L. J. 29, distinguished.
Tulsi Singh v. Dayal Singh, 15 Ind. Cas. 718, referred to.

Appeal from the decree of the District Judge, Monghyr, dated the 28th February 1916, affirming that of the Munsif, First Court, Begusarai, dated the 24th of February 1915.

Mr. Syed Muhammad Tahir, for the Appellant

Mr. Ragho Pershad, for the Respondent.

JUDGMENT.—The appellant in this case was a fractional landlord of the land in suit. He brought a suit for recovery of arrears of rent against defendants Nos. 2 and 3 who are the tenants of the land, and obtained

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a rent decree. In execution of that decree he purchased the right, title and interest of defendants Nos. 2 and 3. As the decree under which the sale took place was that of a fractional landlord only, the right, title, and interest of the judgment-debtor passed and not the entire holding, as in the case of sale in execution of a rent decree by the entire body of landlords. The plaintiff-respondent was the usufructuary mortgagee of this holding from defendants Nos. 2 and 3 and had been in possession of the holding from 1889. The appellant, after his purchase, dispossessed the plaintiff from the land in suit in September 1912. The plaintiff has, therefore, brought this suit for a declaration of his title based on the usufructuary mortgage-bond executed by the father of the defendants Nos. 2 and 3, and for recovery of possession of the land in suit. Both the Courts below gave the respondent a decree for possession of the land. The defendant No. 1 has appealed to this Court. The lower Appellate Court has held that the mortgage-bond in favour of the plaintiff is a genuine document and that the plaintiff was in possession of the land in suit on the strength of the bond till he was dispossessed by the defendant No. 1 in 1912. This finding is not disputed in appeal by the learned Vakil for the appellant. It is, however, contended by him that the lower Appellate Court has omitted to decide the issue raised in the case regarding the non-transferability of the holding. The contention is that the holding of defendants Nos. 2 and 3 was not transferable, and hence the plaintiff, who bases his claim on the mortgage-bond from the predecessor-interest of defendants Nos. 2 and 3, has derived no title to the land, and, therefore, the suit for possession does not lie. Reliance is placed upon *Asmatunnessa Khatun v. Harendra Lal Biswas* (1). In that case the question about the non-transferability of the holding was raised by the entire body of the landlords, and not, as in this case, by a fractional co-sharer, and on that ground the case was distinguished in *Tulsi Singh v. Dayal Singh* (2). I do not think that it is

open to the defendant No. 1, a fractional co-sharer, who purchased the holding in execution of his rent decree which amounts to a money decree, to raise the question of the non-transferability of the holding. It is significant that the plaintiff was in possession of this holding, by virtue of the transfer from the predecessor of defendants Nos. 2 and 3, from the year 1889 and no objection was raised by the defendant No. 1 or by any of the landlords as to the non-transferability of the holding for such a length of time. In paragraph 2 of the plaint some previous transfers also of this very holding have been referred to.

All these facts and circumstances go conclusively to show that there is no substance at all in the contention of the appellant in this case regarding the non-transferability of the holding.

The defendant No. 1 himself recognised the transferable nature of the holding when he bought it in execution of his own decree. There does not appear to be any merit in the contention of the learned Vakil for the appellant regarding the non-transferability of the holding.

I, therefore, agree with the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 2431 OF 1913.
December 11, 1916.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Broadway.

CHHUTTAN LAL—

APPELLANT.

versus

MUL CHAND—OBJECTOR—

RESPONDENT.

Land Acquisition Act (I of 1894), s. 3 (b)—‘Person interested,’ who is—Registration Act (XVI of 1908), ss. 49, 17, applicability of s. 49, to suits for refund of earnest-money—Evidence Act (I of 1872), s. 91—Evidence of payment of money—Proof.

A person who has entered into a valid agreement for the purchase of land is a “person interested” within the meaning of section 3 (b) of the Land Acquisition Act. [p. 824, col. 2.]

(1) 35 C. 904; 12 C. W. N. 721; 8 C. L. J. 29.

(2) 15 Ind. Cas. 718.

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Dunne, A. M. v. Nobo Krishna Mookerjee, 17 C. 144; 8 Ind. Dec. (N. S.) 634; *Galstaun, J. C. v. Secretary of State*, 10 C. W. N. 195 and *Pestonji Jehangir, In re*, 15 Ind. Cas. 771; 37 B 76 at p. 79; 14 Bom. L. R. 507, referred to.

Section 49 of the Registration Act does not apply to a suit for the refund of earnest-money. Therefore, a document which requires registration under section 17 of the Act, but which is unregistered, would be admissible in evidence in such a suit to prove payment of the earnest-money. [p. 825, col. 1.]

Obiter dictum.—Where a receipt for earnest-money is not admissible in evidence, payment of the amount can be proved *aliunde* by virtue of section 91 of the Evidence Act. [p. 825, col. 1.]

Sharaf Ali Khan v. Jagandar Singh, 37 Ind. Cas. 132; 98 P. R. 1916, followed.

First appeal from an order of the Divisional Judge, Delhi, dated the 30th October 1913, ordering Rs. 1,700 to be paid to the respondent out of the compensation awarded.

Dr. Gokul Chand Narang, for the Appellant.

Mr. Sundar Das, for the Respondent.

JUDGMENT.—The facts of this case are these. One Chhuttan Lal was the owner of a garden in *Mauza Bankoli*, Tahsil Delhi. He agreed to sell the same to one Mul Chand and on the 25th September 1907 certain documents were executed which evidenced the said agreement. These documents are three in number and were written on the same day, and apparently about the same time. It is not clear in which order they were written, but judging from their contents it would seem that the first to be executed was a receipt for Rs. 1,500. In this receipt it is stated that Chhuttan Lal had sold the garden to Mul Chand for Rs. 4,500 and had received Rs. 1,500 as earnest money. It is stamped as a receipt and its execution is admitted.

This is followed by a letter from Mul Chand to Chhuttan Lal in which the fact of the sale is recited, as well as the payment of Rs. 1,500 as earnest-money, and an undertaking is given to pay the balance of Rs. 3,000 within two weeks and get the sale-deed executed.

The third document is another receipt executed by Chhuttan Lal in favour of Mul Chand, in which the fact of the sale is recited and the receipt of Rs. 200 as earnest-money is acknowledged. It goes on to say that the *remaining sum* will be taken "by getting the deed registered in favour

of Ch. Mul Chand within a day or two."

In accordance with the agreement to sell a conveyance was drawn up and the draft has been placed on the record. It is not signed nor is it completed, the terms of the sale are recited, and the sale price is given as Rs. 4,500 and the following words occur: "I have received the entire sale-money as per details given below....." but no details are given at the end of the document. This conveyance was written by one Abdul Rashid (P. W.) and though it is not dated, there seems no doubt that it was written soon after the 25th September 1907.

The sale was not completed as one Pars Ram, a brother of Chhuttan Lal, claimed to have a share in the garden, and nothing could be done till that matter was settled. That there was such a dispute seems certain and, therefore, the fact that the money was not paid within the two weeks referred to in the letter of the 25th September 1907 is not really material.

In 1908 Chhuttan Lal brought a suit against Mul Chand asking for a declaration to the effect that the agreement of sale be held to be cancelled. In this suit it was alleged that the sale price was really Rs. 3,000 (the additional Rs. 1,500 being entered merely to stave off pre-emptors) and that only Rs. 200 had been received as earnest-money the receipt for Rs. 1,500 being fictitious though admittedly executed. It was further alleged that Mul Chand had failed to complete the transaction within the specified period and was avoiding payment of the balance and had, therefore, been guilty of a breach of contract.

Mul Chand traversed these allegations and maintained that he was, and always had been, ready to complete the sale, as far as he was concerned, but that owing to the dispute between the brothers Chhuttan Lal had been unable to give him a clear title.

This suit was ultimately decided on appeal by Mr. A. E. Martineau, Divisional Judge, on the 23rd March 1911, who held that there had been no breach of contract on the part of Mul Chand and that the agreement to sell was still subsisting.

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Up to the end of 1911 nothing further seems to have been done by either party, and the garden was then acquired by Government in connection with the establishment of the new capital at Delhi.

In the course of the acquisition proceedings before Mr. Addison, Mul Chand advanced a claim for Rs. 1,700 alleging that he was a person interested. The date of this application by him is not traceable, but that it had been made prior to the 14th February 1913 is clear from an application of that date made by Chhuttan Lal, in which Mul Chand's application is clearly referred to.

The Special Land Acquisition Officer (Mr. Addison) gave his award in the matter on the 2nd July 1913, and on the 5th August 1913 on an application by Mul Chand passed an order referring the question of the apportionment of the compensation awarded for the garden in question to the Divisional Judge.

The parties appealed before the Divisional Judge and agreed that the statements of certain witnesses made in the Suit of 1910 (above referred to) should be treated as evidence in these proceedings.

Ultimately, the Divisional Judge awarded Rs. 1,700 to Mul Chand, holding that the two receipts sufficiently established the payment by him of that amount to Chhuttan Lal.

Against this decision Chhuttan Lal has preferred this appeal through Dr. G. C. Narang, and we have heard Mr. Sundar Das for Mul Chand.

The first point urged by Dr. Narang was that Mul Chand was not a "person interested" in the land within the meaning of section 18 of the Land Acquisition Act, and had no right to be heard in the acquisition proceedings. The order of reference to the Divisional Judge and all subsequent proceedings thereon, it was contended, were without jurisdiction.

We were referred to sections 3 (b), 9 (3), 10 and 25 of the Land Acquisition Act as well as to *Dunne, A. M. v. Nabo Krishna Mookerjee* (1) and were asked to hold that the expression "person interested" meant

a person having a permanent and transferable interest in the property acquired, and no other.

It was argued that the true test was whether the Government could have gone to Mul Chand, and purchased the garden from him without any recourse to the provisions of the Land Acquisition Act.

Mr. Sundar Das objected to such a narrow construction being placed on these words and urged that all that was required was a *prima facie* claim to be interested in the compensation awarded, and he referred us to *Galstaun, J. C. v. Secretary of State* (2) and *Pestonji Jehangir, In re* (3), which decisions certainly support his contention. We do not think that the point really needs any discussion. The expression "person interested" has been defined in section 3 (b) of the Land Acquisition Act as including all persons, claiming an interest in compensation to be awarded on account of the acquisition of land under the Act, and this definition, in our opinion, is wide enough to include the equitable interest that Mul Chand claimed to have in the present case.

It was next urged that whatever interest Mul Chand may have, at one time, had under the agreement to sell, had come to an end before the garden was acquired and that the reference was, for that reason, bad and against law.

As has been said above, it was held in March 1911 that Mul Chand had not committed a breach of contract upto that date, and that the agreement to sell was in force. Dr. Narang has been unable to bring to our notice any subsequent act on Mul Chand's part to warrant the conclusion that the contract to sell had terminated either by the operation of the Statute of Limitation (Article 113) or in any other way, and we accordingly hold that the reference was competent and was made in accordance with law.

Dr. Narang finally took us into the merits of the case, and while admitting that Chhuttan Lal had received Rs. 200 as earnest-money denied the receipt of the sum of Rs. 1,500. He adversely criticised

(2) 10 C. W. N. 195.

(3) 15 Ind. Cas. 771; 37 B. 76 at p. 79; 14 Bom. L. R. 507.

(1) 17 C. 144; 8 Ind. Dec. (N. S.) 634.

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the evidence and objected to the admissibility of the receipt for Rs. 1,500, on the ground that under section 17 (c) of the Indian Registration Act it required to be registered.

It was pointed out that the evidence shows that Rs. 1,500 were not paid in cash, but that *ruqas* to that extent executed by Chhuttan Lal in favour of Mul Chand were said to have been handed over by the latter to the former in lieu of the receipt for Rs. 1,500 and Dr. Narang urged that the absence of any reference to these *ruqas* in the receipt rendered the whole transaction extremely suspicious.

The fact that *two receipts* were executed at the same time was also referred to as a matter creating doubt as to the genuineness of the payments alleged to have been made.

Mr. Sundar Das contended that (1) the receipt was admissible for the collateral purpose of proving the payment, (2) that even if it be excluded the evidence produced by Mul Chand proved the payment, and (3) that there was no rebuttal of the evidence produced beyond the mere statement of Chhuttan Lal.

He referred us to *Sharaf Ali Khan v. Jagandar Singh* (4) in support of the admissibility of the receipt.

That decision is authority for holding that the letter and the receipt are admissible to prove the agreement to sell, and for the proposition that the payment of the earnest-money can be proved *aliunde* by virtue of section 91 of the Indian Evidence Act.

We are inclined to the opinion that in the present case the receipt is admissible in evidence to support the *factum* of payment, inasmuch as the claim advanced by Mul Chand amounts to one for a refund of money paid as earnest-money, and section 49, Registration Act, has no application, and we hold accordingly.

We then have a receipt admittedly executed by Chhuttan Lal for Rs. 1,500 and another for Rs. 200, and in addition there is the evidence of witnesses in support of the transaction. Neither of the parties are shopkeepers, so that account books could not be expected to be produced by either side.

There is nothing inherently improbable in a payment of Rs. 200 in cash and an adjustment of claims amounting to Rs. 1,500 by way of earnest-money, though possibly such a settlement is not usual. There is also some force in Mr. Sundar Dass' contention that the fact that the witnesses mention *ruqas* as having been made over by Mul Chand lends strength to the truth of the story. If the whole transaction relating to this sum of Rs. 1,500 were mythical, it would have been much simpler to have stated that the money had been paid in cash. In our opinion, the learned Divisional Judge was right in holding that the onus lay on Chhuttan Lal to prove non-receipt of this sum, and we agree with him in holding that he has failed to discharge this onus. At the same time while we feel constrained to decide the claim in favour of Mul Chand because of the weight of evidence in the case, we consider he is a good deal to blame for this litigation and, therefore, in dismissing the appeal we direct that the parties will bear their own costs throughout.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2316 OF 1914.

October 3, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

SWAMINATHA VELLALA THEVAN
AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DARMALINGA CHETTIAR—PLAINTIFF—
RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 64, 47—
Auction-sale, invalidity of—Estoppel, plea of, available
to decree-holder, whether enures to auction-purchaser—
Evidence Act (I of 1872), s. 115.*

A judgment-debtor or any one deriving title from him, who is estopped from questioning the validity of an auction-sale as against the decree-holder, is equally estopped from contesting it as against the auction-purchaser at the execution sale, for the decree-holder has a legal right to bring the property to sale and that right would enure for the benefit of the purchaser so far as the judgment-debtor and his representatives are concerned. [p. 826, col. 2.]

Sarat Chunder Dey v. Gopal Chunder Laha, 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201, applied.

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Krishnabhupati Devu v. Vikrama Devu, 18 M. 13; 6 Ind. Dec. (N. s.) 359, followed.

The principle that the auction-purchaser is not the representative of the decree-holder is restricted to cases under section 47, Civil Procedure Code, and does not apply to the plea of estoppel under section 115 of the Evidence Act. [p. 826, col. 2.]

Nadamuni Narayana Iyengar v. Veerabhadra Pillai, 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928 and *Vasanji Haribhai v. Lallu Akhu*, 9 B. 285; 5 Ind. Dec. (N. s.) 189, referred to.

Second appeal against the decree of the Court of the Subordinate Judge, Negapatam, in Appeal Suit No 1043 of 1910, preferred against that of the District Munsif, Tiruvallur, in Original Suit No. 336 of 1909.

Mr. R. V. Krishnaswami Aiyar, for the Appellants.

Mr. P. S. Narayanaswami Aiyar for Mr. C. V. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.—In this case the plaintiff lands were attached in 1900 in execution of a decree against one Sambasiva Aiyar. In 1905 and 1906 the judgment-debtor sold the lands to defendants Nos 1 and 2 by private treaty. In 1908 the lands were sold in execution of the decree and purchased by the plaintiff. Objection was taken to the sale on the ground that the attachment, in pursuance of which the sale was held, was invalid, but this Court decided in Appeal Against Order No. 27 of 1908 that the judgment-debtor could not be allowed to question the proceedings to which his own conduct had led. Defendants now resist plaintiff's claim to the suit lands on the same ground as was taken by their vendor in the execution proceedings, and contend that they are entitled to do so, because section 64 of the Civil Procedure Code does not apply to a case when the attachment is invalid, and that they are not estopped from raising the plea of invalidity, as the plaintiff is not the representative of the decree-holder within the meaning of section 115 of the Indian Evidence Act, and they rely on *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (1) and *Vasanji Haribhai v. Lallu Akhu* (2) as authorities for holding that the auction-purchaser is not the representative of the decree-holder. The former case is

authority for the proposition only so far as section 244 (now section 47) of the Code of Civil Procedure is concerned, and the latter does not carry the case any further, but in *Sarat Chunder Dey v. Gopal Chunder Laha* (3) it was held that when a party was estopped from denying the validity of the mortgage right possessed by a mortgagee, he and his transferees were equally estopped as against the auction-purchaser in a sale obtained on the mortgage. Following this decision it was held in *Krishnabhupati Devu v. Vikrama Devu* (4) that when the plea of estoppel is available to a decree-holder it is likewise available to the purchaser at the execution sale. The reasoning upon which the decision of the Judicial Committee in *Sarat Chunder Dey v. Gopal Chunder Laha* (3) is based is that inasmuch as the party was estopped from denying the validity of the mortgagee's title, the title was good as against the person so estopped, and consequently the mortgagee could give a good title to the purchaser under a mortgage sale. Applying this principle to the present case, it would appear that inasmuch as the sale was valid so far as the decree-holder was concerned, it is equally valid so far as the auction-purchaser is concerned, for the decree-holder had a legal right to bring the property to sale and that right would enure for the benefit of the purchaser, so far as the judgment-debtor and his representatives are concerned. Defendants are, therefore, estopped from contending that plaintiff's purchase at the auction-sale was invalid. Apart from this question of law the finding of the lower Appellate Court is that the attachment in 1900 was not invalid. We see no reason why we should not accept this finding which is one of fact, and as a result the appeal must fail. The second appeal is dismissed with costs.

Appeal dismissed.

V. R. P.

(3) 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. s.) 201.

(4) 18 M. 13; 6 Ind. Dec. (N. s.) 359.

(1) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928.

(2) 9 B. 285; 5 Ind. Dec. (N. s.) 189.

RAMASWAMY CHETTY v. MAUNG TAH.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 32 OF 1916.

December 7, 1916.

Present—Sir Charles Fox, Kt., Chief Judge,
and Mr. Justice Ormond.P. R. V. R. RAMASWAMY CHETTY, BY
HIS AGENT RAMASAWMY PILLAY—
PLAINTIFF—APPELLANT

versus

MAUNG TAH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1903), s. 47, O. XXI,
r. 90—Limitation Act (IX of 1908), Sch. I, Art. 166—
Execution—Sale, application to set aside—Objections—
Limitation.*

Where objections in a petition to set aside an execution sale relate not only to material irregularity in publishing or conducting the sale but go further and include objections to the whole procedure starting with illegal attachment, the petition is admissible under section 47, Civil Procedure Code, and is not time-barred though filed beyond the 30 days allowed for an application under Order XXI, rule 90, Civil Procedure Code. [p. 828, col. 1.]

Mr. A. B. Banerji, for the Appellant.

Mr. Ginwalla, for the Respondents.

JUDGMENT.

Fox, C. J.—On the 2nd September 1912 the plaintiff obtained a decree against the defendants for Rs. 3,068-12, costs and subsequent interest.

On the 8th October 1912 the plaintiff applied for execution by the issue of a prohibitory order to the Receiver of an estate in which the 1st defendant had an 11/48th share, enjoining the Receiver to withhold the share. An order under rule 52 of Order XXI issued to the Receiver: this order has a note on it that it was to be served on the defendants as well as on the Receiver. It was served on the latter, but the process-server reported he had failed to find the defendants. This is the first of many notices to the defendants which process servers have returned with reports that they have been unable to find the defendants. The defendants are husband and wife. In the plaint their residence is given as No. 75, Shwedaungdan Street, Rangoon; in an affidavit sworn by the 1st defendant on the 5th January 1916 his residence is given as No. 73, Oliphant Street, and he describes himself as Zegawng or Market Overseer of the Municipal Market in Strand Road, Rangoon. He must be a well known man, yet the bailiff whose duty it is to see that process-servers perform

their duties properly has permitted them to make reports that they could not find a man whose ordinary whereabouts during the day could easily be ascertained.

The 1st defendant swears in his affidavit that no notices of the attachment or of the proclamation of sale or of the sale which he sought to have set aside were served on him, and he only came to know of the sale of his share on a date less than a month before the date of his affidavit.

His 11/48th share was in seven houses standing on Government leased land, consequently rule 41 was applicable and the procedure under that rule should have been followed under ordinary circumstances, but the property being in the hands of a Receiver appointed by the Court, the plaintiff was not at liberty to attach the property without first obtaining the leave of the Court.

On the 24th May 1913 the plaintiff applied that the bailiff might be ordered to sell the 11/48th share in the houses, and he asked for leave to bid at the sale.

Notice was issued to the parties under rule 66 of Order XXI, but it was not served personally on the defendants.

A proclamation was issued for sale of the share after 15 days instead of after 30 days. At the sale on the 6th September 1913 the share was bought by the plaintiff for Rs. 2,000.

The Receiver subsequently sold the houses for Rs. 29,200, and the 1st defendant's share of this amounted to Rs. 6,457-11-3.

The plaintiff claimed this as his under his purchase at the bailiff's sale.

The 1st defendant applied to have that sale set aside on the ground of the attachment having been illegal and of the irregularities in the procedure leading up to the sale. He also alleged that the plaintiff had fraudulently purchased the share for a grossly inadequate price. There is no ground for imputing fraud to the plaintiff.

The irregularities were mainly due to mistaken views taken by officers of the Court, and a too ready acceptance of reports and affidavits as to the defendants not being able to be found. It is not disputed that the irregularities were such as to justify the sale being set aside if the 1st defendant's application is within time. For the

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plaintiff it has been argued that the application falls within rule 90 of Order XXI and is governed by that alone, and consequently the defendant had only 30 days from the date of sale within which to make the application.

For the defendants it has been contended that they are not confined to the rule for a remedy, and that they have a right to have the question involved dealt with under section 47 of the Code, in which case the limitation applicable is three years.

No doubt some of the objections of the 1st defendant relate to material irregularity in publishing or conducting the sale, but they go further and include objections to the whole procedure starting with illegal attachment.

Under the circumstances we hold that the application was admissible under section 47 of the Code and that it was not time-barred.

The appeal is dismissed with costs, 3 gold mohurs allowed as Advocate's fee.

ORMOND, J.—I concur.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2309 OF 1913.

December 14, 1916.

Present:—Mr. Justice Shadi Lal and

Mr. Justice Broadway.

JAIDIAL MAL—DEFENDANT—

APPELLANT

versus

AMAR NATH—PLAINTIFF—

RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 2 (7)—Appeal, delay in presenting—'Sufficient cause'—Appellant, duty of—"Good faith", meaning of.

In order to be entitled to the benefit of section 5 of the Limitation Act, an appellant must act in good faith, i.e., with due care and attention. [p. 828, col. 2.]

Where an appellant relied upon an unauthorised publication known as the "Legal Diary" and being misled as to the duration of the vacation of the Chief Court, presented his appeal beyond the period of limitation:

Held, that he had not acted with due care and attention and that the cause shown was not sufficient to entitle him to an extension of time under section 5 of the Limitation Act. [p. 828, col. 2.]

First appeal from the order of the District Judge, Delhi, dated the 25th June 1913, directing the partition of the property.

The Hon'ble Pandit Sheo Narain, R.B., and Lala Gopal Chand, for the Appellant.

Messrs. C. Kirkpatrick and Mukand Lal Puri, for the Respondent.

JUDGMENT.—The appeal in this case has been admittedly filed beyond the prescribed period of limitation, and the question for determination is whether there is any sufficient reason for extending the time under section 5 of the Indian Limitation Act.

The last day for filing the appeal was the 10th October 1913; as a matter of fact the memorandum of appeal was presented on the 14th October 1913, insufficiently stamped and described as a miscellaneous appeal.

It was returned and re-presented on the 22nd October 1913 as a first appeal bearing a ten rupee stamp.

Even then the rules had not been complied with as the sum of Rs. 100, advance printing fee, had not been deposited.

The memorandum of appeal was again returned and this money was paid on the 27th October 1913, and the appeal was once more presented on the 30th October 1913. The reason advanced for the delay is that the appellant consulted a diary, known by the name of "The Legal Diary" and compiled by the clerk to an Advocate, in which the vacation is stated to be from the 15th August to the 15th October.

It has been urged that this constituted "sufficient cause" within the meaning of section 5 of the Limitation Act.

In this contention we are unable to concur. The diary in question is not an authorized publication, nor does it definitely state that the Chief Court would be in vacation from the date named to the 15th October.

It is obvious that it was the duty of the appellant to ascertain the precise duration of the vacation, and it is not even alleged that he attempted to obtain this information. He has not acted in good faith, i.e., with

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due care and attention [see section 2 (7), Indian Limitation Act] and we cannot hold that the "cause" shown is sufficient to warrant our extending the time as prayed for.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3407 OF 1914.

December 11, 1916.

Present:—Mr. Justice Jwala Prasad.

Babu RUDRA NARAIN SINGH AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

Hon'ble MAHARAJA RAMESWAR SINGH

Bahadur AND OTHERS—DEFENDANTS—

RESPONDENTS.

Evidence—*Batwara papers, admissibility of*—*Ejectment, suit for.*

Batwara papers are not admissible in evidence against persons who were not parties to the batwara proceedings. [p. 829, cols. 1 & 2.]

Appeal against the decree of the District Judge, Bhagalpur, dated the 12th August 1914, affirming that of the Munsif, Bhagalpur, dated the 22nd January 1914.

Mr. Lal Mohan Ganguli, for the Appellants.

Messrs. Purendra Narain Sahe and Murari Prasad, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants in this case. They brought a suit in the Court of the Munsif of Bhagalpur for a declaration of their title to and for the recovery of possession over plots Nos. 488, 499, 502, 406, and 417 of the Record of Rights of Mouzah Deyalpur. These plots were recorded in the Survey Record of Rights as appertaining to the *patti* of the respondents in *Touti* No. 726. The lands in question consist of *parti* and *dabar* lands.

This is a suit in ejectment; the onus is upon the plaintiffs to prove their title to these lands. The entry in the Survey Record of Rights makes this onus heavier upon the plaintiffs, the presumption being in favour of the defendants. The plaintiff relies for his title upon certain *batwara* papers of 1877. The defendants were not parties to the said *batwara* proceedings and, therefore, these papers are not at all admis-

sible in evidence against the defendants. There is no other document referred to in the judgment of the first Court or in that of the lower Appellate Court, which could identify these lands as being within the *patti* of the plaintiff. The lower Appellate Court has held that it is impossible to identify with absolute certainty these lands with respect to the ancient map of 1877. The plaintiff has, therefore, failed to prove his title to these lands.

The suit is for recovery of possession and admittedly, therefore, the plaintiff is out of possession of these lands. The plaintiff has been found by both the Courts below not to have been in possession of these lands at all, at least not within 12 years of the institution of the suit.

It is contended on behalf of the appellants that the lands being *parti*, their possession should be presumed to be with the rightful owner of these lands and should go with the title of these lands. But when the plaintiff has failed to prove his title to the lands it is immaterial whether the lands are *parti* or cultivated lands or such as are capable of user and possession. It is then contended that the first Court had held that the title in these lands was with the plaintiff in 1877 and the lower Appellate Court has not definitely recorded its finding upon the question of title, and the case should be remanded to the lower Appellate Court for a definite finding as to the title of the plaintiff over these lands. The first Court, while holding that the lands appertained to the *patti* of the plaintiff in 1877 on the report of the Commissioner, had forgotten that the *batwara* map of 1877 was not admissible at all in this case and could not at all be used as evidence of title in favour of the plaintiff in this case. The finding of the first Court on this point is obviously based upon a misconception of the admissibility of the *batwara* paper, which is a sheet anchor of the plaintiff's case. The lower Appellate Court, although it has not definitely recorded its finding as to the title, has sufficiently suggested in the first paragraph of the judgment that it is not possible to identify these lands by a comparison with the map of 1877. This amounts to a finding against the title of the plaintiff.

The appellants were called upon by me to state or to show if there was any evidence

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of title other than the *batwara* map of 1877 upon which the judgment of the first Court has been based. The learned Vakil for the appellants has failed to do so. The first Court's judgment, relied upon by the appellants, clearly states that the plaintiff's title is based upon the *batwara* map of 1877.

Upon the findings of the lower Appellate Court and in view of the absence of any evidence of the plaintiff's title, it is idle to suggest that the ends of justice would be met by a remand of the case to the lower Appellate Court.

I, therefore, hold that the appellants have not been able to prove their case. I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 111 OF 1916.

December 12, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

Pandit CHEDA LAL—OPPOSITE PARTY
—APPELLANT

versus

LACHMAN PARSHAD AND OTHERS—
APPLICANT INSOLVENT AND OTHERS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 47, scope of—Civil Procedure Code (Act V of 1908), O. XXI, r. 71, applicability of—Insolvent's estate, sale of, by Receiver—Purchaser failing to deposit one-fourth of purchase-money, liability of—Proceeding, meaning of.

Section 47 of the Provincial Insolvency Act does not operate so as to confer upon a District Judge all the powers and to impose upon him all the duties in connection with the sale of an insolvent's property by a Receiver, which are provided by Order XXI of the Code of Civil Procedure in connection with the execution of decrees of Civil Courts. [p. 830, col. 1.]

Where, therefore, the highest bidder at the auction of an insolvent's property sold by the Receiver fails to deposit the one-fourth of the purchase-money and the property is thereafter sold at a loss, the Receiver cannot realize the loss from the bidder under Order XXI, rule 71 of the Civil Procedure Code, 1908. [p. 831, col. 1.]

Per Walsh, J.—The word "proceeding" as used in the Provincial Insolvency Act means a proceeding in Court. [p. 831, col. 2.]

A sale by a Receiver is an act of the Receiver and not a proceeding. There is no proceeding under the Provincial Insolvency Act to enable an Insolvency Court to call upon a stranger to the bankruptcy to show cause why he should not pay a sum which may or may not be due from him. [p. 831, col. 2.]

First appeal from the order of the District Judge, Bareilly, dated the 25th February 1916.

Messrs. *J. M. Banerji* and *P. N. Banerji*,
for the Appellant.

Mr. M. L. Agarwala, for the Respondents.

JUDGMENT.

Piggott, J.—This is an appeal against an order passed by the District Judge of Bareilly, in the exercise of insolvency jurisdiction. One Kanhai Lal had been adjudicated insolvent. He owned a shop in the town of Bareilly. This shop became vested in the Receiver appointed by the Court, one Babu Sri Ram. Under the direction of the Court the Receiver proceeded to sell the shop by auction. Cheda Lal, who is the appellant before us, bid up to Rs. 8,700; but on being called upon to deposit one-fourth of the purchase-money failed immediately to do so. The Receiver then put up the property for sale again and it was purchased by another person for Rs. 7,320. These matters having been reported to the Court, the learned District Judge has ordered execution to issue against Cheda Lal for the sum of Rs. 1,380. His order purports to have been passed under Order XXI, rule 71 of the Code of Civil Procedure, read with section 47 of the Provincial Insolvency Act. It is contended before us in appeal that the District Judge had no authority to pass the order complained of and that the Receiver's remedy, if any, for the tort alleged to have been committed by Cheda Lal is by a suit for damages. The question is whether section 47 of the Provincial Insolvency Act operates so as to confer upon a District Judge all powers and to impose upon him all duties in connection with the sale of an insolvent's property by a Receiver, which are provided by Order XXI of the Code of Civil Procedure in connection with the execution of decrees of Civil Courts. So far as I am concerned, I have already expressed a contrary view in the case of *Mool Chand v. Murari Lal* (1). I have there held that the provisions of Order XXI of the Code of Civil Procedure do not apply to sales by a Receiver in bankruptcy. The point has been re-argued to-day with much keenness and ability by Mr. Agarwala on behalf of the respondents; but, apart from the question of applying the principle of *stare*

(1) 21 Ind. Cas. 702; 11 A. L. J. 979; 36 A. 8.

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decisis, I am not satisfied that the view taken by me in the reported case is erroneous. I think that the powers conferred upon a Court and the duties imposed upon a Court by Order XXI of the Code of Civil Procedure have to do with the execution of Civil Court decrees, the foundation of which is a decree for sale or an attachment duly effected in accordance with the provisions of the Order itself. The position of the Receiver is that of a man in whom certain property has become vested. It has no doubt vested in him as a trustee for other persons; but for all that he is in law the owner of the property. He has authority under the Provincial Insolvency Act, section 20, to sell the same, and his power of sale cannot be limited by the provisions of Order XXI of the Code of Civil Procedure, as it would have to be if the contention for the respondents now before us were correct. Except that the Receiver is bound to act under the directions given him by the Court and that any person aggrieved by any act or decision of the Receiver has a right of appeal to the Court under section 22 of the Provincial Insolvency Act, the position of the Receiver is simply that of a private person owning certain property who is under the necessity to convert the same into cash as readily as possible. I think the consequences which would follow from fettering the Receiver by all the details of procedure which Order XXI of Act V of 1908 provides for execution of Civil Court decrees would be undesirable, and that there is nothing in section 47 of the Provincial Insolvency Act which compels us to take such a view. If, however, the Court, or the Receiver acting under orders of the Court, is not bound to follow all the procedure laid down by Order XXI aforesaid, including the necessity for attaching the property sought to be realized, for issuing a proclamation of sale, for hearing objections preferred as to ownership of the property or the like, neither can it be held that the Court becomes invested with special powers such as those conferred upon an execution Court by Order XXI, rule 71, of the Code of Civil Procedure. I think, therefore, that this appeal must be allowed and I would decree it accordingly, setting aside, so much of the order of the Court

below dated the 25th February 1916, which has directed that the deficiency in the sale proceeds to the extent of Rs. 1,380 be realized from Cheda Lal under Order XXI, rule 71, of the Code of Civil Procedure. The appellant is entitled to his costs in this and in the lower Court. The costs in this Court will include fees on the higher scale. This may be paid by the Receiver out of the insolvent's estate.

WALSH, J.—I entirely agree. I think a sale by the Receiver is an act of the Receiver and not a proceeding at all. All the places where the word "proceeding" occurs in this Act indicate that a proceeding in Court is intended. I think that view is strengthened by comparing sub-section (1) of section 47 with sub-section (2). Sub-section (1) clearly deals with a proceeding under this Act before the Court itself, and provides that the Court in regard to proceedings under this Act (that is, before itself) shall follow the same procedure as in the exercise of original civil jurisdiction. Sub-section (2) deals with High Courts and District Courts and in regard to proceedings under this Act, not before the Court itself but brought before it from a Court subordinate to it. From this, it is abundantly clear that a proceeding under section 47 is a proceeding in the ordinary meaning of the word. There is no proceeding under the Provincial Insolvency Act to enable an Insolvency Court to call upon a stranger to the bankruptcy to show cause why he should not pay a sum which may or may not be due from him. Our decision in no way prevents the Receiver from bringing an action for such loss as he has sustained owing to the breach of contract on the part of the appellant, if there was one.

By THE COURT.—The appeal is allowed and so much of the order of the Court below dated the 25th of February 1916 as directed that the deficiency in the sale proceeds to the extent of Rs. 1,380 be realized from Cheda Lal appellant under Order XXI, rule 71, of the Code of Civil Procedure is set aside. The appellant will have his costs here and in the Court below and the costs of this Court will include fees on the higher scale. It may be paid by the Receiver out of the insolvent's estate.

Appeal allowed.

BISMILLAH BEGAM v. HIRA LAL.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL NO. 27 OF 1916.

December 15, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

Musammât BISMILLAH BEGAM—

DEFENDANT—APPELLANT—PETITIONER

versus

HIRA LAL AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Appeal to Privy Council—Final order passed in appeal—Order rejecting application for restoration of appeal dismissed for default—Decree.

An order of a High Court rejecting an application for restoration of an appeal dismissed for default is not appealable to His Majesty in Council, inasmuch as it is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court.

Application for leave to appeal to His Majesty in Council.

FACTS material for the purposes of this report are as follows:—

Hira Lal and others brought a suit against Musammât Bismillah Begam on foot of a mortgage and got a decree for over Rs. 10,000. From this decree Musammât Bismillah Begam filed an appeal in the High Court and engaged Counsel to conduct it. On 27th January 1916, the appeal was dismissed for default. The applicant then applied for the restoration of the appeal but this application was also dismissed on 29th April 1916. Musammât Bismillah Begam then applied for leave to appeal to His Majesty in Council against the order refusing to restore the appeal.

Dr. S. M. Sulaiman, for the Applicant.—An order refusing to re-admit an appeal dismissed for default is a final order and an appeal lies from such an order under the provisions of Order XLIII, rule 1 (t). Though Order XLIII is not applicable in the case of appeals to His Majesty in Council, still the order in question is a "final order" within the meaning of section 109, Civil Procedure Code. In ordinary cases an appeal will lie from such an order and if the words "final order" in this section be interpreted in a narrow and limited sense, the applicant will be without any remedy. The value of the subject-matter of the proposed appeal is over Rs. 10,000.

Dr. Sunder Lal, for the Respondents, was not called upon.

JUDGMENT.—This application arises under the following circumstances. A suit was brought on a mortgage. The defendants pleaded (*inter alia*) part payment of an amount below Rs. 10,000. The Court of first instance held that the part payment had not been proved. If it had been held otherwise the claim of the plaintiffs would have been reduced by a certain amount for principal and interest. The defendants preferred an appeal to the High Court. On the case being called on, the learned gentleman who appeared in the case stated that they had no instructions to proceed with the appeal and the same was accordingly dismissed on the 27th of January 1916. On the 25th of March 1916 Counsel, (not the same gentleman who had appeared on the previous occasion) applied for restoration under the provisions of Order XLI, rule 19, of the Code. This application was grounded on an affidavit. The Bench which heard this application considered that no sufficient cause had been shown for the non-appearance of the appellant at the hearing, and accordingly summarily rejected the application without issuing notice to the other side. The order of the Court was dated the 29th of April 1916. The present application is one for leave to appeal to His Majesty in Council from this order rejecting the application for restoration. It is argued that an appeal lies as of right to His Majesty in Council under the provisions of section 109 (a) or (b). Section 109 (a) provides for an appeal from any decree or final order passed "on appeal" by a High Court. It is quite clear that the order rejecting the application for restoration was not a decree or final order passed "on appeal." Clause (b) provides for an appeal from any decree or final order passed by a High Court in exercise of original civil jurisdiction. It is equally clear that the order rejecting the application for restoration was not an order passed in the exercise of the "original civil jurisdiction" of this Court. If an appeal lay and it were necessary that we should certify that the case was "otherwise" a fit one for appeal to His Majesty in Council, we would be unable to give the necessary certificate. We reject the application with costs.

Application rejected.

RANJIT PRASAD TEWARI v. RAMJATAN PANDEY.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 265 OF 1912.

January 18, 1917.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

RANJIT PRASAD TEWARI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

RAMJATAN PANDEY AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family, liability of, for debts—Mortgage decree—Manager, whether represents other members—One member not party to suit—Redemption—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

The interests of all members of a joint Hindu family are liable for payment of money borrowed for the purpose of paying Government revenue. [p. 834, col. 1.]

Where all members of a joint Hindu family are effectively represented in a mortgage suit in which the family property is sold, one of them cannot afterwards maintain a suit for redemption on the ground that he was no party to the suit. [p. 834, col. 2.]

Jaddo Kuar v. Sheo Shanker Ram, 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945; *Sheo Shankar Ram v. Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (19 4) M. W. N. 593; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 1 L. W. 695; 41 L. A. 216 (P. C.); *Bulwant Singh v. Aman Singh*, 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852; *Kehri Singh v. Chunnai Lal*, 9 Ind. Cas. 476; 33 A. 436; 8 A. L. J. 216; *Bhola Jha v. Kali Prasad*, 34 Ind. Cas. 288; 1 P. L. J. 180 and *Ram Taran Goswami v. Rameswar Malia*, 6 C. L. J. 719; 11 C. W. N. 1078, referred to.

Appeal against the decision of the District Judge, Chapra, dated the 9th April 1912.

Mr. Pugh (with him Mr. Mustafa Khan), for the Appellants.

Mr. Fakhruddin (with him Mr. Rajendra Prasad), for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an appeal by the plaintiffs in a suit against a decree of the District Judge of Saran, whereby the suit was dismissed with costs. Three of the plaintiffs are sons of one Bhagwat Saran. The 4th plaintiff is a son of Harihar Saran. Bhagwat Saran, Harihar Saran and Shankar Saran were three brothers, being the sons of one Pundeo Narain Tewari. On January 1st, 1890, Pundeo Tewari mortgaged the three properties now in question to the father of defendants Nos. 1—4 and to Gopi Chand defendant No. 5. In 1903 the mortgagees brought a suit for sale of the mortgaged property. They impleaded as defendants three of the sons of Pundeo Narain Tewari

and also other persons who claimed interests in the property, but they did not implead any of the present plaintiffs. It has been found, and it is now admitted, that the plaintiffs Nos. 2, 3 and 4 may be disregarded as they were not alive at the date of the institution of the suit on the mortgage and that the plaintiffs' statement to the contrary in the plaint is false. Plaintiff No. 1 appears to have been about ten years of age when the suit on the mortgage was instituted and the mortgagees did not implead him as a defendant. There is a conflict of evidence on the question whether the mortgagees were aware, when they brought their suit, of the existence of plaintiff No. 1. For the purpose of my judgment I am prepared to assume that the mortgagees were aware of his existence or might have become aware of it if they had made any enquiry. A decree was passed in that suit in April 1904 which was confirmed on appeal in August 1904. Execution proceedings followed and the property was put up for sale and was purchased by the mortgagees themselves in August 1903. Possession was delivered to the purchasers in October 1909. The present suit was instituted in January 1911. The Court below in dismissing the claim has held, as I understand its judgment, that the plaintiffs or at least plaintiff No. 1, not having been made a party to the former suit, would have been entitled to redeem the family property, had it not been proved that the property passed out of the possession of the family at various auction-sales which are referred to in its judgment.

As regards the village Bareja it is now common ground that the 1st plaintiff had not at the date of the present suit any subsisting interest in it. Therefore the suit as to Bareja was rightly dismissed.

As regards the village Shahbazpur I am of opinion that the District Judge was clearly right in holding that plaintiff No. 1 had at the date of this suit no subsisting interest in this village. It is true that the exact means by which Abdur Rahman became proprietor of this village has not been proved by direct evidence, but it has been shown that he was in possession of the village for many years and was recognized as proprietor by the Land Registration Department. The plaintiffs in the present

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case have totally failed to prove that any of them had any subsisting interest in Shahbazpur when this suit was brought.

The position as regards the third village Habibnagar is not quite so clear, but here again I am of opinion that the District Judge's decision is correct. As already stated, the suit on the mortgage was instituted and decided in 1904 and the execution sale took place in 1908. It appears that in 1907 Habibnagar was put up for sale to satisfy a public demand and was purchased by Sheikh Bulaki who by his purchase acquired the right, title and interest of all the members of the mortgagor's family in the village. Nine months later the property was put up for sale again on account of arrears of land revenue and was purchased by one Ujagir Tewari who for the purposes of this judgment may be assumed to have been a *farzidar* for Harihar Saran or for the family of which he and the plaintiffs were members. The purchase made by Sheikh Bulaki and also the purchase made in the name of Ujagir were, of course, made subject to the decree for sale which had been passed. The plaintiffs in the present case sue not by reason of any title which they have acquired through the purchase effected in the name of Ujagir but by virtue of the right which they had as members of a joint family before the property was sold to Sheikh Bulaki. It appears to me quite clear that whatever right the plaintiffs had in the property was wiped out by the purchase effected by Bulaki and that on this ground the present suit should be dismissed as regards Habibnagar.

Lastly I am of opinion that on the authorities the present suit is not maintainable at all in the absence of proof on the part of the plaintiffs that the debt for the recovery of which the property was brought to sale was not one for which they or their property were liable. It has never been suggested that the debt on account of which the mortgage was made was not binding on the family as a whole. On the contrary it has been proved that the money was borrowed for the purpose of paying Government revenue and it is quite clear that the interests of all the members of the family were liable for that debt. It is said that plaintiff No. 1 is entitled to redeem the property because he though then

alive was not made a party to the suit by the mortgagees. In my opinion this is not a sufficient ground on which to base such a suit as this. I need only refer to the decisions in *Jaddo Kuar v. Sheo Shanker Ram* (1) confirmed on appeal by their Lordships of the Privy Council in *Sheo Shankar Ram v. Jaddo Kunwar* (2), *Bulwant Singh v. Aman Singh* (3) and *Kehri Singh v. Churni Lal* (4). In some of these cases it was found that the mortgagees when suing upon their mortgage had no notice of the existence of the persons who subsequently sued to redeem the property and that was so in the suit decided by their Lordships of the Privy Council. The real ground of the decisions in all the cases referred to was that the plaintiffs seeking to redeem the mortgage and avoid the sale were effectively represented by the other members of the family in the suit brought upon the mortgage. Their Lordships of the Privy Council say: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure actions when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself." Every word of this passage applies to the present case. In my opinion on this ground also the present suit is liable to dismissal. If the cases of *Bhola Jha v. Kali Prasad* (5) and *Ram Taran Goswami v. Rameswar Malia* (6) were rightly decided it would appear that the present suit is also barred by limitation but it is unnecessary to go into this matter. I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

- (1) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.
- (2) 24 Ind. Cas. 504; 36 A. 333; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 1 L. W. 695; 41 I. A. 218 (P. C.).
- (3) 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852.
- (4) 9 Ind. Cas. 476; 33 A. 436; 8 A. L. J. 216.
- (5) 34 Ind. Cas. 288; 1 P. L. J. 180.
- (6) 6 C. L. J. 719; 11 C. W. N. 1078.

PAKARI PRAMANIK v. SARAT SUNDARI DEBYA.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 501 OF 1916.

November 24, 1916.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.PAKARI PRAMANIK AND OTHERS—
PLAINTIFFS—PETITIONERS*versus*

SARAT SUNDARI DEBYA AND OTHERS—

DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. IX, r. 13
—Order rejecting application to set aside *ex parte*
decree, whether appealable—Appeal.An appeal lies from an order rejecting an applica-
tion to set aside an *ex parte* decree made under
Order IX, rule 13, Civil Procedure Code, for default
of the applicant to appear in support of the applica-
tion.Rule against the order of the District
Judge, Pabna.Babus Brojolal Chuckerbutty and Gurudas
Sinha, for the Petitioners.Babu Rama Kanta Bhattacharjee, for the
Opposite Parties.

JUDGMENT.

FLETCHER, J.—This Rule was issued calling on the opposite party to show cause why the order of the District Judge complained of should not be set aside on the ground that no appeal lay to him. The plaintiffs brought a suit to enforce a mortgage security, and obtained an *ex parte* decree. Under the provisions of Order IX, rule 13, Civil Procedure Code, the defendant No. 2 applied to have the *ex parte* decrees set aside. That application was rejected on the ground that the said defendants did not appear in support of it. Against that order of rejection, the defendant No. 2 appealed to the District Judge. The District Judge set aside the order rejecting the application and directed the Court of first instance to hear it on its merits. The present Rule was obtained on the ground that the learned District Judge had no jurisdiction to hear an appeal from an order rejecting an application made under Order IX, rule 13, of the Code when it was dismissed for default. No such limitation can be placed upon the right of appeal given by Order XLIII, rule 1 (d), Civil Procedure Code, in the case of the rejection of an application made under Order IX, rule 13. It seems to me that the learned District Judge clearly had jurisdiction to hear and dispose of the appeal. This Rule, therefore, must

KALPU RAI v. BENI MADHO SAHU,

be discharged with costs one gold mohur.
RICHARDSON, J.—I agree.*Rule discharged.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1730 OF 1914.

January 16, 1917.

Present:—Justice Sir George Edward
Knox, Kt.KALPU RAI AND ANOTHER—PLAINTIFFS—
APPELLANTS*versus*

BENI MADHO SAHU AND OTHERS—

DEFENDANTS—RESPONDENTS.

Construction of document—Intention of parties—
*Deed fifty years old, interpretation of.*In interpreting a document the intention of the
parties must be gathered from the document or from
the language of the document viewed in the light of
the surrounding circumstances. [p. 836, cols. 1 & 2.]A Court after a lapse of thirty years ought to
require cogent evidence to induce it to hold that an in-
strument is not what it purports to be. [p. 836, col. 2.]*Jhanda Singh v. Wahid-ud-din*, 36 Ind. Cas. 38; 14 A.
L. J. 1189; 31 M. L. J. 750; 21 C. W. N. 63; 20 M. L. T.
529. 38 A. 570; (1916) 2 M. W. N. 570; 19 Bom. L. R.
1; 5 L. W. 189; *Bhagwan Sahai v. Bhagwan Din*, 17 I.
A. 98; 12 A. 387; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.)
992; *Alderson v. White*, (1858) 2 De G. & J. 97 at p.
103; 4 Jur. (N. S.) 125; 6 W. R. 242; 4 E. R. 924; 119
R. R. 38, referred to.Second appeal against the decision of the
Second Additional Subordinate Judge,
Gorakhpur, dated the 11th July 1914.

FACTS.—The case came up originally for hearing before Knox, J. On the 2nd of November 1916 when a preliminary objection was raised on behalf of the respondents to the effect that as the suit out of which this appeal arises was instituted by Kalpu Rai and Gobind Dial Rai and during the pendency of the appeal Kalpu Rai died and no one was brought on record as his legal representative and his name was expunged and also as the name of one of the respondents who also died during the same time was expunged, this appeal abated in the case of both. As the other appellant was found to be the manager of the joint Hindu family the preliminary objection to him was disallowed relying on *Hori Lal v. Nimman Kunwar* (1), but as to the respondent there was no finding that another respondent was the manager of the joint family consisting of him and the deceased respondent. An issue was, therefore, remitted to the effect whether Mathura Sahu was the manager of a joint

(1) 15 Ind. Cas. 126; 9 A. L. J. 819; 34 A. 645.

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Hindu family consisting of the respondents. On the return of a finding to the effect that Mathura Sahu was the manager of a family consisting of himself and some other respondents, the case came up for final hearing before Knox, J.

Mr. P. L. Banerji, for the Appellants.

Mr. Jung Bahadur Lal, for the Respondents.

JUDGMENT.—The sole question argued before me in this second appeal is whether the document which purports to be a deed of sale was in fact a deed of sale or whether it should be read with other documents and be held to be a mortgage-deed. On the 24th of June 1856, Gajadhar Rai executed a deed, No. 39C on the record, in favour of Bhola Sahu and others, and indubitably if this were the only deed, there can be no question that there was a deed of sale in favour of Bhola Sahu and others. There is, however, another deed, No. 35C, dated 25th June 1856, and the further fact that on that date Bhola Sahu and others instituted a suit against Gajadhar Rai for possession. A deed of compromise was filed the same day, and the suit was decided in accordance with the compromise. The main condition in the last deed was that if by *Jeth Sudi 15, 1266 Fasli* the defendant paid in the amount mentioned in the first of the deeds, then that deed and the decree passed in the case were to be set aside; if not, that deed and the decree were to be affirmed. The amount mentioned in the so-called deed of sale was not paid into Court by *Jeth Sudi 15, 1266 Fasli*, and it was not until the 22nd of November 1913 that the suit, out of which this second appeal has arisen, was instituted in the Court of the Munsif of Basti with a prayer that a decree might issue in favour of the plaintiffs for redemption of the property to which these deeds relate and the plaintiffs be put in possession on payment of Rs. 426, the amount entered in the sale-deed as the price for which the property was sold by Gajadhar Rai and purchased by Bhola Sahu and others. The lower Appellate Court held that it was not established that the transaction between the parties was really a mortgage transaction and dismissed the claim. I have heard all the arguments which could be urged on either side, and I have considered the documents. It has been held and must be deemed beyond dispute now that the intention of the parties must be gathered from the documents or

from the language of the documents viewed in the light of the surrounding circumstances, see *Jhanda Singh v. Wahid-ud-din* (2). The language used in the deed of sale is very positive, and while there is much in favour of the contention put forward on behalf of the appellants that the surrounding circumstances are similar to the procedure which was at that time in force with reference to the deeds of conditional sale, there is also the circumstance which cannot be overlooked that more than fifty years had elapsed between *Jeth Sudi 15, 1266 Fasli* and the date on which the suit out of which this second appeal has arisen was instituted. It was laid down by Lord Chancellor Cranworth in *Alderson v. White* (3) accepted by Sir Barnes Peacock in *Bhagwan Sahai v. Bhagwan Din* (4) and cited and approved by their Lordships of the Privy Council in *Jhanda Singh v. Wahid-ud-din* (2) that "the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." *A fortiori* when a Court is to interpret after a lapse of more than fifty years. I accept the view taken by the lower Appellate Court and I dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

(2) 36 Ind. Cas. 38; 14 A. L. J. 1189; 31 M. L. J. 75; 21 C. W. N. 66; 20 M. L. T. 529; 38 A. 570; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189.

(3) (1858) 2 De G. & J. 47 at p. 105; 4 Jur. (N. S.) 125; 6 W. R. 242; 44 E. R. 924; 119 R. R. 38.

(4) 17 I. A. 98; 12 A. 387; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992.

MADRAS HIGH COURT. FULL BENCH.

APPEALS AGAINST ORDERS NOS. 51 AND 93
OF 1915.

August 15, 1916.

Present:—Mr. Justice Abdur Rahim,
Officiating Chief Justice, Mr. Justice Seshagiri
Aiyar and Mr. Justice Phillips.

K. A. N. CHIDAMBARAM CHETTIAR—
DEFENDANT No. 2—APPELLANT

versus

IN A. A. O. No 51 OF 1915
KRISHNA VATHIYAR AND ANOTHER—
PLAINTIFF AND DEFENDANT No. 1—

RESPONDENTS

IN A. A. O. No. 93 OF 1915
KRISHNA VATHIYAR—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI

CHIDAMBARAM CHETTIAR V. KRISHNA VATHIYAR.

r. 2, O. XX, r. 11—Civil Procedure Code (Act XIV of 1882), s. 244—Agreement for stay of execution before decree, whether adjustment of decree—Execution—Agreement, plea of, in bar.

Per *Curiam*—Order XXI, rule 2, Civil Procedure Code, which speaks of a decree being 'adjusted in whole or in part, assumes the existence of the decree at the time of adjustment. It has no application to cases in which the alleged adjustment was by virtue of an agreement entered into between the parties before the passing of the decree. [p. 838, col. 2; p. 839, col. 1; p. 840, col. 2.]

Per *Abdur Rahim, Offg. C. J.*, (*Seshagiri Aiyar, J., dubitante and Phillips, J.*, dissenting).—An agreement between the parties to a suit made before the passing of a decree, by which the decree is not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court within the meaning of section 47, Civil Procedure Code. [p. 838, col. 2.]

Authorities reviewed.

Per *Abdur Rahim, Offg. C. J.*—The Court which can postpone execution of a decree under Order XX, rule 11, Civil Procedure Code, is the Court which passed the decree and the section does not define the powers of the executing Court. The power of the executing Court to grant postponement is derived from the language of section 47, which is very wide. [p. 839, col. 1.]

The omission of the words 'stay of execution' in section 47 of the Code of 1908, which were embodied in section 244 of the Code of 1882, was not intended to exclude questions relating to stay of execution from the powers of the executing Court. The language of section 47 is comprehensive enough to include such questions. Under this section, questions relating to execution are not necessarily confined to those arising subsequent to the decree. [p. 839, col. 1.]

Per *Seshagiri Aiyar, J.*—In matters of procedure, the principle of consistency and adherence to established practice will conduce to justice more than a strict adherence to logic. On a question of substantive law, the existence of a course of decisions may not be as effective an answer as in the case of procedural law. In the latter class of cases, litigants should be enabled to rely on a settled practice. [p. 839, col. 2.]

Per *Phillips, J.*—It is very doubtful whether a question relating to the stay of execution of a decree can be said to be a question relating to its execution. The omission of the words 'stay of execution' in section 47, of the Civil Procedure Code of 1908, must have been deliberate and consequently importance should be attached to it. [p. 841, cols. 1 & 2.]

An agreement for stay of execution made before the passing of a decree which was not brought to the notice of the Court when it passed the decree, is not a question which can be gone into by the executing Court for it impeaches the validity of the decree. The decree must be executed as it stands and the executing Court cannot go behind its terms. A further ground for excluding such an agreement from consideration is that the conduct of the parties amounts to an abuse of process of the Court, for they have collusively induced the Court to pass a decree which, according to their agreement, was never to have effect. [p. 841, cols. 1 & 2.]

Appeals against the orders of the Court of the Subordinate Judge, Tinnevely, in R. E. P. No. 123 of 1914 and in Miscellaneous Petition No. 1502 of 1914 respectively, in Original Suit No. 159 of 1913.

These appeals coming on for hearing on 27th and 28th March 1916, upon perusing the petitions of appeals, the orders of the lower Court and the records in the case and upon hearing the arguments of Mr. K. V. Krishnaswami Iyer, for the Appellant in both the appeals and of Mr. C. V. Ananthakrishna Aiyar, for the 1st Respondent in Appeal against Order No. 51 of 1915, and the respondent in Appeal against Order No. 93 of 1915 and the 2nd respondent in Appeal against Order No. 51 of 1915 not appearing in person or by Pleader, the Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

On 16th July 1914, the parties to these appeals entered into an agreement, set out in paragraph 2 of appellant's counter affidavit, that he should submit to a decree in a suit by respondent then pending against him, that the former should make an arrangement for satisfaction of such decree within a fixed date and that the latter should not before that date execute or transfer it. A decree was passed against appellant accordingly. After it, on 1st October 1914, he is alleged to have again made a similar agreement with the respondent. Both these agreements are relied on here as barring respondent's right to execute his decree.

We can deal shortly with the argument based on the agreement of 1st October 1914. It is not referred to specifically in the grounds of appeal to this Court, and it is not mentioned in the lower Court's order, which deals with the appellant's contention as based exclusively on the agreement before decree. In these circumstances we are led to infer that the later agreement was not relied on until the hearing before us, and we are fortified in this conclusion by appellant's admission that only oral evidence is available in support of it and the fact that respondent denies it. We, therefore, consider it no further,

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The question is then whether the agreement of 16th July 1914 can be relied on; and, apart from authority we should be reluctant to answer it in the affirmative, because, in our opinion, such agreements, made without the knowledge of the Courts, result in evasions of Order XXI, rule 2 (3), of the Civil Procedure Code, if not in other circumstances. Authority, however, in this Presidency to some extent authorises them, *Krishnamachariar v. Rukmani Ammal* (1) and *Rukmani Ammal v. Krishnamachari* (2). In the first, however, of these cases the question was dealt with rather as one of evidence than of procedure and without detailed discussion of the provisions of the Code of Civil Procedure, whilst in the second the distinction between an agreement for stay of execution and one barring execution *in toto* was drawn, but does not appear to have received effect. On the other hand there is the case of *Benode Lal Pakrashi v. Brajendra Kumar Saha* (3) in the authorised reports, in which the right to rely on such an agreement as that before us was negatived. In these circumstances we refer for the decision of a Full Bench the question:—

“Whether it is open to appellant to rely on the agreement dated 16th July 1914 and referred to in paragraph 2 of his counter-affidavit in execution proceedings?”

These appeals coming on for hearing on the 3rd and 4th August 1916 on the question referred for the decision of the Full Bench, upon perusing the said order of reference and upon hearing the arguments of Mr. K. V. *Krishnaswami Iyer* for the Appellant in both the appeals and of M. C. V. *Anantharishna Aiyar* for the 1st respondent in Appeal against Order No. 51 of 1915 and the respondent in Appeal against Order No. 93 of 1915 and the 2nd respondent in Appeal against Order No. 51 of 1915 not appearing in person or by Pleader and the cases having stood over for consideration till this day the Court expressed the following

OPINION.

ABDUR RAHIM, OFFG., C. J.—I would answer the question referred to the Full Bench in the affirmative. Order XXI, rule 2, which speaks of a decree being adjusted in whole or in part assumes the existence of the decree at the time of adjustment. But it has no application to cases in which the alleged adjustment was by virtue of an agreement entered into between the parties before the passing of the decree. See *Rama Ayyan v. Sreenivasa Pattar* (4). Then it is said that it is the duty of the executing Court to enforce the decree as it stands and it has no power to stay proceedings in execution because of an agreement made while the suit was still pending and in contemplation of a decree being passed in favour of the plaintiff. Order XX, rule 11, says that after a decree for money—which is the nature of the decree in this case—has been made, the Court can postpone payment of the amount decreed only with the consent of the decree-holder. But the Court here referred to is apparently the Court which passed the decree, and this section does not seem to define the powers of the executing Court. The powers of the Court executing a decree are laid down in section 47, the terms of which are extremely wide. It says: “All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.” By a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree, by which the decree was not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court. See *Rama Ayyan v. Sreenivasa Pattar* (4), *Rukmani Ammal v. Krishnamachari* (2), *Krishnamachariar v. Rukmani Ammal* (1) *Subramania Pillai v. Kumaravelu Ambalam* (5). A similar view was adopted in Bombay and in Allahabad. See *Laldas Narandas v. Kishordas Devidas* (6)

(1) 15 M. L. J. 370.

(2) 8 Ind. Cas. 1071; 9 M. L. T. 464; (1910) M. W. N. 798.

(3) 29 C. 810; 6 C. W. N. 838.

(4) 19 M. 230; 5 M. L. J. 218; 6 Ind. Dec. (N. S.) 865.

(5) 33 Ind. Cas. 66; 39 M. 541.

(6) 22 B. 463; 11 Ind. Dec. (N. S.) 891.

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and *Gauri Singh v. Gajadhar Das* (7). But in the Calcutta High Court a different view has prevailed. See *Benode Lal Pakrashi v. Brajendra Kumar Saha* (3), *Hassan Ali v. Gauzi Ali Mir* (8), *Ohhoti Narain Singh v. Musammam Rameshwar Koer* (9). I am unable to hold that the very comprehensive terms of section 47 do not include questions like the one raised before us. I may mention that the language of section 244 of the Code of 1882, with reference to which the case in *Rama Ayyan v. Sreenivasa Pattar* (4), which has been always followed in this Presidency was decided, was not perhaps as comprehensive as that of section 47. No doubt section 244 of the Code of 1882 specifically mentions 'stay of execution' as a question to be decided by the Court executing the decree but the scheme of the corresponding section 47 of the present Code is not to specify any particular questions at all but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope. There is undoubtedly a great deal to be said in favour of the view taken in Calcutta and perhaps it would, in some cases, be embarrassing to the executing Court to enquire into agreements made before the passing of a decree and modifying its operation. On the other hand, the Court executing the decree has been by section 47 given such large powers that it is in quite as good a position as any other Court to decide upon controversies of this character. I do not think we should be justified in saying, as held in Calcutta, that under section 47 questions relating to execution are necessarily confined to those arising subsequent to the decree and thus upsetting the practice which has so long obtained in this Presidency.

SESHAGIRI AYYAR, J.—I do not propose to say much in this case. What has mainly influenced me in answering the question in the affirmative is the fact that for over twenty years this Court has acted on the principle that agreements like the one in

question can be pleaded in execution proceedings. *Rama Ayyan v. Sreenivasa Pattar* (4) was not disputed for a long time. It was followed in *Rukmani Ammal v. Krishnamachari* (2), in *Krishnamachariar v. Rukmani Ammal* (1) and in *Subramania Pillai v. Kumaravelu Ambalam* (5). In Bombay such agreements are dealt with by the Court executing the decree, *Laldass Naranda v. Kishor-das Devidas* (6). So also in Allahabad, *Gauri Singh v. Gajadhar Das* (7) (three out of the four Judges held that the agreement should be enquired into by the executing Court.) It is true that the view of the Calcutta Judges has been uniformly and consistently against this position. *Sheo Golam Lall v. Beni Prosad* (10), *Thakoor Dyal Singh v. Sarju Pershad Misser* (11) and *Durga Prasad Banerjee v. Lalit Mohan Singh Roy* (12). In this state of the law, I do not think it desirable or proper, that we should upset a practice which has been prevalent for a long period of time in this Presidency. I have always held that in matters of procedure, the principle of consistency will conduce to justice more than a strict adherence to logic. What, after all, is the change advocated? It is that the validity of the agreement should be separately litigated upon, and should not be enquired into in execution. This means further litigation and expense to the parties. I am, therefore against overruling the long course of practice in the Presidency and the decisions commencing with *Rama Ayyan v. Sreenivasa Pattar* (4). On a question of substantive law, the existence of a course of decisions may not be as effective an answer as in the case of procedural law. In the latter class of cases, litigants should be enabled to rely upon a settled practice.

I, therefore, do not propose to examine the case-law on the question at any length. The agreement in question is not an adjustment within the meaning of Order XXI, rule 2. The adjustment presupposes an existing decree, *Ladd Govindoss v.*

(7) 1 Ind. Cas. 608; 6 A. L. J. 403.

(8) 81 C. 179.

(9) 6 C. W. N. 796.

(10) 5 C. 27; 4 C. L. R. 29; 4 Ind. Jur. 409; 2 Shome L. R. 182; 2 Ind. Dec. (N. S.) 629.

(11) 20 C. 22; 10 Ind. Dec. (N. S.) 16.

(12) 25 C. 86; 13 Ind. Dec. (N. S.) 59.

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Ramdoss Vishnadoss (13), *Ponnusami Nadar v. Letchmanan Chettiar* (14) and *Futeh Muham-mad v. Gopal Das* (15). Therefore, the agreement is not obnoxious to Order XXI, rule 2.

Nor is the executing Court debarred from enquiring into it by virtue of the language of section 47. The decision in *Sakharam Ramchandra v. Govind Vaman* (16) was passed with reference to the language of the Code of 1861, which in material points is different from that of the present Code.

The real difficulty arises, as pointed out by the learned Officiating Chief Justice in the course of the argument, with reference to Order XX, rule 11. Under sub-clause (2) of that rule, the postponement of execution shall be made only on the consent of the parties. I am convinced that this consent must be subsisting at the time the executing Court is asked to pass the order; but it is open to argument whether the clause lays down that without that consent the Court has no jurisdiction to stay execution for a time. I agree that it is of the essence of the rights under a decree that a decree-holder should have prompt execution, and that the Court should have no option to put him off against his will. It may be that the effect of postponing execution will be virtually to vary the terms of the decree. These are weighty considerations in favour of the view that an agreement prior to decree which the decree-holder refuses to stand by should not be enquired into in execution, however reprehensible the conduct of the decree-holder may be in resiling from his position. If the matter were *res integra*, I would have hesitated a great deal before allowing such a course to be adopted in execution; but as I said before, no question of the substantial violation of rights is involved in holding that the question should be litigated in execution rather than by a separate suit; and as the practice has been otherwise

in this Presidency, I would answer the reference in the affirmative.

PHILLIPS, J.—The agreement of 16th July 1914 referred to in the question of reference runs as follows:—

That the defendant should remain *ex parte* without pressing the defence, that the plaintiff should obtain a decree for the full amount, that this defendant should deposit Rs. 2,500 in the South India Bank, Tinnevely, on or before 15th October 1914, that the plaintiff should assign the decree to this defendant or his nominee and after executing the assignment deed should recover the money from the Bank, and that the plaintiff should not transfer or execute the decree till then.

It is an agreement entered into before the decree was obtained and the question for consideration is whether it can be pleaded in proceedings taken in execution of that decree.

The first point that has to be decided is whether the agreement amounts to an adjustment of the decree within the meaning of Order XXI, rule 2, for, if it is, it cannot be pleaded as it has not been certified to Court. I think, however, that the agreement does not come within the provisions of Order XXI, rule 2, for at the time it was made no decree was in existence nor could the parties be certain that any decree would be passed in the suit. The decree was not, therefore, adjusted by the agreement, which at most was an agreement to adjust the decree in the future.

The next point for determination is whether such an agreement can be pleaded in execution proceedings. The question has been answered in the affirmative by the Bombay High Court in *Lalidas Narandas v. Kishordas Devidas* (6) and in the negative by the Calcutta High Court in *Chhoti Narain Singh v. Musammat Rameshwar Koer* (9), *Hassan Ali v. Gauri Ali Mir* (8) and *Benode Lal Pakrashi v. Bajendra Kumar Saha* (3) and in this Court the views are conflicting [*Rukmani Ammal v. Krishnamachari* (2) and *Ladd Govindoss v. Ramdoss Vishnadoss* (13)]. The case reported as *Rama Ayyan v. Sreenivasa Pattar* (4) relates to an agreement after decree, and in *Krishnamachariar v. Rukmani Ammal* (1) the question whether

(13) 28 Ind. Cas. 376; (1915) M. W. N. 225; 17 M. L. T. 222.

(14) 12 Ind. Cas. 657; 35 M. G. 9; 10 M. L. T. 442; (1911) 2 M. W. N. 565; 22 M. L. T. 170.

(15) 7 A. 424; A. W. N. (1885) 70; 4 Ind. Dec. (N. S.) 593.

(16) 10 B. H. C. R. 361.

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an agreement before decree can be pleaded in execution proceedings is not discussed.] In *Laldas Narandas v. Kishordas Devidas* (6), the cases of *Chenvirappa v. Puttappa* (17) and *Mukund Harshet v. Haridas Khemji* (18) were dissented from and Ranade, J., gave as one of the reasons for disagreeing with West, J.'s decision in *Chenvirappa v. Puttappa* (17) that section 244 of the Civil Procedure Code had been since amended by the addition of the words "and stay of execution" and that the addition had not been brought to Sir C. Sargent's notice in *Mukund Harshet v. Haridas Khemji* (18). These words are now omitted in the Code of 1908. It is very doubtful whether a question relating to the stay of execution of a decree can be said to be a question relating to its execution and although in *Subramania Pillai v. Kumaravelu Ambalam* (5), a Bench of this Court has held that the omission of the words from section 47 has no effect, because they were mere surplusages in the old section 244, I must with all deference differ, for the words were added to section 244 by an amendment to the Code of 1882, passed in 1888. When, therefore, the words were added the Legislature deemed them to be of importance, and not mere surplusage. Their omission, therefore, from Act V of 1908, must have been deliberate, and consequently I think importance should be attached to it. However that may be, I think the matter can also be decided on another ground. The agreement sought to be pleaded could have been brought to the notice of the Court which passed the decree, and the Court might have been asked to pass a decree in accordance with its terms. The defendant allowed a decree to be passed, and, now that execution is sought, wants to go behind the decree and substitute another arrangement in its place. This does not appear to me to be a question which can be gone into by the Court executing the decree, for it impeaches the validity of the decree. It is a well settled principle, for which no authority is now required, that a decree must be executed as it stands, and the executing Court cannot go behind the terms of the decree.

(17) 11 B. 708; 12 Ind. Jur. 102; 6 Ind. Dec. (N. S.) 466.

(18) 17 B. 23; 9 Ind. Dec. (N. S.) 15.

The Legislature has enacted certain provisions which enable the Courts to recognise agreements between the parties after the decree has been passed, for instance, adjustments under Order XXI, rule 2, postponement of payment or payment by instalments under Order XX, rule 11 (2), but in order that these modifications may be enforced certain special procedure is prescribed. Again, a Court has no inherent power to stay execution of a decree, and the various circumstances in which stay can be granted are duly set forth in the Civil Procedure Code. None of those circumstances exists in the present case. Otherwise under Order XXI, rule 17 (4), a Court shall execute a decree upon application, provided certain rules have been complied with by the applicant. For this reason there is ground for holding that the words "and stay of execution" have been deliberately omitted by the Legislature with a view to excluding questions relating exclusively to stay of execution from the jurisdiction of the executing Court. A further ground for excluding an agreement like the present from consideration in execution proceedings is that the conduct of the parties amounts to an abuse of process of the Court, for they have collusively induced the Court to pass a decree, which according to their agreement was never to have effect.

This seems to be a case in which the principle of *stare decisis* need not be too strictly applied, for it relates only to a question of procedure, and an alteration in procedure will not materially affect existing rights for the rights are not taken away, but the method of enforcing them is changed. Practically all the cases in which the plea was allowed in execution were decided under the Code of 1882, and now that that Code has been altered by the Legislature, there appears to be no reason why, if the proper interpretation of the Statute necessitates an alteration in procedure, effect should not be given to such interpretation.

I would, therefore, answer the question referred in the negative.

By THE COURT -- The answer to the question referred to us will be in the affirmative.

Reference answered in the affirmative.

V.R.P.

SURAJNARAIN SINGH v. SUGRA.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3023 of 1914.

December 12, 1916.

Present:—Mr. Justice Jwala Prasad.

SURAJNARAIN SINGH—PLAINTIFF—

APPELLANT

versus

Musammât SUGRA AND OTHERS—DEFENDANTS
—RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), s. 73—Rent, suit for—Parties, necessary—Transferee of tenant, liability of—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, power of, to pass decree against co-defendant against whom no appeal has been preferred.

Under section 73 of the Bengal Tenancy Act a landlord has a right to make both the tenant and his transferees jointly liable for the rent. [p 842, col. 2.]

Under rule 33 of Order XLI of the Civil Procedure Code, an Appellate Court has power, in an appeal from a decree passed against one or more co-defendants, to pass a decree against any or all of them. [p. 843, col. 1.]

Appeal against the decree of the District Judge, Patna, dated the 22nd August 1914, reversing that of the Munsif, 4th Court, Patna; dated the 16th April 1914.

Mr. Ganesh Dutt Singh, for the Appellant

Messrs. Abani Bhusan Mukerji and Baikant Nath Mittra, for the Respondents.

JUDGMENT.—The plaintiff is the appellant in this case. The suit is for rent in respect of certain lands held by defendants Nos. 1 to 3 as tenants. There is no question as to the amount of rent claimed or as to the rate of rent. The defendants Nos. 4 to 14 are the *ijaradars* or the mortgagees of the lands in question from defendants Nos. 1 to 3, the original tenants. Defendants Nos. 4 to 9 compromised the suit with the plaintiff in the first Court. The suit was contested by the remaining defendants Nos. 10 to 14 as *ijaradars* of the disputed land. Defendants Nos. 1 to 3, the original tenants, filed written statements, but did not contest the suit at the hearing.

The relief sought in the plaint is for a decree for the amount in claim against all the principal defendants Nos. 1 to 14. The first Court gave a decree to the plaintiff against defendants Nos. 10 to 14, but dismissed the suit as against defendants Nos. 1 to 3. On appeal by the

defendants Nos. 10 to 14, the District Judge dismissed the suit of the plaintiff entirely, holding that although by the terms of the *rehannamah* or the mortgage-bond the defendants Nos. 10 to 14 are liable to pay rent to the landlord, the agreement in the bond was not acted upon and hence defendants Nos. 1 to 3 the original tenants are alone liable for the claim of the plaintiff.

The learned District Judge further directed that the plaintiff might bring a fresh suit against the defendants Nos. 1 to 3, unless the claim was barred by limitation, but it is not clear from the judgment of the learned District Judge on what ground he did not give a decree against defendants Nos. 1 to 3 when he found that they were liable for the payment of the rent to the landlord. I see no reason why the plaintiff should have been driven to another suit and run the risk of his claim being barred. The plaintiff being dissatisfied with the decision of the learned District Judge has come to this Court in appeal.

Now the defendants Nos. 1 to 3 are the recorded tenants of these lands. Defendants Nos. 4 to 14, who hold the lands under the *ijara*, are actually in possession of these lands and their right and possession have also been recognised in the survey *khatian* with the amount of rental entered against their names. Under the terms of the mortgage-bond they are liable to pay rent to the landlord. The liability to pay rent is not at all denied by the learned Vakil who appears on their behalf, but what he contends is this, that they pay rent to defendants Nos. 1 to 3, and that defendants Nos. 1 to 3 in their turn pay rent to the landlord, and hence the plaintiff has no right to bring this action for rent against them. I do not at all agree with this contention. The original tenants have transferred their lands to defendants Nos. 4 to 14, and under section 73 of the Bengal Tenancy Act the landlord has a right to make both the tenants and the transferees jointly liable for the rent. Their liability to pay the rent is confirmed by the Record of Rights. I do not see any cogency in the argument of the learned Vakil for the defendants,

JAITHU MAL V. JANKI DAS.

Nos. 10 to 14 for allowing them to follow the circuitous method of payment of rent. Incident of the rent falls upon the defendants-*ijaradars* who are in possession of the lands in suit and who have agreed in the bond to pay rent. The plaintiff-appellant is perfectly within his rights in bringing the suit against all the defendants, the original tenants and the *ijaradars*, and under section 73 has a right to enforce his claim against all of them. His claim cannot be affected by dispute amongst the defendants *inter se*. I, therefore, hold that the plaintiff-appellant is entitled to a decree in this case against all the defendants jointly.

Under rule 33, Order XLI of the Code of Civil Procedure, the lower Appellate Court was competent to give a decree against defendants Nos. 1 to 3, although the plaintiff did not prefer any appeal against the order of the first Court dismissing the suit against the defendants Nos. 1 to 3. There was a conflict of decisions in the different High Courts regarding the power of the Appellate Court in a case of this kind, but the conflict has been set at rest by the new provision in rule 33, Order XLI to the Code of Civil Procedure. The illustration to that section makes the meaning of the rule quite explicit. I, therefore, hold that this Court is competent to make a decree against all the defendants-respondents in this case for the claim of the plaintiff.

I accordingly allow the appeal, decree the suit of the plaintiff against the defendants Nos. 1 to 3 and defendants Nos. 10 to 14 with costs throughout.

The cross-appeal preferred by defendants Nos. 1 to 3 is dismissed.

Appeal allowed; Cross-appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1761 OF 1912.

December 19, 1916.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge, and Mr. Justice LeRossignol.

JAITHU MAL — PLAINTIFF—

APPELLANT

versus

JANKI DAS AND OTHERS — DEFENDANTS—

RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 5 (a)—Pre-emption—Building, whether shop or residential—Test.

In order to determine whether a certain building is, for the purposes of pre-emption, a shop or a residential building, regard must be had to the chief or most important purpose to which the building in question is devoted. [p. 843, col. 2]

Where it was found that the whole of the lower storey of a building was used for shops and had been so used for over fifty years, whilst the upper storey was a *bala khana*:

Held, that the building was one and indivisible and was a shop, the upper storey being merely auxiliary or appended to the lower. [p. 843, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 10th June 1912, varying as to costs only that of the Subordinate Judge, second class, Delhi, dated the 4th March 1912, dismissing the suit with half costs.

Kanwar Dalip Singh and Lala Sangam Lal,
for the Appellant.

Mr. Kirkpatrick, for the Respondents.

JUDGMENT.—The only matter calling for decision in this case is whether the building of which pre-emption is sought is a shop or a residential building.

The learned Additional Divisional Judge finds that it is not a residential building and the appellant contends that it lay on the respondent vendee to prove that it was a shop and that such proof has not been furnished. He further argues that if the lower storey is found to consist of a shop or shops, he should be granted a decree for the upper storey only, which admittedly is residential.

In these cases, the decision it is admitted depends on the chief or most important purpose to which the building in question is devoted, and having regard to the fact that the whole of the lower storey is used for shops and has been used for that purpose since, at any rate, 1853, whilst the upper storey is a *bala khana*, we hold that the building is primarily a shop or

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shops and that the residential upper storey is auxiliary or appended to the lower.

The building is one and indivisible and so is the transaction.

In our opinion the building sold is in the main a shop or set of shops and we dismiss the appeal with costs.

The cross-objections are not pressed before us and are dismissed.

Appeal and cross-objections dismissed.

PATNA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL NO. 590 OF 1915.
December 8, 1916.

Present:—Mr. Justice Jwala Prosad.

RADHA KANT MISSER AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

JALADHAR JHA AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 3, s. 105, O. XLI, r. 23—Arbitration and award—Award made within time fixed by Court but filed beyond it, validity of—'Decision on merits', supersession of award, whether affects—Remand, order of—Preliminary point.

The acceptance or supersession of an award affects the decision on the merits of the case. [p. 845, cols. 1 & 2]

There is nothing in the rules in Schedule II of the Civil Procedure Code on arbitration to show that an award would be invalid if not filed on or before the time fixed for the filing of it in Court. All that is required by rule 3 of Schedule II is that the Court must fix a time for the making of the award and an award would be valid if made within the time fixed, though not filed in Court on the date fixed for submitting the award to Court. [p. 846, col. 1.]

Arumugam Chetti v. Arunachalam Chetti, 22 M. 22; 8 Ind. Dec. (N. S.) 17; *Umersey Premji v. Shamji Kanji*, 13 B. 119; 7 Ind. Dec. (N. S.) 79; *Sita Ram v. Bhavani Din Ram*, 26 A. 105; A. W. N. (1903) 205; and *Asad-ul-lah v. Muhammad Nur*, 27 A. 459; A. W. N. (1905) 47; 2 A. L. J. 201, referred to.

A case was referred to arbitration and 19th December was fixed for submitting the award to the Court. On that date the award was not filed, and the Court superseded the reference, and proceeded to hear the case on the merits. The arbitrator signed the award at 7 P. M. on the same day and filed it in Court on 21st December. The Court, nevertheless, decided the case on the evidence. On appeal, the District Judge set aside the decree of the first Court and remanded the case under Order XLI, rule 23, to be tried in accordance with the award:

Held, (1) that the order of supersession of the award was one affecting the merits of the case

within the meaning of section 105 of the Civil Procedure Code; [p. 845, col. 1.]

(2) that inasmuch as no particular hour was fixed by the Court for making the award, it must be taken to have been made within the time fixed by the Court, notwithstanding that it was made after the rising of the Court; [p. 845, col. 2.]

(3) that the action of the Court in superseding the award amounted to a decision on a preliminary point within the meaning of rule 23 of Order XLI of the Civil Procedure Code and the order of remand by the District Judge was, therefore, correctly made. [p. 846, col. 2; p. 847, col. 1.]

Nabin Chandra Tripati v. Pran Krishna Dey, 20 Ind. Cas. 39; 41 C. 108; 18 C. L. J. 613, referred to.

Appeal from an order of the District Judge, Darbhanga, dated the 11th September 1915, reversing that of the Munsif, 1st Court, Madhubani, dated the 4th March 1915.

Messrs. *Ajendra Narain Dutta* and *Saroshi Chundra Dutta*, for the Appellants.

Messrs. *Lachmi Narain Saha* and *Shiva Narain Bose*, for the Respondents.

JUDGMENT.—The appellants in this case were plaintiffs in the original Court. They brought a suit for recovery of possession of certain lands in the Court of the Munsif of Madhubani. On November 11, 1914, the parties applied to the Court for reference of the case to the arbitrator named by them. The case was, therefore, by the order of the Court, referred to the arbitrator, Babu Krishna Singh Thakur, with the request to submit his award positively by the 19th of December 1914. On December 19th, the award of the arbitrator was not filed in the Court nor any application made by him for time. The Court made the following order:—"The arbitrator has not submitted the award. He has not applied for time. The plaintiff has filed an objection also to the arbitration. Let the arbitration be superseded and the records be called from the arbitrator. Put up on 14th January 1915 for hearing." On 21st December the arbitrator submitted his award and returned the record. Whereupon, the Munsif made the following order;—"The arbitrator submitted the award. The Pleaders of the parties be informed, and put up on the date fixed." The case was after some adjournments taken up on the 11th of February 1915, and the Court passed the following order:—"The defendant's Pleader contends that the award submitted by the arbitrator was signed on

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19th December 1914 that it was filed in the Court on 21st December 1914 and, therefore, the award was valid and the arbitration ought not to have been superseded. But I find from the award that the arbitrator signed it at 7 P. M. on 19th December 1914, that is, after the order superseding the arbitration was passed. The arbitrator did not submit the award within the time allowed by the Court. The award was, therefore, invalid." The Munsif ultimately, on 6th March 1915, decreed the suit in favour of the plaintiffs on the merits of the case, *i. e.*, upon evidence given by the parties to the trial. The defendants appealed to the District Judge of Darbhanga who by his judgment, dated 11th September 1915, set aside the decree made by the Munsif and remanded the case to him with the direction that he consider the award and any objection that may have been made thereto within the period allowed by law. The learned District Judge held that the order of the Munsif superseding the arbitration was *ultra vires*, because as a matter of fact, the award was made on the date specified in the Court's order and, therefore, within the time fixed by the Court. The plaintiffs have appealed to this Court. It is contended by the learned Vakil for the appellants that the order superseding the arbitration passed by the Munsif was final, inasmuch as no appeal was preferred against it by the respondents under section 104, clause (a) of the Code of Civil Procedure, and hence it was not open to the District Judge in appeal to set aside the decree on account of any error, defect or irregularity in the order of supersession passed by the Munsif, inasmuch as the order of supersession did not affect the decision of the case, within the meaning of section 105 of the Code of Civil Procedure. There does not appear to be any substance in the contention that the order of supersession of the award in this case does not affect the merits of the case. It is obvious that if the award was not superseded the Court was bound to pronounce judgment upon the award and to pass decree in accordance with the award. Therefore, the acceptance of the award or the supersession of the award affects the decision upon the

merits of the case. The point seems to have been concluded by the decisions of all the High Courts, the leading case on the point is that of Calcutta, *Mothooranath Tewaree v. Brindabun Tewaree* (1). This case has been followed in *Damodar Trimbak v. Raghunath Hari* (2), *Achuthayya v. Thimmayya* (3), *Ram Jiwan v. Nawal Singh* (4), *Ram Autar Tewari v. Deoki Tewari* (5). The last case was decided on 11th February 1915 by Tudball and Chamier, Judges (Now Sir Edward Chamier, Chief Justice) and is the latest authority on the point. The learned District Judge was, therefore, competent to set aside the decree of the Munsif on the ground that the order of supersession made by the Munsif was *ultra vires*. The first contention, therefore, of the learned Vakil for the appellant is overruled.

The second contention on behalf of the appellants is that the award was not made within the time fixed by the Court and, therefore, it was invalid. The Court by its orders had fixed the 19th of December for the submission of the award. The Munsif held that the award, as a matter of fact, was made on the 19th December, but as it was made at 7 P. M. after the Court hours it was not made within the time fixed by the Court. No particular hour was at all fixed by the Court for the making of the award and if the award was made on the date fixed by the Court it must be taken to have been made within the time fixed by the Court notwithstanding that it was made after the rising of the Court. It is then contended that as the award was to be submitted on the 19th December it was intended by the Court that the award should have been made by the arbitrator before the 19th. Rule 3 of Schedule II of the Code of Civil Procedure is a complete answer to this contention. The Court is bound by the order of reference to the arbitrator to fix such time as it thinks reasonable for the making of the

(1) 14 W. R. 327.

(2) 26 B. 551; 4 Bom. L. R. 267.

(3) 31 M. 345; 18 M. L. J. 258; 3 M. L. T. 315.

(4) 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. L. T. 400.

(5) 29 Ind. Cas 411; 37 A. 450; 13 A. L. J. 653.

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award and to specify that time in the order itself. There is nothing in the rules in Schedule II of the Code of Civil Procedure on arbitration to show that an award would be invalid if not filed on or before the time fixed for the filing of it in Court. All that is required is that the Court must fix a time for the making of the award and an award would be valid if made within the time fixed though not filed in Court on the date fixed for submitting the award to Court. The learned District Judge is, therefore, right in holding that 19th December fixed for the submission of the award must be taken to have been fixed under rule 3 of the Schedule for the making of the award. This view is again supported by a string of rulings on the point. In *Ram Autar Tewari v. Deoki Tewari* (5), already referred to, the award was not filed until three days after the date fixed for filing but it was proved that the award was made within the time fixed for filing. The award was held good and was enforced. Reference may also be made to the following authorities *Arumugam Chetti v. Arunachalam Chetti* (6), *Umersey Premji v. Shamji Kanji* (7), *Sita Ram v. Bhawani Din Ram* (8), *Asad-ul-lah v. Muhammad Nur* (9). There is, therefore, no substance in the second contention also.

The third ground taken by the learned Vakil for the appellants is that the order of remand made by the District Judge was wrong, inasmuch as it contravened the provisions of rule 23, Order XLI of the Code of Civil Procedure. The point urged on behalf of the appellants is that the Munsif had not disposed of the case on any preliminary point but had disposed of it on the merits and hence rule 23, Order XLI, did not apply to this case. To my mind this would be taking a very narrow view of the word "preliminary point" referred to in rule 23 Order XLI. The first and the foremost point before the Munsif was whether the award filed by the arbitrator was a valid one or not. If the award was found to be invalid or such as could not be acted upon then

only the Court could deal with the case on merits otherwise the Court was bound to give effect to the award and to give judgment and decree on the basis of the award. Section 3, clause 2, precludes the Court from dealing with the case when once it is referred to arbitration save as is provided in the rules in Schedule II. The first Court declined to go into the merits of the award itself and disposed of the award on a preliminary ground that it was not made or filed within the time prescribed by the Court. If the Court had decided that the award was filed within the time and had not thrown out the award on the preliminary objection there would have been no necessity for the Court or the parties to go into evidence at the trial of the case. The case has, therefore, been disposed of on a preliminary point as contemplated by rule 23 of Order XLI of the Code of Civil Procedure. The Appellate Court has set aside the order of the Munsif regarding the preliminary objection to the validity of the award. The subsequent proceedings of the Munsif, that is, the taking of evidence and the passing of his judgment and decree in the case, all become null and void under rule 3 Schedule II of the Code of Civil Procedure and are set aside as a result of the reversal of the Munsif's order on the preliminary question as to the validity of the award. So the case of the defendants has been thrown out on a preliminary point by the first Court and the order of remand by the lower Appellate Court was, therefore, within the powers given to it by rule 23, Order XLI. In the second place even if the order of the Court below is not exactly in conformity with rule 23, Order XLI still it is an irregularity of the kind that cannot by itself vitiate the judgment of the District Judge, as held in *Nabin Chandra Tripati v. Pran Krishna Dey* (10). In *Ram Autar Tewari v. Deoki Tewari* (5) already referred to in the earlier part of this judgment where the facts appear to be in all respects similar to the present case, a similar order of remand was passed. The Additional Judge set aside the order of the Munsif superseded.

(6) 22 M. 22; 8 Ind. Dec. (N. S.) 17.

(7) 13 B. 119; 7 Ind. Dec. (N. S.) 79.

(8) 26 A. 105; A. W. N. (1903) 205.

(9) 27 A. 459; A. W. N. (1905) 47; 2 A. L. J. 201.

(10) 20 Ind. Cas. 39; 41 C. 108; 18 C. L. J. 613.

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ing the award, and the decree passed by him on evidence; and remanded the case to the Munsif to consider the validity of the award. I, therefore, hold that the judgment of the District Judge is not bad on account of any defect in the order of remand made by him. The result is that the judgment of the Court below is upheld. This appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1206
OF 1915.

December 12, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Newbould.

BHOSAI (BEPARI) AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

AMINUDDI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 52, 188—(Co-sharer landlord, right of suit by, for his share of excess area—Kabuliyat, construction of—Contract Act (IX of 1872), s. 45—Co-contractees—Suit by one co-contractee for his share of the obligation, maintainability of.

Where a *kabuliyat* described the land let out as 50 *bighas* by guess, and provided that the lessees should enjoy the land rent-free for two years and thereafter should pay rent at the rate of Rs. 2 per *bigha* fixed in perpetuity for as much land as was cleared and brought under cultivation, and that when the surrounding lands were all brought under cultivation, the lessees would be liable to pay rent for the entire area in their possession at the stipulated rate:

Held, (1) that, after all the surrounding lands had been brought under cultivation, a co-sharer landlord could, under the general law, maintain a suit upon the *kabuliyat* for his share of the rent for the entire area, (which was in excess of the 50 *bighas*) provided he made the other co-sharers *pro forma* parties to the suit; [p. 849, col. 2.]

(2) that such a suit was not a suit for the rent of additional area under section 52 of the Bengal Tenancy Act, and, therefore, section 188 would be no bar to it. [p. 850, col. 2.]

Shital Chandra Bairagi v. Manik Chandra Hazra, 1 Ind. Cas. 254; 9 C. L. J. 33; 13 C. W. N. 509; *Pramada Nath Roy v. Ramani Kanta Roy*, 35 C. 331; 10 Bom. L. R. 66; 35 I. A. 73; 7 Cr. L. J. 139; 18 M. L. J. 43; 3 M. L. T. 151; 12 C. W. N. 249 and *Ram Chunder Chuckerabutty v. Giridhar Dutt*, 19 C. 755; 9 Ind. Dec. (N. s.) 945, referred to.

Gopal Chunder Das v. Umesh Narain Chowdhry, 17 C. 695; 8 Ind. Dec. (N. s.) 1004; *Sati Prosad Garga v. Radha Nath Maity*, 18 Ind. Cas. 197; 16 C. L. J.

427; and *Darik Dhakai v. Aswini Kumar Nag*, 20 Ind. Cas. 659; 18 C. W. N. 942, distinguished.

As a general rule all co-contractees ought to be joined as plaintiffs, but a suit by one co-contractee to enforce his share of the obligation would not be bad if the others are joined as defendants and if there is good reason for not joining them as plaintiffs [p. 849, col. 2.]

Appeal against the decree of the District Judge, Backergunge, dated the 5th March 1915, reversing that of the Munsif, 2nd Court, Perozepur, dated the 11th June 1914.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

“This is an appeal by the defendant in a suit for rent that has been decreed. The plaintiffs are the holders of a 5/6ths share in a *miras ijara* tenure of which the remainder is held by defendant No. 7. Defendants Nos. 1 to 6 are the holders of a *howla* subordinate to this *miras ijara*, and they executed a *kabuliyat* in favour of the entire body of landlords on the 17th of *Aswin* 1306 for the lands, which were then unreclaimed. The *kabuliyat* stated the area settled with the executants to be roughly 50 *bighas*, and it provided that the executants should enjoy the lands rent-free for two years and that thereafter they should pay rent at the rate of Rs. 2 per *bigha* fixed in perpetuity for as much land as was cleared and brought under cultivation. No period was fixed within which the land should be reclaimed, but it was provided that if the surrounding lands were all brought under cultivation the executant should be liable to pay rent for the entire area in their possession at the stipulated rate. It was further provided that the rental should be made to correspond to the acreage when the lands should be properly surveyed and measured.

The Record of Rights prepared some years ago, shows that the actual area of the lands comprised in the *howla* is 83 *bighas* local measure, and it has been ascertained by a commissioner appointed by the Court that all the surrounding lands, with the exception of a *patch* measuring 10 or 12 *cottas* which is kept as a grazing ground, are under cultivation. The tenants-defendants have brought only a portion of the lands under cultivation.

The plaintiffs had previously sued the defendants for arrears of rent due on account of the *howla* and had prayed for a decree for additional rent for additional area. They with.

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drew the prayer relating to the assessment of additional rent with permission to sue again and took a decree for rent at the rate at which it had been previously realised. In the present suit they have prayed for a decree for the balance of the rent payable under the *kabuliyat*. They have made their co-sharer a *pro forma* defendant and have prayed that if anything be found to be due to the co-sharer, and the latter fails to join as plaintiff, Court-fees may be realised from them on account of such amount and a decree granted for the entire sum found to be due.

The co-sharer defendant did not join as plaintiff, and no evidence has been given that anything is due to him.

The Court below has given the plaintiffs a decree for their share of the rent at the *kabuliyat* rate of Rs. 2 per *bigha* on the 83 *bighas* of land comprised in the *howla* together with interest at the rate of Rs. 3-2-0 per mensem as provided by the *kabuliyat*.

The following contentions have been raised before me in appeal.

Issue No. 1—That the plaintiffs are not entitled to maintain a separate suit as they have no right to collect rent separately.

Issue No. 2—The decree granted by the Court below is for the plaintiffs' share of the rent and has the effect of declaring the plaintiffs' right to collect rent separately.

Issue No. 3.—Section 188 of the Tenancy Act is a bar to the suit.

* * * * *

The answer to the third objection is difficult. There has been no separate attornment to the plaintiffs; indeed admittedly there is even no right of separate collection. The plaintiffs profess to sue for the additional rent they claim, not under the provisions of section 52 of the Tenancy Act, but on the basis of the *kabuliyat*. If they are entitled to maintain their suit under the ordinary law, section 188 of the Tenancy Act will not apply. The question then is whether or not the plaintiffs are competent to sue under the ordinary law to enforce a contract in spite of their co-sharer's refusal to join in the suit. There is, as far as I am aware no reported decision on the point. In the cases of *Panchanan Banerji v. Raj Kumar Guha* (1) and *Gobind*

Ohandra Pal v. Hamidulla Bhuian (2), the tenants had attorned separately to the plaintiffs who were co-sharer-landlords, and as the *kabuliyats*, they executed, gave the plaintiffs the right to sue independently for additional rent on account of additional area found on measurement, it was held that the plaintiffs were entitled to maintain suits for such additional rent on the basis of the *kabuliyat* and independently of the provisions of the Tenancy Act. The case of *Baidya Nath De Sarkar v. Sheikh Jhin* (3) was also decided according to the terms of the *kabuliyat*. The plaintiffs were co-sharer-landlords in whose favour the tenant had executed a separate *kabuliyat* providing for the payment of additional rent for additional area found on measurement. It was, however, found on construction of the *kabuliyat* that the provision was that in case the rent of the entire holding was increased the plaintiffs should be entitled to recover separately a proportionate share of such increase. The other reported cases are cases in which co-sharer landlords sought to maintain separate suits under the provisions of section 30 of the Tenancy Act and it was held that they were not entitled to do so as those suits are governed by the provisions of the Tenancy Act, and section 188 would be a bar. The only principle deducible in the plaintiffs' favour from these decisions is that where a suit is not based on the provisions of the Tenancy Act, and where section 178 does not restrict freedom of contract, a suit may be maintained under the ordinary law to enforce the contract.

In order that the plaintiffs in the present case should be entitled to maintain such a suit, it must be found that their interest and cause of action are several; otherwise under the provisions of section 45 of the Contract Act they are not competent to sue independently. If it could be proved that the co-sharer-defendant had, by a private arrangement with the defendants, rendered himself incapable of suing to enforce the original contract, the plaintiffs might have been entitled to sue for the enforcement of the contract so far as it affected them. No such contingency has arisen here. The

(2) 7 C. W. N. 670.

(3) 2 C. W. N. 44; 25 C. 917; 13 Ind. Dec. (N. S.) 597.

(1) 19 C. 610; 9 Ind. Dec. (N. S.) 849.

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cause of action is non-fulfilment of the entire contract and the plaintiffs cannot be said to have any separate cause of action. I am, therefore, of opinion that the plaintiffs are not entitled to maintain the suit. I accordingly allow the appeal and dismiss the suit with costs in both Courts."

Babu Probodh Chunder Chatterjee (for Babus Mammotho Nath Mukherjee and Panna Lall Chatterjee), for the Appellants.

Babu Gunada Charan Sen, for the Respondents.

JUDGMENT.—The plaintiffs-appellants as the owners of a 5/6th share of a *miras* tenure sued to recover rent of a *houla* (subordinate to the *miras*) held by the principal defendants, the owner of the remaining 1/6th share of the *miras* being made a *pro forma* defendant on the ground that she refused to join with the plaintiffs in the suit. The suit was based upon a *kabuliyat* which described the land let out as 50 *bighas* "by guess" and provided that the lessees should enjoy the land rent-free for two years and that thereafter they should pay rent at the rate of Rs. 2 per *bigha* fixed in perpetuity for as much land as was cleared and brought under cultivation. No period was fixed within which the land should be reclaimed, but it was provided that if the surrounding lands were all brought under cultivation the executants would be liable to pay rent for the entire area in their possession at the stipulated rate.

The area of the land comprised in the *houla* was found to be 83 *bighas* in the Record of Rights, and it was also found that all the surrounding lands with the exception of a small *patch* of land reserved as pasture land had been brought under cultivation.

The plaintiffs stated that they were unable to ascertain whether any rent was due to the *pro forma* defendant and claimed their share of the rent of the entire land. They also prayed that the *pro forma* defendant might be joined as plaintiff if she desired to do so and a decree might be passed for the entire rent if it was found that the rent due to her was left unpaid, on taking additional Court-fee from the plaintiffs. The Court of first instance passed a decree in favour of the plaintiffs, but

on appeal that decree was reversed by the District Judge. The plaintiffs have appealed to this Court.

The main ground upon which the learned District Judge dismissed the suit, *viz.*, that under section 45 of the Contract Act the plaintiffs alone could not maintain the suit upon the joint contract contained in the *kabuliyat* cannot be sustained. As pointed out in *Shital Chandra Bairagi v. Manik Chandra Hazra* (4), although as a general rule all co-contractees ought to be joined as plaintiffs, a suit by one would not be bad if the others were joined as defendants and if there was good reason for not joining them as plaintiffs, and that one of several joint contractees may sue to enforce his share of the obligation if the other co-contractees are joined as defendants. In the present case the remaining co-sharer, who, it is found, refused to join as plaintiff, was made a *pro forma* defendant to the suit. The learned Pleader for the respondent also did not attempt to support the judgment on that ground.

It cannot be disputed that the plaintiffs can maintain a suit under the general law to recover the entire rent of the tenure provided they make their co-sharer a party to the suit [See *Pramada Nath Roy v. Ramani Kanta Roy* (5)], but it is contended on behalf of the respondents that this is a suit for additional rent for additional area under the provisions of section 52 of the Bengal Tenancy Act and that, therefore, the suit cannot be maintained unless all the landlords join as plaintiffs in bringing the suit. If the suit is one under section 52 of the Bengal Tenancy Act the provisions of section 188 of the Bengal Tenancy Act would apply, and in that case the suit cannot upon the authorities be maintained by some of the co-sharer-landlords. [See *Gopal Chunder Das v. Umesh Narain Chowahry* (6) and *Sati Prasad Garga v. Radha Nath Maity* (7).]

The question, therefore, is whether the suit is one under section 52 of the Bengal Tenancy Act. Now, the land at the time

(4) 1 Ind. Cas. 254; 9 C. L. J. 331; 13 C. W. N. 509.

(5) 35 C. 351; 12 C. W. N. 249; 10 Bom. L. R. 66; 35 L. A. 73; 7 C. L. J. 139; 18 M. L. J. 43; 8 M. L. T. 151.

(6) 17 C. 695; 8 Ind. Dec. (N. S.) 1004.

(7) 18 Ind. Cas. 197; 16 C. L. J. 427.

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it was let out was waste and jungly. It was apparently not measured and the area was stated to be 50 *bighas* "by guess." The *kabuliyat* as stated above provided that the tenants would pay rent on the entire area at the fixed rate of Rs. 2 per *bigha*, when the lands would be reclaimed or when the surrounding lands would be brought under cultivation. The rent claimed under that contract, therefore, is not additional rent for excess land within the meaning of section 52 of the Bengal Tenancy Act but a claim for rent in accordance with the terms of the original letting. The present case is similar to that of *Ram Chunder Chuckerabutty v. Giridhar Dutt* (8), where Pigot and Banerjee, JJ., held that such a suit is not for additional rent for excess land within the meaning of the Bengal Tenancy Act, and that "there is no reason why he should not be entitled to claim separately the rent that is payable, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with terms of the original letting." The case is sought to be distinguished on the ground that the plaintiff in that case was in separate collection of his share of the rent. That fact, however, is immaterial where the suit is not one for additional rent for excess area under section 52 of the Act, but is a suit brought by a co-sharer-landlord under the general law after making all the co-sharers parties to the suit.

The learned Pleader for the respondents relies strongly on the case of *Darik Dhakai v. Aswini Kumar Nag* (9), in which Coxe and Roy, JJ., held that a suit for additional rent on the basis of a *kabuliyat* executed by the tenant in favour of the entire body of landlords agreeing to pay additional rent for additional area, was not maintainable by a co-sharer-landlord although the other co-sharers are made parties to the suit. But that case is clearly distinguishable from the present. There the tenants had executed a *kabuliyat* agreeing to pay rent for 15 *bighas* of land, and there was a stipulation that

the tenant would pay additional rent for additional land. The land on being measured was found to be 25 *bighas* and the suit was for the whole rent including the rent due on the additional area. That was, therefore, a suit for additional rent for excess area under section 52 of the Bengal Tenancy Act and the decision in that case cannot apply to the present. The learned Judges pointed out that the existence of an agreement (*kabuliyat*) does not necessarily take the suit out of the Tenancy Act. It is not, however, the existence of the *kabuliyat*, but the fact that the whole area was by the terms of the *kabuliyat* to be assessed with rent at a fixed rate on the lands being reclaimed or in the event of the surrounding lands being brought under cultivation, shows that the suit is not one for additional rent for excess area. There is no question in the present case of any excess area or of adjustment of rent inconsistent with the terms of the original tenancy. The rate of rent was fixed for the whole area at the inception of the tenancy and the tenant agreed to pay the rent for the entire land on the happening of the contingency mentioned in the *kabuliyat*. The tenant was paying rent for lands which had previously been brought under cultivation, and under the terms of the original letting he was liable to pay rent for the entire area under the circumstances found in the case.

The suit, therefore, is maintainable by the plaintiffs upon the *kabuliyat* under the general law, and the provisions of section 188 are not applicable to the suit. No other question appears to have been urged before the Court below.

The decree of the Court of Appeal below must, therefore, be set aside and that of the Court of first instance restored with costs in both Courts.

Appeal allowed.

(8) 19 C. 755; 9 Ind. Dec. (N. S.) 945.

(9) 20 Ind. Cas. 659; 18 C. W. N. 242.

NASRAT HUSAIN v. ADIA SARAN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 57 OF 1916.

December 4, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.Hakim NASRAT HUSAIN AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus

ADIA SARAN—DEFENDANT—RESPONDENT.

*Suits Valuation Act (VII of 1887), s. 11—Appeal—
Suit undervalued—Jurisdiction—Appellant, duty of—
Objection, how taken.*

In an appeal on the ground that the first Court had no jurisdiction to try the suit inasmuch as it was beyond the pecuniary jurisdiction of that Court, the appellant has to show, under section 11 of the Suits Valuation Act, not merely that there has been an incorrect valuation but that the trial of the suit has been prejudicially affected thereby. [p. 852, col. 1.]

Per Walsh, J.—In such a case an appellant ought to take the ground in the memorandum of appeal and to state how he has been prejudicially affected. [p. 852, col. 2.]

First appeal against the order of the Subordinate Judge, Cawnpore, dated the 14th February 1916.

FACTS:—The suit was brought for a declaration that plaintiffs had the rights of *saknadars* in a town in Fatehpore District and for other reliefs. The defence was that the Munsif had no jurisdiction to try the suit and that the plaintiffs had no such rights as they alleged. The Munsif decreed the suit holding on all points in favour of the plaintiffs. The learned Sub-Judge in appeal only went into the question of jurisdiction and returned the plaint for presentation to the proper Court holding that the suit was undervalued and was not within the jurisdiction of the Munsif.

The plaintiffs appealed to the High Court.

Dr. S. M. Sulaiman (with him Mr. Iqbal Ahmad), for the Appellants.—All evidence had been tendered and had been recorded by the first Court. All findings necessary for the disposal of the suit had been arrived at and the suit was decided on the merits.

Section 11 of the Suits Valuation Act provides that an objection as to jurisdiction will not be entertained in appeal unless it was taken in the first Court as well as in the lower Appellate Court and the latter is satisfied that the under valuation has prejudicially affected the disposal of the suit. In this case no doubt the objection was taken in both the Courts but there is no finding that the under-valuation has prejudicially affect-

ed the disposal of the suit on the merits.

I submit that it is the clear duty of the Court to record such a finding. In the absence of such a finding the order of the lower Appellate Court is defective.

I rely on *Wahidullah v. Kanhaya Lal* (1) *Dalip Singh v. Kundan Singh* (2) in both of which cases this Court remanded the case to the Court below for trial on the merits and for finding whether under-valuation had prejudicially affected the disposal of the suit.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondent.—The defendant-respondent raised this point at the earliest possible opportunity. He is not responsible.

If a party is compelled to produce evidence or if he consents to the trial of the suit under protest, the Court cannot have jurisdiction to try the suit.

An issue may be sent to the lower Court for a finding as to the question of prejudice.

The case was a complicated one, and involved a consideration of intricate questions and the Court can itself record a finding that it would be better for such a case to be tried by a Sub-Judge. Prejudice is a mixed question of fact and law and this Court can record its finding on it.

[PIGGOTT, J.—Did you urge in the memorandum of appeal in the lower Appellate Court that under-valuation had prejudicially affected the disposal of the suit?]

No. The provisions of section 11 must, however, have been brought to the notice of the Judge in argument.

Dr. S. M. Sulaiman, in reply.—The defendant not having urged prejudice in his appeal, the case should be sent back for trial on the merits.

JUDGMENT.

PIGGOTT, J.—These are three connected appeals which raise a point of law. The said point is clearly covered by authorities of this Court. It is sufficient to refer to the Full Bench case of *Wahidullah v. Kanhaya Lal* (1) and the recent case of *Dalip Singh v. Kundan Singh* (2). The three suits in question were instituted in the Court of a Munsif. In each case the defendant objected that the suit had been under-valued. An issue was framed

(1) 25 A. 174 A. W. N. (1902) 222.

(2) 22 Ind. Cas. 614; 36 A. 58; 12 A. L. J. 21.

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on this point, but was not separately tried. The learned Munsif tried the question of valuation along with the other issues, after taking all the evidence offered by both parties. He found in favour of the plaintiff on the question of valuation and he decreed the plaintiffs' suits on the merits. The defendant appealed to the Court of the District Judge and his appeals were transferred to the Court of the Subordinate Judge for disposal. That Court has found that, as a matter of fact, the suits had been undervalued and that their correct valuation was such as to bring them beyond the pecuniary jurisdiction of the Munsif's Court. On this finding alone it has set aside the decree of the Court of first instance and has passed in lieu thereof an order that the plaint in each of the three suits should be returned to the plaintiff to be presented to the proper Court, that is to say, to the Court of the Subordinate Judge. There is no reference in the judgment of the Court below to the provisions of section 11 of the Suits Valuation Act IX of 1887. It is not clear from the record whether any reference was made to this section in argument before the lower Appellate Court. We notice that in the memorandum of appeal to that Court, although the defendant challenged the finding of the Court of first instance on the question of valuation, he did not clearly or explicitly take the point that he had been prejudiced by the fact that the suits had been tried in the Court of the Munsif. At any rate the lower Appellate Court has, in deciding the three appeals before it, overlooked the provisions of the section referred to above. The case is strictly on all fours with the two previous reported decisions of this Court. Following the precedents there set, we must set aside the decree of the lower Appellate Court in each of these three cases and remand each of these cases to that Court for disposal with regard to the provisions of the Suits Valuation Act as mentioned above. The costs of each of these appeals will abide the event.

WALSH, J.—I agree. I think section 11 of the Suits Valuation Act clearly throws the burden on the appellant to show not merely that there has been an incorrect valuation, but that the trial of the suit which means of course the decision against himself has been

prejudicially affected thereby. I think he ought to take the ground in the memorandum of appeal and to state how he has been prejudicially affected. There is no better method of testing an argument of that kind, than by examining the grounds which are put forward by the person who makes the allegation, and satisfying one's self whether it is made out in fact or whether it is sufficient in law. It seems pretty clear that it was thought by the appellant or by those who conducted the case in the Court below on his behalf that it was sufficient to show that there was an incorrect valuation. It is very hard on the Judge if his attention is not drawn to the section, and I am inclined to think that his attention was not properly drawn to the matter at all.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 4171
OF 1913.

November 22, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walsley.

HIRANMOY KUMAR SAHA AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

BANKA BEHARI GHOSE - DEFENDANT—
RESPONDENT.

Landlord and tenant—Lease by trespasser—Good faith Rights of parties.

A person taking a settlement of land from a trespasser in *de facto* possession is not entitled to remain in possession as a tenant as against the rightful owner, unless it is found not only that he acted *bona fide* in taking the settlement but also that the person from whom the settlement was taken was acting *bona fide* in making the settlement with him. [p. 854, col. 1.]

Binad Lal Pakrashi v. Kalu Pramanik, 20 C. 708; 10 Ind. Dec. (N. S.), 417, distinguished.

Upendra Narain Bhattacharya v. Protap Chandra Pardhan, 8 C. W. N. 320; 31 C. 703; *Krishna Nath Chakravarti v. Muhammad Wafiz*, 31 Ind. Cas. 789; 21 C. W. N. 93; 23 C. L. J. 563, followed.

Appeal against the decree of the District Judge, Nadia, dated the 16th June 1913, affirming that of the Subordinate Judge of that District, dated the 31st of May 1912.

FACTS of the case appear from the judgment.

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Babus Ram Ohandra Majumdar and Upendra Nath Bagchi, for the Appellants, contended that the finding of the lower Appellate Court to the effect that although the lessor, Madan Mohan Roy, had no title to the land settled with the defendant Banku yet as the defendant acted *bona fide* in taking settlement of the land from his lessor and as he did not know that his lessor had no title to any portion of the land settled, but that on the other hand, he believed in good faith that he was taking settlement from a person who had good title to the *pattai* land, good faith on the part of the lessor is not necessary and that the lessee's good faith is sufficient to protect him from eviction, is bad in law. In order that a tenant may retain the land of which he had taken settlement from a person who had no title to such land it is essentially necessary that there should be *bona fide* conduct not only on the part of the person taking the settlement but also on the part of the person making the settlement. Good faith of the lessee alone is not sufficient. Lessor's good faith is also necessary. See *Upendra Narain Bhattacharya v. Protap Chandra Pardhan* (1). According to the Full Bench case of *Binad Lal Pakrashī v. Kalu Pramanik* (2) it cannot be said that the good faith of the lessor is not necessary. If there was *bona fide* conduct on the part of both the defendant and his lessor then and then only the defendant would be entitled to the protection provided for in the Bengal Tenancy Act. Simply because the defendant alone has acted in good faith he is not entitled to be protected from ejectment. See *Krishna Nath Chakravarti v. Muhammad Wafiz* (3). The defendant cannot claim protection from eviction as it has not been shown that his lessor acted *bona fide* and in good faith in making the settlement.

Babus D. N. Chakrabarty and Brojo Lal Chakrabarty, for the Respondent. There is nothing to show that the lessor Madan Mohan acted *mala fide*. At the time of

making the settlement the landlord Madan Mohan was in *de facto* possession of the land by the erection of pillars. The defendant tenant took settlement of the land in good faith. According to the Full Bench case of *Binad Lal Pakrashī v. Kalu Pramanik* (2), *de facto* possession in the owner and good faith on the part of the tenant are sufficient to protect the tenant from eviction. The case of *Pezry Mohun Mondal v. Radhika Mohun Hazra* (4) decides simply that if the tenant enters on the land *bona fide* the rule of law laid down in the Full Bench case of *Binad Lal Pakrashī v. Kalu Pramanik* (2) will apply.

If a person is in *de facto* possession as a proprietor under a *bona fide* assertion of right then the tenant entering upon the land *bona fide* and in good faith is protected from ejectment. This is quite consistent with the law laid down in the case of *Madhu v. Sabor Ali* (5) and *Tepu Mahammad v. Tefayit Mahammad* (6).

Babu Ram Churn Mazumdar replied.

JUDGMENT.—It has been found by the lower Court that the land in dispute is in the *zemindari* of the plaintiffs. It has been also found that the defendant took settlement of the same from a neighbouring *zemindar* in good faith. Upon these findings, the first Court allowed the defendant to remain in possession and the plaintiffs were given a decree for possession by receipt of rent from the defendant. In the lower Appellate Court, it was contended on behalf of the plaintiffs, that it was not sufficient to find the *bona fides* of the tenant and that it was further necessary to find whether the person from whom the tenant took settlement, was acting *bona fide* in making the settlement with him. The learned Judge, however, thought that it was not necessary to enter into that question as it was, in his opinion, immaterial whether the lessor made settlement in good faith or otherwise. That, however, does not seem to be the correct view of the law as laid down in some of the latest cases.

(1) 8 C. W. N. 320; 31 C. 703.

(2) 20 C. 703; 10 Ind. Dec. (N. S.) 477.

(3) 31 Ind. Cas. 789; 23 C. L. J. 563 at p. 565; 21 C. W. N. 93.

(4) 8 C. W. N. 315; 5 C. L. J. 9.

(5) 6 Ind. Cas. 177; 14 C. W. N. 681; 11 Cr. L. J. 283.

(6) 29 Ind. Cas. 216; 19 C. W. N. 772.

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The case relied on in the lower Court was the case of *Binad Lal Pakrashi v. Kalu Pramanik* (2). That case decided that if a tenant took settlement from a trespasser in good faith, he might be considered a tenant in accordance with the definition of the word in the Bengal Tenancy Act and be allowed to retain possession. The question of the *bona fides* of the person so letting him in was not raised in that case and probably could not be raised, as the landlord in that case had been litigating for title to the property. That case formed the subject of consideration in the case of *Upendra Narain Bhattacharya v. Protap Chandra Pardhan* (1) and it was held that it was necessary to find whether the landlord letting in a tenant was acting *bona fide* in doing so. That case has been followed in a number of cases which have been considered in the case of *Krishna Nath Chakravarti v. Muhammad Wafiz* (3) and the latest opinion on the subject is that the *bona fides* of the persons from whom the tenant takes settlement have also to be considered in deciding whether the tenant is to be allowed to retain possession as a tenant. We see no reason to differ from the view expressed in these cases.

The learned Vakil for the respondent has referred to some other cases, viz., *Peary Mohun Mondal v. Radhika Mohun Harra* (4), *Madhu v. Sabar Ali* (5) and *Tepu Mahammad v. Tefayit Mahammad* (6). But none of these cases decided the exact point now raised by the learned Vakil for the appellant.

That being so, the appellant is entitled to a decision of the Court below upon the point now raised by him as to whether Madan Mohan in letting out the land to the defendant acted *bona fide*. The case was argued on this point alone. No other point was pressed.

The judgment of the Court below is set aside and the case sent back for a decision on the above point. If the Court finds that Madan Mohan acted *bona fide* in making the settlement defendants will retain their possession.

Costs will abide the result.

Appeal allowed; Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1646 OF 1915.

January 2, 1917.

Present:—Mr. Justice Atkinson.

CHAIRMAN OF GAYA MUNICIPALITY
—DEFENDANT—APPELLANT

versus

Babu SUKAN SINGH—PLAINTIFF—

RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), ss. 240, 241, 242A (b)—Construction of platform on open space between house and drain, whether 'erection' of building—Gaya Municipal Rules, r. 1, whether ultra vires—Statutory rules, object and construction of—Notice of removal or demolition under section 241 (3)—Remedy of party aggrieved—Omission to appeal to Commissioners, effect of—Suit for declaration and injunction against Municipality, maintainability of.

The erection of a platform on an open space between the outer wall of a house and the street drain is an 'erection' within the meaning of section 240 of the Bengal Municipal Act, for which the previous sanction of the Municipality is necessary. [p. 856, col. 2.]

Rule 1 of the Rules framed by the Gaya Municipality under the powers vested in them by section 241 (d) of the Act is not *ultra vires* or unreasonable. [p. 856, col. 2.]

An order, therefore, issued by the Municipality to a house owner to leave an open space between the external wall of his house and the drain adjoining the road is not illegal [p. 856, col. 2.]

A person aggrieved by an order under section 241 (3) must exhaust the statutory remedy provided in section 242A before going to the Civil Courts for redress. [p. 856, cols 1 & 2.]

Section 241 (d) indicates the line or foundation upon which a Municipality should frame their rules. If they exceed their jurisdiction and the limitation imposed upon them by the section, then their rules will be *ultra vires*. Where the rules are framed in the interests of public health they should not be construed in too strict and too limited a sense. [p. 855, col 2; p. 856, col. 1.]

The rules, after receiving the assent of the Lieutenant-Governor, should be read as if they were incorporated in the Statute, unless there is something in them patently outside the jurisdiction conferred by it. [p. 856, col. 1.]

Appeal against the order of the Additional Sub-Judge, Gaya, dated the 28th April 1914, reversing that of the Officiating Munsif, first Court, Gaya, dated the 7th August 1914.

Mr. Khurshed Hasnain, for the Appellant.

Mr. Kulwant Sahai, for the Respondent.

JUDGMENT.—This case comes on appeal from the Additional Subordinate Judge of Gaya reversing a decision of the Munsif of Gaya, dated the 7th August 1914; and the question mainly turns upon the rules made by the Gaya Municipality under the pro-

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visions of the Bengal Municipal Act, Act III of 1884.

It appears that the plaintiff's house in Gaya fell down or became dilapidated in consequence of floods, and he was anxious to re-build his house, and before doing so applied to the Municipal authority of Gaya for leave to re-build or re-erect his house, and the Municipal authority conceded the plaintiff's application and allowed him to re-build on the strict understanding that he would leave a space between the external wall of his house and the drain adjoining the road of 2 feet 3 inches in depth and 34 feet 8 inches in length. The plaintiff agreed to leave this space free of any structure or building whatsoever. But after he had re-built his house, and having obtained the concession or the right which he did from the Municipality, he suddenly took it into his head to build upon the space between the house and the drain a *pukka* masonry platform covering the entire area of 34 feet 8 inches by 2 feet 3 inches. The Municipal authority complained that what the plaintiff had done was in violation of the terms he had made with them; and it is alleged and not controverted, that this *pukka* platform outside the plaintiff's house was completed on the 20th November 1913; and upon the 25th November 1913 notice was served by the Municipal authority of Gaya upon the plaintiff requiring him forthwith to remove the platform which he had erected outside his house and between his house and the drain.

The plaintiff now contends that it was quite unnecessary for him to have applied for leave to the Municipal authority to re-build his house; and that they have no power whatsoever to prevent him from building upon this strip of land which adjoins his house, and which is his own property, this *pukka* platform; and that if any rule exists in the Municipality of Gaya to the contrary it is *ultra vires*, and if not *ultra vires* it is unreasonable; and accordingly he brings this action for a declaration that he is entitled to build this *pukka* masonry platform outside his house, and claims that the defendants may be enjoined from in any way interfering with the platform which he has erected.

The case is a simple case, and appears

to me to have received very little consideration at the hands of the Subordinate Judge. He has cursorily glanced at the several sections of the Act and half considered them, and several sections he has entirely ignored, as he also appears to have ignored some general principles. However, it is well to note that this platform was built as part and parcel of the plaintiff's design in the re-building of his house; and that becomes material, because the plaintiff says in his plaint that finding that this piece of land which he had agreed to leave free and unoccupied would be of use to him in the occupation and enjoyment of his house he thereupon made up his mind to build the *pukka* masonry platform that he has built, and, therefore, we may take it that the building of the *pukka* platform formed part of the entire scheme for the enlargement or rebuilding of his house.

Now, section 241 of the Bengal Municipal Act III of 1884 endows the Commissioner with power to make rules for the regulation of the erection or re-erection of houses, not being huts, within the Municipality; and accordingly the Municipality have made rules in pursuance of the powers so vested in them, and the rules made are applicable to districts No. 1 to No. 9 of the Gaya Municipality and in which this house is situated. One of the purposes for which the Municipality may make rules is provided by clause (d) of section 241, namely, to provide space to be left about the house which is being re-built in order to secure free circulation of air, to facilitate the removal of foul and obnoxious matter and to prevent the possibility of fire by creating air spaces in front of dwelling houses to be re-built or newly built. What the Act contemplates is to indicate the line or foundation upon which the Municipality are to frame their rules, and the purpose and object which they are to have in view. It is for the Municipal authority in pursuance of that power to frame their rules in accordance with it. If they exceed their jurisdiction and the limitation imposed upon them by the Statutes, then their rules will be *ultra vires*. But it seems to be recognised by the House of Lords and by

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all other Courts that in these matters wide discretionary powers must be given to local bodies in the interest of public health, and their rules must not be construed in too strict and too limited a sense. Now, the object of the Statute was, to provide free spaces for air and scavenging and for the prevention of fire in the re-building of houses, and the Municipal authority was charged with the making of rules in that behalf. When the rules are made under the Statute they are submitted to the Local Government for sanction; and when the sanction has been obtained, the rules are to be enforced. Now, in this particular case the rules were submitted to the Lieutenant Governor in Council and were approved of and sanctioned by the Lieutenant Governor in Council. Sub-section (2) of section 241 prescribes that once the rules have been sanctioned by the Local Government and duly published then the rules are to have the force and effect of law. Therefore, I read these rules as if they were incorporated in the Statute, unless I can find something in them which shows them to be patently outside the jurisdiction conferred by the Statute.

I must refer to section 242A, sub-clause (b), which provides the mode or procedure to be adopted by a person aggrieved upon whom a notice has been served under sub-section 3 of section 241; and admittedly in this case on the 25th November the plaintiff was served by the defendants with a notice under sub-section 3 of section 241, and Mr. Das admitted to me in reply that if such a notice had been served then admittedly this action would be unsustainable, if the provisions of section 242A, sub-clause (b), were to apply to this case.

Now, I am satisfied myself, because it is not traversed in the plaint, that the notice was served within 15 days from the erection of this platform which was completed on the 20th November, and that that being so, if the plaintiff had any cause for feeling aggrieved he had a statutory remedy provided by section 242A, namely, an appeal to the Commissioners, and while that remedy exists, in my opinion, it is

not open to the plaintiff to pursue a remedy otherwise than that provided by the Statute. There is ample authority to support that proposition, certainly in England, and I believe also in this country. But the learned Subordinate Judge has held that rule 1, clause (a), made by the Municipality is *ultra vires*, and, therefore, not binding on the plaintiff, and if not *ultra vires*, it is unreasonable and, therefore, not binding on the plaintiff. In my opinion both these contentions are wrong in point of law. I think that rule 1 of the rules of the Municipality of Gaya dated the 22nd January 1912 is not *ultra vires*, that the rule is made in pursuance of the powers conferred by section 241, clause (b), that it does no more than provide according to its own design the methods by which the objects indicated in sub-clause (b) can be carried into effect; and merely because a form of explanation is given at the conclusion of paragraph A, which the learned Judge thinks is somewhat unique, it does not invalidate the entire rule. I see nothing in this rule to render it *ultra vires*. Is it unreasonable? In my opinion, clearly not. The whole object and intention of the Act of Parliament was to make provision, in the interest of public health, for the free circulation of air, to facilitate the removal of all foul and obnoxious matter and to prevent the possibility of fire by creating air spaces in front of dwelling houses to be re-built or newly built. Accordingly in this case we have an erection of a house within the definition of the word "erect" in section 240, namely, a material alteration or enlargement of a building. We must take the erection of this platform in conjunction with the improvements which the plaintiff made to his house consequential upon the destruction of his building by the floods and which was in form one entire scheme for the enlargement of the prior existing building, and, therefore, this case is an erection within the meaning of the Statute.

For these reasons I am of opinion that the learned Subordinate Judge erred in law in holding that the rules of the

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Gaya Municipality were *ultra vires* or that they were unreasonable. Accordingly I shall reverse the order of the learned Subordinate Judge and set aside his judgment and re-establish the judgment of the learned Munsif, with which I entirely agree. I award the defendants in this case the costs of this appeal and in the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1108 TO 1111,
1113 TO 1118 AND 1120, 1123 TO 1125
OF 1914.

October 10, 1916.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

Sree RAJAH BOMMEDEVARA VENKATA
NARASIMHA NAIDU BAHADUR
ZEMINDAR GARU — PLAINTIFF

— APPELLANT

versus

ANDAVOLU VENKATARATNAM (DEAD)

AND OTHERS — DEFENDANTS — RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XIV, r. 1—*Res judicata*—'Matter' in s. 11, meaning of—*Question of law, decision on, when res judicata*—*Mixed questions of law and fact, treatment of*—*Landlord and tenant*—*Ghattuthumulu, levy of, finding as to, whether res judicata in subsequent suit between same parties.*

A decision on an abstract question of law is not *res judicata*. [p. 859, col. 1.]

Where a decision on a point of law, whether it be on the construction of a document or of a Statute or on Common Law or on Customary Law settles a question that arises directly out of the conflicting views as to the rights of the parties, it is *res judicata*. [p. 861, cols. 1 & 2.]

Though it is a convenient treatment to say that a particular case is a mixed question of law and fact and that the doctrine of *res judicata* does not, therefore, apply to it, it must be seen what exactly are the issues involved and decided. The question whether an issue arising in a case is of law or of mixed fact and law, must depend on the way in which the issues are framed, quite apart from the question which is really decided in the case. Any issue which, as framed, contains questions of fact and law must be split up in such a manner that a pure issue of law can be framed on the hypothesis of the finding of fact one way or the other. [p. 859, col. 1.]

A defence or claim based on a question of law is a 'matter' within the meaning of Explanation II to section 11, Civil Procedure Code. A 'matter' must sometimes include an issue of law and where the point of law directly affects the rights in litigation between the parties to the suit, it is a 'matter' within the meaning of the section. [p. 859, col. 2.]

Mangalathammal v. Narayanswami Aiyar, 30 M. 461; 17 M. L. J. 250; *Natesan Chetty v. Vengu Nachiar*, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20; *Badar Bee v. Habib Merican Noordin*, (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161; *Rai Churn Ghose v. Kumud Mohon Dutta*, 1 C. W. N. 687; *Bishun Priya Chowdhurani v. Bhaba Sundari Debya*, 28 C. 318; *Aghore Nath Mukerjee v. Kamini Debi*, 6 Ind. Cas. 554; 11 C. L. J. 461 and *Secretary of State v. Rajah of Venkatagiri*, 3 Ind. Cas. 266; 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 284, referred to.

Parthasaradi Ayyangar v. Chinnakrishna Ayyangar, 5 M. 304; 2 Ind. Dec. (N. S.) 211; *Mangalathammal v. Narayanswami Aiyar*, 30 M. 461; 17 M. L. J. 250 and *Natesan Chetty v. Vengu Nachiar*, 3 Ind. Cas. 701; 6 M. L. T. 313; 20 M. L. J. 20; 33 M. 102, distinguished.

Plaintiff, a *zemindar*, sued his tenants to recover a cess known as *ghattuthumulu* in 1902. The Munsif held that the plaintiff was not entitled by sheer force of custom to a perpetual payment of the cess by the *inamdars* without any obligation on his part to maintain any of the old irrigation works in the villages concerned. Plaintiff preferred a similar suit against the defendants in 1905 when a similar decision was given. The District Judge, on appeal, reversed the Munsif's decree. In second appeal, the High Court called for findings as to whether the parties and the subject-matter were the same as in the suit of 1902 and, on receipt of findings in the affirmative, pronounced judgment in 1912 stating, 'we accept the finding and set aside the decree'.

Held, that the Munsif's judgment of 1902 was *res judicata* and the decision of the High Court in 1912 that that decision was *res judicata* was also *res judicata*. [p. 861, col. 2.]

Second appeals against the decrees of the District Court of Kistna at Masulipatam, in Appeal Suits Nos. 133 to 143, 145, 148 to 150 of 1913, preferred against those of the District Munsif, Ellore, in Original Suits Nos. 899, 891, 896 of 1911, 305, 294 of 1908, 962, 897 of 1911, 295 and 201 of 1908, 894, 890, 895, 900 of 1911 and 293 of 1908, respectively.

The Hon'ble Mr. S. Srinivasa Aiyengar (Advocate-General) and Mr. V. Ramadoss, for the Appellant.

Mr. V. Ramesam, for the Respondents.

JUDGMENT.

NAPIER, J.—These are series of appeals by the plaintiff *zemindar* in suits brought by him against tenants to recover a cess known as *ghattuthumulu*. It is not properly a cess at all as only Government

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and statutory bodies can levy cesses, but is a charge claimed by him in respect of pre-ancient irrigation facilities which are no longer in existence. As pointed out by the District Judge the High Court has held that this charge is recoverable, but he has dismissed the suits on the ground that the principle of *res judicata* prevents the recovery. He has divided the appeals before him into five batches, the first four being those in which notice had gone to the respondent and the fifth batch containing appeals in which no notice had gone but were dealt with by him under Order XLI, rule 11. It will be convenient to treat these latter with the first four as the appeals are before us. Out of the whole number, however, some are not yet before us and they will be indicated in the classification. Following his classification as far as possible, we divide the appeals as under: The first batch corresponds to his first batch and contains Second Appeals Nos. 1110, 1115 and 1124, together with Second Appeals Nos. 1119 and 1121 which are not before us. The second batch contains his second and third batches and covers Second Appeals Nos. 1109, 1114, 1120, 1123, 1111, 1113, 1116, 1117 and 1125. The third batch contains Second Appeals Nos. 1118 and 1108.

Mr. Ramesam, for the respondent, admits that the appellant is entitled to succeed in the first batch as they undoubtedly must be decided against him if his contention on the second batch is sustained. He also admits that the third batch must also succeed on the same principle—with the result that Second Appeals Nos. 1110, 1115, 1124, 1108 and 1118 must be allowed if we uphold his argument.

There remains then to consider the second batch. It is urged that these are *res judicata* in that the High Court in 1912 in Second Appeals Nos. 616 to 629 of 1908 held, on second appeal from the decisions of the District Munsif in suits of 1905, that the matter was *res judicata* by reason of the decision of the District Munsif between the same parties in 1902. It is not denied that the decision of the High Court in 1912 does cover these cases. It is urged, first, that that judgment, although correct on the materials then before the High Court, does not bind us in these second appeals be-

cause another judgment of the High Court in 1892 was not before it. *Secondly*, that that judgment of the High Court in 1912 is not binding on us because it is merely on a point of law. With regard to the first argument it is sufficient to say that this contention was never put before the District Munsif who decided the cases now under appeal and we cannot allow it to be raised now. We must, therefore, confine ourselves to the second question.

The broad proposition contended for is that a decision on a pure question of law is not *res judicata*. The decision of the High Court is Exhibit A and it simply says "we accept the findings and set aside the decrees." The issue sent down for finding was whether the parties to those second appeals and the lands, the subject of them, were the same as those dealt with by the District Munsif in 1902, and the finding was that the parties and the lands were the same. It is argued on this that the question decided by the Munsif in the suits of 1902 was a pure question of law and accordingly the decision of the High Court in 1912 must have been a pure question of law too. The decision of the Munsif is Exhibit F, and the issue is as follows:—"Is the plaintiff entitled to levy on the plaint land the cess called *ghattu-thumulu*. (This issue includes consideration of the question whether, granting that the cess is payable by custom, the plaintiff is not entitled, in the present circumstances of the parties, to enforce the same.)" It is dealt with by the Munsif on page 53 of the printed papers and his decision is as follows:—"I hold that the plaintiff's contention, that he is entitled by the sheer force of custom to a perpetual payment of the plaint cess by the *inamdars* without any obligation on his part to maintain any of the old irrigation works in the villages concerned is not sustainable." Now there is no doubt that if the question of *res judicata* was out of the way, this would be the very issue to be decided by the High Court now and we have, therefore, to decide whether that finding does operate as *res judicata*. Mr. Ramesam urges that it is a mixed question of fact and law and, as such, is *res judicata*. Mr. Narasimha Rao relies on certain decisions. In *Mangalatham*-

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mal v. Narayanswami Aiyar (1) it was decided that an erroneous decision on a question of law in a previous suit is no bar, in a subsequent suit between the same parties, to the Court deciding the same question, provided the decision in the latter case does not in any way question the correctness of the former decree. In *Natesan Chetty v. Vengu Nachiar* (2) it was decided that an order or decree passed on a mistake of law does not operate as *res judicata*, with the same reservation. Now it could at once be conceded that a decision on an abstract question of law is not *res judicata*. But the difficulty arises in applying that proposition to cases that come before the Court. It is a very convenient treatment to say that a particular case is a mixed question of fact and law and to hold that the doctrine, therefore, does not apply. But speaking for myself, I find it difficult to appreciate exactly what is meant by the term "mixed question of fact and law." It seems to me that the question, whether an issue arising in a case is of law or is of mixed fact and law, must depend on the way in which the issues are framed, quite apart from the question which is really decided in the case. It must be possible to split up any issue which, as framed, contains questions of fact and law in such a manner that a pure issue of law can be framed on the hypothesis of the finding of fact one way or the other, and I cannot conceive that the whole question should be decided by the frame of the issue. It is a matter of daily experience that some Judges frame issues in a concentrated form, while others analyse the questions at issue between the parties and frame an issue of law on the hypothesis of the alternative findings of fact. I must not be understood to mean that the phrase "mixed question of fact and law" is not one that should be used. I only mean that, to me it does not contain a principle which I can apprehend.

Before proceeding to examine the cases any further, I think it advisable to examine the section, which is section 11 of the

present Code of Civil Procedure, "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties," Order XIV, rule 1, states that "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other;" and "issues are of two kinds; issues of fact and issues of law." Applying the language of Order XIV to section 11 we get the language "No Court shall try any suit or issue of fact or of law in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." Mr. Narasimha Rao contends that the word 'matter' there does not include a point of law and this may be so with regard to some propositions of law decided in a case, but the word 'matter' is used in two of the Explanations to the section; the second of which certainly throws light on its meaning: "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been.....directly and substantially in issue in such suit." It can hardly be contended that a defence or claim based on a question of law is not 'matter' within the meaning of this Explanation. If his contention were correct the decision on a point of law in any suit, (entirely apart from the question of a decision on an issue) would not be final between the parties and a fresh suit could be brought on the same cause of action, provided that a new point of law was raised. So 'matter' must include an issue of law sometimes, and it seems to me that where the point of law directly affects the rights in litigation between the parties to the suit it must be matter within the meaning of the section. The doctrine of *res judicata* is stated in Halsbury's Laws of England, Volume XIII, page 331 as follows: "Where *res judicata* is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment which may involve the determination of questions of law as well as findings of fact." In my opinion the phrase "legal rights and obligations of the parties" and the words "which may involve the deter-

(1) 30 M. 461 at p. 463; 17 M. L. J. 250.

(2) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

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mination of questions of law" cover the same ground as the language "any suit or issue of law in which the matter directly and substantially in issue etc., etc.," in the section. Mr. Ramesam relies on a decision of the Privy Council in *Badar Bee v. Habib Merican Noordin* (3) and a careful examination of this case certainly does show the principle which the Board applies, quite apart from the particular language of the section. The appellant petitioned to have it declared that the devise and gifts contained in the 6th clause of the testator's will were void, and that the lands comprised therein and the income thereof being undisposed of belonged to the testator's next-of-kin. By that 6th clause he gave certain lands in Penang, which he directed to be called "the *wakaf* of Mahomed Noordin," to trustees for certain purposes. By a decree of the Supreme Court of the Straits Settlements in 1872, it was held that one of the purposes for which the income of the *wakaf* was to be applied was void as not being lawful charitable gifts and that the gifts fell into the undivided residue of the testator's estate. In consequence of this decree a sum of \$700 out of the rents and profits of the *wakaf* was for several years paid to the next-of-kin. But the trustees, after that, seem to have declined to pay this amount either to the next-of-kin or to the residuary legatees, doubtless owing to the residuary legatees having protested against payment to the next-of-kin. In 1889 one of the next-of-kin brought a suit in respect of that annual sum of \$700 against the trustees. The trustees pleaded that they were advised that the amount ought to be paid to the residuary legatees. It was decided by the Court that the defendants were estopped from raising that defence. Several years afterwards, the only daughter of the eldest son of the testator filed a petition for declaration that the property comprised in the *wakaf* was at the death of the testator vested in his trustees and executors in trust for the next-of-kin of the testator living at the time of his death. It was decided by the Court of Appeal that the said lands were vested in the said trustees in trust for the residuary legatees, save and except

the two yearly sums amounting to \$700 which yearly sums were payable to the testator's next-of-kin—the ground of decision being that, so far as the yearly sum of \$700 was concerned, the matter was *res judicata* by the first decree. But they held that the amount of \$700 formed only a small portion of the total income yielded by the properties mentioned in clause 6 and that there was nothing in the case from which it could be inferred that the next-of-kin had been recognized as entitled to anything beyond the \$700. The next-of-kin appealed to the Privy Council and it was in that appeal that the present judgment was given. Their Lordships say:—"The decree of 1872 was a decision on the construction of the testator's Will as to the destination of funds released from the operation of the trust declared by the 6th clause of the Will..... The result is that it appears that the point raised by this appeal has already been adjudicated on and it is not open to the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal." Now here clearly the decision of the first Court was on a pure question of law, namely, the construction of the testator's Will, the question being to whom any moneys released from the trust by reason of the trust being found not to be good at law should go. The amount affected by the judgment was only a sum of \$700, but their Lordships have held that the first case decided the legal rights of the parties and that that decision governed claims made subsequently where the same question arose, namely, the construction of the Will. It cannot be contended, that this point of law, namely, the true construction of the Will as to the destination of released funds, was not a matter "directly and substantially in issue" in both suits within the meaning of section 11, and yet it is difficult to see what question of fact was mixed up in it. It is to be noted too that the Board draw no distinction between questions of law and mixed questions of fact and law. In a case reported in *Rai Churn Ghose v. Kumud Mohon Dutta* (4) the High Court held that the decision of a Court on the question

(3) (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161.

(4) 1 C. W. N. 687.

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whether rent was payable under section 53 of the Bengal Tenancy Act quarterly or annually was *res judicata*. The Bench put it on the ground that it was a mixed question of law and fact. I find a difficulty in seeing the question of fact but the decision seems to me in entire accordance with *Badar Bee v. Habib Merican Noordin* (3). In *Bishnu Priya Howthurani v. Bhaba Sundari Debya* (5) the High Court held that a decision on the question whether a stipulation in a *kabuliāt* was valid and binding between the parties was *res judicata*. All the cases were considered by Mookerjee, J. in an elaborate judgment reported in *Aghore Nath Mukerjee v. Kamini Debi* (6). He applies the test of mixed question of fact and law to the construction of a clause in a Will in which process, I am with respect, unable to follow him but he says that the decision on the question of the true construction regulates the rights of the parties. That latter test seems to me to be the one applied in *Badar Bee v. Habib Merican Noordin* (3) and also to give due effect to the words of section 11 of the Code. The question has been recently considered by the Chief Justice in *Secretary of State v. Rajah of Venkatagiri* (7) and the Court had the decision in *Badar Bee v. Habib Merican Noordin* (3) before it. The cases in *Mangalathammal v. Narayanswami Aiyar* (1) and *Natesan Chetty v. Vengu Nachiar* (2) and all the Calcutta cases were also cited. The learned Chief Justice applies the decision of the Privy Council to the question of the right of Government to resume *inams* in *zemindari* and decides that such a decision cannot be said not to be *res judicata* on the ground that it is erroneous in law. It is to be noted that the Chief Justice does not apply the test of mixed question of fact and law. My conclusion is both on the authority of the Privy Council and on the language of the section that where a decision on a point of law, whether it be on the construction of a document, or of a Statute or on Common Law or on Customary Law settles a question

that arises directly out of conflicting views as to the rights of the parties, it is *res judicata*. In this view I think the cases in *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (8), *Mangalathammal v. Narayanswami Aiyar* (1) and *Natesan Chetty v. Vengu Nachiar* (2) cannot now be regarded as accurately expressing the law though they may be correct on the facts of each particular case, as they are inconsistent with *Badar Bee v. Habib Merican Noordin* (3) and *Secretary of State v. Rajah of Venkatagiri* (7). In this view the decision of the District Munsif in the 1902 suits that the *zemindar* cannot by custom claim the payment of the charge without maintaining the tanks is *res judicata*, and the decision of the High Court in 1912, that that decision is *res judicata* is also *res judicata*. The Appeals in Nos. 1108, 1110, 1115, 1118, 1124 will, therefore, be allowed with costs and the Appeals Nos. 1109, 1111, 1113, 1114, 1116, 1117, 1120, 1125, 1125 will be dismissed with costs. The memorandum of objections will be dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree. The actual decision in *Parthasaradi v. Chinnakrishna Ayyangar* (8) might, perhaps, be supported on the ground that the decree in the plaintiff's favour in an injunction suit affects only the particular defendants who are parties thereto individually and that in a subsequent suit for injunction against other individuals, the questions decided in the first suit cannot be *res judicata*. [See *Sadagopachariar v. Rama Rao* (9) and *Sadagopa Chariar v. Krishnamoorthy Rao* (10).]

I also think that Wallis, C. J., in *Secretary of State v. Rajah of Venkatagiri* (7) has clearly changed the views which he had expressed in the cases reported in *Mangalathammal v. Narayanswami Aiyar* (1) and *Natesan Chetty v. Vengu Nachiar* (2), in the light of the Privy Council decision in *Badar Bee v. Habib Merican Noordin* (3) and the decision of Mookerjee, J., in *Aghore Nath*

(5) 28 C. 318 at p. 323.

(6) 6 Ind. Cas. 554; 11 C. L. J. 461.

(7) 35 Ind. Cas. 266; 31 M. L. J. 97 at p. 117; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 234.

(8) 5 M. 304; 2 Ind. Dec. (N. S.) 211.

(9) 26 M. 376.

(10) 30 M. 185; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204; 34 I. A. 93 (P. C.).

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Mukerjee v. Kamini Debi (6) though my Lord does not expressly say so. I might also refer to *Bishnu Priya Chowdhurani v. Bhaba Sundari Debya* (5) where the distinction is pointed out between the contention that the decision on an abstract question of law (say a question of limitation between the parties) in one suit is *res judicata* so that the law of the land should itself be deemed to have been altered when that question arises in subsequent suits between the same parties and the contention that a legal right, found declared or awarded in favour of one of the parties in one suit though based on an erroneous view of the law or an erroneous construction of a document is *res judicata* when the same legal right is controverted in subsequent suits between the same parties. The first contention is unsustainable while the second ought to be upheld. The memorandum of objections will stand dismissed with costs, not being pressed.

Appeals partly allowed;
Memo of objections dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 476
OF 1914.

December 6, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walmsley.

KRISTADHAN GHOSE—PLAINTIFF—
APPELLANT

versus

GOLAM MANDAL—DEFENDANT—

RESPONDENT.

Bengal Tenancy Act (VIII B C. of 1885), s. 29—Landlord and tenant—Amalgamation of tenancies, whether changes their incidents—Enhancement of rent—Pleadings—Appeal, fresh basis for claim, whether can be adopted in.

Where two occupancy holdings are amalgamated without any registered document, the lands remaining the same, and the consolidated *jama* is enhanced more than 2 annas in the rupee on the old *jama*, then unless it is proved that a new tenancy has been created or the parties intended to create a new tenancy, the incidents of the old tenancy remain unchanged, so that the landlord cannot get enhanced rent in contravention of the provisions of section 29 of the Bengal Tenancy Act. [p. 863, col. 1.]

Where the plaintiff's case in the lower Court was not that a new tenancy had been created or that the parties had intended to create a new tenancy by the amalgamation of the old tenancy, he cannot be

allowed to contend in second appeal that a new tenancy was created by the amalgamation. [p. 863, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 27th November 1913, affirming that of the Munsif, first Court, Kandi, dated the 17th March 1913.

FACTS of the case appear from the judgment.

Babus Ram Chandra Majumdar and Turkeswar Pal Ohoudhri, for the Appellant. The defendant respondent held two *jotes* under the plaintiff-appellant. Subsequently in 1301 B. S., the two *jotes* were consolidated together and a consolidated rent exceeding the rent of the two *jamas* together by more than 2 annas in the rupee was settled. The defendant on being sued for rent contended that under section 29 of the Bengal Tenancy Act the plaintiff cannot get rent exceeding the previous rent by more than 2 annas in the rupee. The only question for determination, therefore, is whether the plaintiff is entitled to get the full extent of the enhanced rent settled. My submission is that after consolidation a new *jote* was created. It is clear that section 29 has no operation when a new *jote* comes into existence. Therefore, unless it is found that after consolidation the old *jotes* were intended by the parties to be kept alive it cannot be said that the rent has been enhanced in contravention of the provisions of section 29.

The principle laid down in *Mulzik Chand Das v. Satish Chandra Das* (1) supports my contention. That was a case of splitting up of one *jote*, but the principle which governs the splitting up of a *jote* applies also in the case of consolidation of two or more *jotes*. If by consolidation a new tenancy was created the question of the right of occupancy does not arise, and consequently section 29 can have no proper application.

[CHATTERJEE, J.—Your point is that defendant is not an occupancy-*raiyyat*. Therefore you are entitled to recover the enhanced rent agreed upon?]

Yes. The whole point is whether by the consolidation a new tenancy was created. Before applying section 29 one way or the other it must be definitely found what the intention of the parties was when the *jamas* were consolidated together.

(1) 3 Ind. Cas. 306; 11 C. L. J. 56 at p. 59; 14 C. W. N. 335.

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[CHATTERJEE, J.—The point was not raised in any of the lower Courts.]

In the case reported in *Mulluk Chand Das v. Satish Chandra Das* (1) the point was not taken in the lower Courts. Still it was allowed to be raised before the High Court, and the High Court gave effect to the contention.

Babu Karunamoy Bose, for the Respondent, was not called upon.

JUDGMENT.—This is an instance of the various subterfuges that have been devised to evade the salutary provisions of the Bengal Tenancy Act.

Two occupancy holdings were amalgamated in 1301 B. S., without any registered document, the lands remaining the same but the consolidated *jama* being an enhancement of more than 2 annas in the rupee on the old *jama*. The lower Courts have given a decree on the old state of things.

It is contended before us that there ought to have been a finding as to whether the landlord and the tenant intended by this amalgamation to create a new tenancy. This was never the case of the appellant in the Courts below. In the first Court, his case was that the tenant was a non-occupancy-*raiyat* and that, therefore, he was liable to pay at the rate at which he had been paying for more than three years and that failing, his contention was that he was entitled to realise rent at the enhanced rate under proviso (1) to section 29.

Both the grounds failed on the Courts deciding *first*, that he was an occupancy-*raiyat*, and *secondly*, that there was no written document. It was never the case of the plaintiff that a new tenancy had been created or that the parties had intended to create a new tenancy. All the facts point to the conclusion that the old tenancy was to continue and that all the incidents of the tenancy were to remain unchanged.

In this view of the case, there is no substance in this appeal and it is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 228 of 1916.

December 14, 1916.

Present:—Mr. Justice Roe and

Mr. Justice Jwala Prasad.

KEDAR NATH MARWARI AND OTHERS—

DECREE-HOLDERS—APPELLANTS

versus

JAI BERHMA AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Restitution, principles governing—Property, sale of, not covered by proclamation—Sale certificate, cancellation of, in appeal—Application for restitution—Auction-purchaser, rights of.

On an application for restitution under section 144, Civil Procedure Code, the Courts should not only restore parties to the positions which they held before the erroneous order was made, but should also make restitution from party to party, as nearly as possible, simultaneous. [p. 865, col. 1.]

Where a sale of property not covered by the proclamation is afterwards set aside, the judgment-debtor can claim restitution only on payment to the purchaser of the purchase-money. The purchaser cannot be forced to seek his remedy against the decree-holder or required to vacate, till restitution is made of the sum paid by him for the property erroneously offered for sale. [p. 865, cols. 1 & 2; p. 868, col. 2.]

Courts acting under section 144, Civil Procedure Code, will only re-place parties in the position which they actually occupied at the time of the order reversed and will not consider all the various subsequent positions voluntarily taken up by the parties as the remote consequences of that order. [p. 866, col. 1; p. 869, col. 1.]

Appeal against the order of the Sub-Judge, Godda, dated the 20th August 1916.

Mr. Hassan Imam, Sir Rosh Behari Ghose and Messrs. Purendra Narain Sinha, Naresh Chandra Sinha and Ranjit Sinha, for the Appellants.

Messrs. Pugh, Sarat Chandra Mukerji and Mahomed Tahir, for the Respondents.

JUDGMENT.

Roe, J.—This appeal arises from proceedings under section 144, Civil Procedure Code. The appellants are Kedar Nath Marwari and others, auction-purchasers, and respondents are Jai Berhma, and others, judgment-debtors.

Raja Thakur Berhma the father of the judgment-debtors, was very deeply indebted in the early years of this century, his principal creditors being members of the family of the appellants. Anant Ram Marwari, the father of Sri Mohan Marwari, held a decree against him upon a mortgage-debt by which was secured eight annas of

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the village Patsanda. Another two annas of the same village had also been given to the same creditor as security for another debt. One Jivan Ram Marwari held a decree for Rs. 42,000 and in execution of that decree attached the Raja's *milkiat* right in six annas out of sixteen annas of *Mahal* Tappa Patsanda, etc. The application for attachment sets forth that "this property is mortgaged in the bond of Babu Anant Ram Marwari and others decree-holders and also a two-annas share of the said *mahal* which has been hypothecated as security on behalf of the defendant in the case of execution of a mortgage-decree by the said Babu Anant Ram Marwari and others decree-holders against the judgment in the first Court of the Subordinate Judge of Bhagalpore; in all eight-annas share of the said *mahal*, the estimated value being Rs. 50,000"

Now this entry of the share to be attached as six annas was in all probability a mistake for eight annas. It was eight annas out of the sixteen annas that was originally mortgaged to Babu Anant Ram Marwari. It was clearly the intention of the auction-purchasers to attach and bring to sale the whole of the property secured upon the two debts due to Anant Ram Marwari. It happened that the residue of the property was also six annas and inasmuch as there was no six-annas share mortgaged to Anant Ram, there appears to have crept into the minds of those interested in the proceedings the illusion that what had been attached was the unmortgaged six-annas share. The sale notification published in the Gazette specifically mentioned that the share to be sold was not mortgaged to Anant Ram and in the letter asking for the sanction of the Commissioner of Bhagalpur (which was necessary before this property could be sold in execution of a money-decree) it was again stated that the property to be sold was the unencumbered six annas share. Though spoken of in the proceedings as the unencumbered share this six-annas was not entirely unencumbered, three annas of it had been given as security for the satisfaction of a decree obtained by Gobardhan Marwari, the brother of Anant Ram, and in the sale proclamation upon which the property was put up to auction by the Nazir of the Court there is a note to the effect that of the share to be sold three annas is held in security for the satisfaction of Gobardhan's

decree. It is unnecessary to speculate upon whether this change in the identity of the property to be sold was intentional or unintentional. It is sufficient to say that though the property attached was without doubt the share mortgaged to Anant Ram, the property actually put up to sale in the auction room was the six-annas residue not mortgaged to Anant Ram. Even the judgment-debtor himself was under the impression that it was the unencumbered six-annas share that had been sold, as is clear from a petition of the judgment-debtor to be found at page 16 of the paper book. This petition was filed in connection with a petition by the auction-purchasers for confirmation of sale and the issue of a sale-certificate. It was an objection to the confirmation of the sale but was afterwards withdrawn and on its withdrawal the learned Subordinate Judge confirmed the sale made by his Nazir and directed the issue of a certificate of sale of the property not covered by the mortgage to Anant Ram. Against this order for a sale-certificate the judgment debtor appealed to the High Court. The High Court refused to cancel the certificate of sale, holding that it was quite obvious that what was sold was the unencumbered six annas.

On appeal to the Privy Council the Judicial Committee held that only that can be sold which has been attached, and in the body of its judgment humbly advised His Majesty that the appeal should be allowed and that the order of the Subordinate Judge confirming the sale together with the certificate granted thereunder dated 23rd December 1904 should be set aside, and added "this will of course have the effect of setting aside all subsequent proceedings on the part of the auction-purchasers based thereon."

The successful appellants upon receipt of this order in Council applied to the Subordinate Judge for restitution. The auction-purchasers objected to restitution on various grounds. The learned Subordinate Judge refused to accept these objections. He ordered the judgment-debtors to be restored immediately to possession of the property of which possession had been delivered to the auction-purchasers under the sale-certificate. The auction-purchasers appeal and in support of the appeal Sir Rash Behari Ghose urges:

(1) That the respondent before the Privy Council Chatari Ram Marwari was dead

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before the appeal came on for hearing in the Privy Council, and that, therefore, the order cannot affect his share in the property of which possession was delivered to him, which share is half an anna of the sixteen annas.

(2) That the auction-purchasers cannot be asked to vacate the property until the amount deposited by them to complete the sale has been refunded.

(3) That in order to obtain a clear title to the property the auction purchasers paid Rs. 34,000 to Gobardhan Marwari in accordance with the security-bond entered into by the judgment debtor for the satisfaction of the decree obtained by Gobardhan Marwari. That before eviction from the property this sum must be restored to them.

Mr. Pugh, on the other hand, contends that the sale-certificate having been cancelled, the delivery of possession following on the certificate of sale becomes inoperative and that it is incumbent now upon the Court to forthwith restore the judgment-debtors to the property without considering at this stage any question that may afterwards arise between the parties.

Upon a plain reading of the words of section 144, it seems to me that the Courts should not only take care that all parties are restored to the positions which they held before the erroneous order was made but should also make restitution from party to party, as nearly as possible, simultaneous.

It seems to me utterly inequitable that the judgment-debtor in this case, who acquiesced in the idea that the six annas unencumbered share had been put up to sale, should derive benefit from this mistake and should forthwith return to possession of the property without any arrangement whatever for the restoration to the auction-purchaser of the money paid upon the auction-purchase.

Mr. Pugh contends that it is the business of the auction-purchaser to get that money out of the decree-holders as best as he can by subsequent proceedings. I can see no force at all in this argument. The words of the section are clear: "any party entitled to any benefit by way of restitution should be placed in the position which he would have occupied but for the erroneous order made." But for

the erroneous order made the auction-purchasers would have had in October 1903 Rs. 1,12,000 in their pocket, and it is the business of the Court to see that Rs. 1,12,000 is put back into their pocket simultaneously with the restoration of the judgment-debtor to his property.

Mr. Pugh suggests to us an alternative, that a sale certificate should now be given on the six annas share mortgaged to Anant Ram. I can hardly believe that he is serious in making this suggestion. That share has never been sold. The sale proclamation was for the unencumbered share. The notification in the Gazette was for the unencumbered share. Sanction of the Commissioner was taken for the sale of the unencumbered share, and the Nazir actually put up for sale the unencumbered share. Undoubtedly the Judicial Committee intended that the effect of their order should be that the order confirming the sale made by the Nazir should be set aside and this their Lordships have actually said in the body of their judgment. For the reason that the judgment-debtor in his appeal had not asked for this particular relief does not appear in the decree. The only restitution that can be made to the auction-purchaser is restitution of the sum paid by him for property erroneously offered for sale.

It appears that this sum was rateably distributed among thirteen judgment-creditors who held decrees against the judgment-debtor, Raja Thakur Barhma. Until those creditors refund the money the auction-purchaser should not be required to vacate the property. It cannot be contended that this entails any hardship upon the judgment debtor. The money was paid to his creditors in liquidation of his debts and if the similar judgment-creditors are not prepared to restore it to the auction purchaser, it is reasonable that the judgment-debtor should refund it before returning to possession of his property.

We are not in sympathy with the arguments advanced by Sir Rash Behari Ghose in respect of the liquidation of the mortgage lien in satisfaction of the charge held by Gobardhan Marwari upon the property. The payment of cash in satisfac-

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tion of that charge was not made by order of the Court. It was an optional payment made by the auction-purchaser for his own convenience. Seeing, moreover, that Gobardhan Marwari was the uncle of the ostensible auction-purchaser, it is by no means certain that any payment was made and it is more than probable that there was no close scrutiny of the account rendered by Gobardhan Marwari. The appellants cannot be held to be in a stronger position than this, that they having discharged the lien held by Gobardhan Marwari are entitled to hold the property bound by that lien. This appears to be in accordance with the principles laid down in *Gunga Prosad v. Brojo Nath Das* (1) and other cases to the same effect and is in accordance with the terms of the section. The Courts can only re-place the parties in the position which they actually occupied at the time of the order reversed, they cannot consider all the various subsequent positions taken up voluntarily by the parties as the remote consequences of that order.

It may be suggested that this order amounts in effect to a denial of justice to the judgment-debtor and permanent deprivation to him of the property wrongly put up for sale. I see no reason why justice should be denied to the auction-purchaser in preference to the judgment-debtor. The auction-purchaser has done no wrong, he was not concerned in the mistake made either in the proclamation or in the attachment. In good faith he bid for the property which the Nazir of the Court had assured him was up for sale.

The judgment-debtor, on the other hand, is in the wrong, in that he has never made any attempt to satisfy the decree made against him and in that he acquiesced in the mistake made in the sale proceedings. If any one should suffer clearly it is the judgment-debtor. Nor does he suffer any appreciable injury. He is entitled to some twelve years' mesne profits. As far as I can ascertain, the mesne profits will approximately balance the purchase-money with interest from the date of its deposit, with the result

that there will be no real delay in his restoration to the property.

The last point for consideration is whether the judgment-debtor is entitled to restoration of five-and-a-half-annas share of the property or of the whole six annas. There is no proof on the record that Chatri Ram is dead. The learned Subordinate Judge must go into this point. If he is satisfied on the evidence taken that Chatri Ram was dead at the time of the hearing of the appeal by the Judicial Committee, it is clear that the decree made at that hearing cannot affect the interests of his heir. In that event the judgment-debtor will be entitled to restoration to five and a half annas only of the property wrongly given to the auction-purchaser with mesne profits on that share only and the auction-purchaser is entitled to recover only eleven-twelfths of the money paid by him. The orders of the Subordinate Judge should, therefore, be set aside and the papers returned to him with these instructions:— That he do ascertain, *firstly*, whether Chatri Ram died before the hearing of the appeal by the Judicial Committee; (2) that he do ascertain the amount of mesne profits due on the share in respect of which restoration is to be made and (3) that he set off the sum due to the judgment-debtors as mesne profits against the sum due to the auction-purchasers in recovery of their deposit and in the event of the sum due to the judgment-debtors being in excess of the sum due to the auction-purchasers, he do restore possession of the property forthwith to the judgment-debtors and in the event of the sum due to the auction-purchasers being in excess of the sum due to the judgment-debtors he do refuse to restore possession of the property until the deficit due to the auction-purchasers has been made up either by the decree-holders or by the judgment-debtors themselves.

I would make no order as to the costs of this appeal.

JWALA PRASAD, J.—This is an appeal arising out of an application under section 144 of the Code of Civil Procedure. The judgment-debtors were owners of the entire sixteen-annas share of a *Mahal* Tappa Patsanda. Ten annas out of sixteen annas

(1) 12 C. W. N. 642.

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of the share was subject to the mortgage of Anant Ram Marwari and others and is referred to in these proceedings as the ten-annas encumbered share. The remaining six-annas is referred to in these proceedings as the unencumbered six-annas share, although three annas out of it was subject to certain encumbrances created by the security bonds executed by the judgment-debtors in favour of Gobardhan Das Marwari in execution cases Nos. 3 and 4 of 1902. The appellants are auction-purchasers at a sale held on July 27th, 1904, in execution of a money-decree against the judgment-debtors. The property was described in the attachment and the sale proclamation as being six-annas share of Tappa Patsanda under the mortgage of Anant Ram Marwari. On 20th December 1904 the appellants applied to the Subordinate Judge who had held the sale to grant them a sale-certificate in respect of six-annas unencumbered share, i.e., distinct and outside the ten-annas encumbered share which was under the mortgage of Anant Ram and others, alleging that by mistake the property was described in the attachment and the sale proclamation as being under the mortgage of Anant Ram, whereas the property should have been described as being not under the said mortgage. On the same date (20th December 1904) the Subordinate Judge, who had held the sale, granted a sale-certificate to the auction-purchasers in respect of six-annas unencumbered share as desired by the auction-purchasers. The Subordinate Judge held that it was clearly the intention of the Court to sell the six-annas share of Tappa Patsanda which was not covered by Anant Ram's mortgage and it was this six-annas unencumbered share which was sold to the auction-purchasers on 27th July 1904 and that there existed no doubt in the minds of the judgment-debtors or auction-purchasers as to what property was being sold. The auction-purchasers paid into the Court Rs. 1,12,000 for which the property was knocked down. On application by several decree-holders who had obtained decrees against the judgment-debtors, the Court directed a rateable distribution of the purchase-money, which was accordingly distributed and paid under

the orders of the Court. The auction-purchasers paid the encumbrance of Rs. 34,000 over three annas out of the six-annas unencumbered share, covered by the two security bonds which the judgment-debtors had executed in favour of Gobardhan Das and which had been notified at the time of the auction-sale. On 26th December 1904, the auction-purchasers obtained possession of the six annas unencumbered share through Court.

The judgment-debtors appealed to the High Court of Calcutta against the order of the Subordinate Judge of the 20th December 1904, granting the sale-certificate in respect of the six-annas unencumbered share. The High Court, by its judgment dated the 26th June 1906, dismissed the appeal of the judgment-debtors, and confirmed the order of the Subordinate Judge granting the sale-certificate of the six-annas unencumbered share. The judgment-debtors then appealed to His Majesty. Their Lordships of the Judicial Committee, by their judgment dated the 25th November 1913, held that the property described in the attachment and the proclamation was six annas subject to the existing mortgage, whereas the effect of the certificate of sale granted by the order of the Subordinate Judge was to make the sale that of a property not attached, namely, the six-annas unencumbered property, which could not be sold inasmuch as it was not the property attached. Their Lordships, therefore, set aside the order of the Subordinate Judge confirming the sale together with the certificate granted thereunder dated 20th December 1904, and also all subsequent proceedings on the part of the auction-purchasers based thereon. The decision of their Lordships received the sanction of His Majesty on 19th December 1913. Therefore, the judgment-debtors applied to the Subordinate Judge for a restoration of possession to them over the six-annas unencumbered share with mesne profits. The auction-purchasers objected to the restoration of the property to the judgment-debtors on various grounds. The learned Subordinate Judge overruled their objections and directed possession to be delivered to the judgment-debtors forthwith with mesne profits. The auction-

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purchasers have appealed to this Court.

The *first* objection urged by the auction-purchasers-appellants is that they are entitled to retain possession of the property and no restitution can be made to the judgment-debtors, unless and until they refund to the appellants the purchase-money, namely, Rs. 1,12,000 paid by them at the auction-sale. It is contended on behalf of the judgment-debtors that the auction-purchasers are not entitled to a refund of the purchase-money, inasmuch as what was sold on the 27th of July 1904 was the six-annas encumbered share and that the sale thereof was duly confirmed on 18th November 1904 and has not been set aside. It is contended that the only remedy now left to the auction-purchasers is to obtain a sale certificate in respect of the six-annas encumbered share and to content themselves by getting the six-annas encumbered share for what it is worth in lieu of the purchase-money. This contention of the judgment-debtors does not commend itself to me. I do not think that the auction purchasers can get a sale-certificate in respect of the six-annas encumbered share, nor can they obtain possession of it. In the first place, it is clear from the proceedings in connection with the sale that the six-annas encumbered share was not sold at all. The Subordinate Judge who held the sale distinctly says that it was the six-annas unencumbered share which was actually sold to the auction-purchasers on the 26th of July 1904, and that it was the intention of the Court to sell the said share and the parties as well understood that this was the property that was being sold. The Subordinate Judge had no doubt in his mind that he sold the six annas unencumbered share and accordingly granted a sale-certificate to the auction-purchasers in respect of that share. The Court may have been wrong in granting a sale-certificate of the six-annas unencumbered share, because it was not the property prescribed in the attachment and the sale proclamation, but certainly the Court cannot enforce the sale of the six-annas encumbered share which it did neither intend to sell nor actually did sell. The auction-purchasers cannot be compelled to take a sale certificate in respect of

the six-annas encumbered share which they did not intend to purchase.

The only result of the proceedings in connection with the sale is that the six-annas encumbered share was not sold. Even if it be held that the six-annas encumbered share was sold, the circumstances connected with the sale and the ends of justice require that the sale should be set aside and considered to have been set aside by virtue of the inherent power vested in the Courts. Therefore, it is but just and proper that the auction-purchasers should get back their money before they are deprived of the possession of the property delivered to them in execution of a sale-certificate granted to them by the Court.

The judgment-debtors further contend that if the auction-purchasers have a right to a refund of the purchase-money, they must recover it from the decree-holders to whom the money was paid by the Court, and not from the judgment-debtors who did not actually receive the money. This contention also does not appear to have any substance in it. It is not denied that the money paid to the decree-holders was due to them from the judgment-debtors. The decree-holders applied to the Court for a rateable distribution of the purchase-money and the Court directed the rateable distribution of the money. The decree-holders received the money from the Court and under the orders of the Court. The judgment-debtors are bound by the orders of the Court directing the payment. The auction-purchasers paid the money in Court and they have nothing to do with how the money was disposed of. The judgment-debtors have been benefited by the payments, and the payments made to the decree-holders will be considered to have been made to the judgment-debtors. The judgment-debtors are, therefore, liable to pay this money to the auction-purchasers before they can recover possession of the property. I, therefore, disagree with the views of the learned Subordinate Judge that the judgment-debtors are entitled to recover possession of the property forthwith without refunding the purchase-money to the auction-purchasers.

The *second* objection of the auction-purchasers is that they are entitled to retain the property until the judgment-debtors pay to them Rs. 34,000 which they had paid

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to Gobardhan Das Marwari in respect of the security-bonds executed by the judgment-debtors, subject to which the property was sold and which were notified at the time of the auction-sale. The lien of the security-bonds of Gobardhan Das was over three annas out of the six-annas unencumbered share.

The auction-purchasers, by virtue of the payments made by them to Gobardhan Das, have stepped into the shoes of the creditor Gobardhan Das Marwari and have a right to enforce their claim against the judgment-debtors by a suit or other proceedings they may be advised to take. The payment to Gobardhan Das was made long after the auction-purchase and cannot be taken into account in the restitution proceedings, in which only the rights of persons that existed at the time the possession was delivered to the auction purchasers can be looked into and considered. The auction-purchasers, therefore, cannot resist the claim of the judgment-debtors to restitution on the ground that the payment made to Gobardhan Das Marwari should be refunded to them before the property is restored to the judgment-debtors.

The *last* objection urged by the appellants to the restoration of the property to the judgment-debtors is that the order of their Lordships in the Privy Council does not affect the half-anna share of the *mahal*, which is in the possession of his heir Puran Mal, in execution of the sale-certificate granted by the Court. It is alleged that Chatri Ram Marwari and Nib Chand had purchased one-anna share in the property, as specified in the bid-sheet and the sale-certificate, in which Chatri Ram had half share. He was one of the respondents in the appeal preferred by the judgment-debtors to the Privy Council, and is said to have died in 1911 before the hearing of the appeal, but his heir was not substituted and brought on the record and the appeal before the Privy Council was heard and decided in the absence of Puran Mal, his heir, and, therefore, the order of their Lordships in the Privy Council cannot affect the half-anna share in his possession and the judgment-debtors have no right to a restoration of this half-anna share. If Chatri Ram was actually dead before the appeal was heard in the Privy Council and Puran

Mal is his heir and no substitution was made and he was not brought on the record of the Privy Council appeal, it appears to me that the contention of the auction-purchasers must prevail. The learned Subordinate Judge has not enquired into the allegations made by the auction-purchasers and the case should be remanded to him for an enquiry into this matter. If it is found, as a matter of fact, that Chatri Ram Marwari died before the appeal was heard in the Privy Council, the judgment-debtors will not be entitled to a restoration of this half-anna share. I do not agree with the contention of the learned Counsel for the respondents that as their Lordships in the Privy Council have held that there was no sale at all of the entire six-annas unencumbered share, the heir of Chatri Ram Marwari is not entitled to retain possession of the share purchased by Chatri Ram, even if he was dead before the hearing of the appeal in the Privy Council and his heir was not substituted in his place.

The result is that the judgment-debtors are entitled to a restoration of the possession over the property in dispute and to recover mesne profits from the auction-purchasers for the period that they have been kept out of possession of the property. The auction-purchasers are entitled to get the purchase-money from the judgment-debtors and to retain the possession of the property till the judgment-debtor refund to them the purchase-money. The claims of the appellants and the judgment-debtors are, therefore, liable to be set off one against the other. If it is found that the half-anna share in the possession of Puran Mal is not affected by the order of their Lordships in the Privy Council, in that case the judgment-debtors would be entitled to recover only 11/12ths of the property, that is, five half annas out of the six-annas unencumbered share. The judgment-debtors are liable to pay 11-12ths of the purchase-money, namely, Rs. 1, 12,000 i. e., Rs. 1,02,660 10 8 to the auction-purchasers. This will be set off against the mesne profits they are entitled to get from the appellants other than Puran Mal.

The result is that the order of the learned Subordinate Judge is set aside and the case remanded to him to determine the rights of the parties in the light of the above re-

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marks. For the reasons given above I agree with the order proposed by my learned brother to be made in this appeal.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1505
AND 1677 OF 1914.

December 7, 1916.

Present:—Mr. Justice Fletcher and

Mr. Justice Richardson.

IN No. 1505

SURESH CHANDRA ROY CHOW-

DHURY AND OTHERS—DEFENDANTS—

APPELLANTS

versus

SURENDRA CHANDRA ROY CHOW-

DHURY—PLAINTIFF—RESPONDENT.

IN No. 1677

SURENDRA CHANDRA ROY CHOW-

DHURY—PLAINTIFF—

APPELLANT

versus

SURESH CHANDRA ROY CHOW-

DHURY AND OTHERS—DEFENDANTS—

RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 8—Right, reservation of, inference of—Construction of document—Ambiguity.

Where property is transferred on execution of a document, unless there is an ambiguity in the document, an intention to reserve a certain right cannot be necessarily implied under section 8 of the Transfer of Property Act except from the terms of the document itself. If the document, however, is ambiguous, a Court can consider the object of the grantor and other circumstances attending its execution and the acts of the parties since the date of its execution. [p. 871, col. 2.]

Appeals against the decrees of the District Judge, Rajshahye, dated the 14th March 1914, modifying that of the Officiating Subordinate Judge of that District, dated the 30th June 1913.

FACTS appear fully from the judgment.

IN S. A. No. 1677 of 1914

Babu Sarat Chandra Roy Chowdhury (with him Babu Krishna Kamal Maitra, for the Appellant.—The right of way was reserved; although the land was included within the limits of the property given to the respond-

ents, the intention to reserve the right of way over that was evidently reserved and was necessarily implied by the facts and circumstances of the case, and for a conclusion like this the Court is not confined to the terms of the document itself, but must look to the object of the grantor and other circumstances and the acts and conduct of the parties since the execution of the document. The Court of first instance took all this into consideration and came to the conclusion that the right of way was reserved. The Court of Appeal below failed to consider all this and confined itself to the consideration of the terms of the document itself, and thus came to a wrong conclusion and erred in its decision. The matter should go back on remand for a re-hearing of the appeal with a view to come to a finding on the question of intention of parties upon consideration of all the evidence on the record.

Babu D. N. Bagchi, for the Respondent.—Having regard to the provisions of section 8 of the Transfer of Property Act and section 92 of the Evidence Act and the clear terms of the document itself, the conditions of the other side must be taken to have no force in them. Section 8 of the Transfer of Property Act at once lays down a principle and a rule of interpretation—the principle underlying the law of transfer, and the rule of interpretation of the document or conveyance by means of which the transfer is effected. The terms of the document are clear enough, and you cannot read reservations or exceptions into it which are not there, as the learned Judge below has held. There is no express provision for such a reservation in the document, nor is there anything to necessarily imply any such reservation. And now to travel beyond the document itself and to try to infer intention of parties from extraneous evidence would be to transgress the clear provisions of section 8 of the Transfer of Property Act and also those of section 92 of the Evidence Act. Even if an intention like that is to be inferred from other evidence, it cannot be said that the learned Judge below has not considered that evidence—on the contrary, the learned Judge, upon consideration of all the evidence on record, did come to the deliberate conclusion “that there were no reasons for reading into this document exceptions which must have

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been belibegately omitted by the conveying party," a finding of fact which is not to be disturbable in second appeal.

Babu Sarat Chandra Rai Chowdhury replied.

JUDGMENT.

FLETCHER, J.—This is an appeal from the judgment of the learned District Judge of Rajshahye, dated the 14th March 1914, modifying the decision of the learned Subordinate Judge of the same place. The suit was brought by the plaintiff for a declaration of his right to the use of a certain private road and for an order compelling the defendants to remove certain obstructions. The road consisted of two parts; namely, *first*, what is called in these proceedings the main road and *secondly*, the branch road. The present appeal relates wholly to the road which is called the main road. Originally this property, the road, with the adjoining lands belonged to the plaintiff and the defendants jointly. Subsequently, a partition suit was instituted. During the course of those proceedings, the parties arrived at a settlement and it was agreed that certain land should be given to the plaintiff and certain land to the defendants. The main road clearly falls within the limits of the land which was given to the defendants as taken by the boundaries. The question is whether, on the documents that were executed between the parties, the plaintiff has the right of still using that main road which falls within the limits of the property that was given to the defendants. During the partition proceedings, the parties executed material documents in each other's favour—called *ladavi ekrarnamas*. Those documents were duly registered and they operated as mutual conveyances and as transfers of properties within the meaning of the Transfer of Property Act, 1882. It is quite true that subsequently, after those documents had been completed by execution and registration, a petition was presented to the Court and a consent decree was obtained; but the foundation of the title in this case seems to be based, without doubt, on the material conveyances that the parties executed in favour of each other. Now, it is a common factor in this case, as have

already said, that within the limits of the property that was allotted to the defendants by the documents that were executed by the parties the site of this road—the road which is called the main road—fell. The question, therefore, is reduced to this, namely, whether under the terms of section 8 of the Transfer of Property Act the plaintiff reserved to himself the right of using this road which would otherwise pass to the defendants under the terms of the document that he executed in their favour. The learned Judge in the first Court came to the conclusion that, having regard to the other terms of the document and the acts of the parties subsequent to the execution thereof, the plaintiff had reserved to himself the right of using this road. The terms of section 8 of the Transfer of Property Act are as follows:—"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." It has been argued by Mr. Chaudhury, the learned Vakil who appears for the appellant, that, for the purpose of discovering whether a different intention should be necessarily implied the Court is not confined to the terms of the document itself but it must consider the object of the grantor and other circumstances and the acts of the parties since the date of the execution of the document. I am not at present prepared to assent to that view. Of course, if there is an ambiguity in the document those matters might well be considered; but as at present advised, I am not prepared to say that, on the construction of section 8, a different intention which may necessarily be implied under that section can be implied except from the terms of the document itself. However, even if the view that Mr. Chaudhury has put forward is correct, I am unable to see any ground for interfering with the judgment of the lower Appellate Court. I see no necessary implication which should require us to read the conveyance of this property in favour of the defendants in the way that has been suggested. The document is perfectly plain in its terms. The suggested convenience of

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leading the ladies of the plaintiff's family to the temple to perform their worship by this private road instead of proceeding by the public road perhaps may be a matter of importance to the plaintiff and the members of his family, but that there is any necessity for implying such reservation is immediately negatived by the terms of the deed. It may be inconvenient for the females of the plaintiff's house to go to the temple by the other way and that inconvenience of proceeding by the public road may be a matter of moment to Hindu ladies. But Hindu ladies do, at times, have to proceed by public roads. The method of proceeding by a public road may be different in each case, but it is a matter of every day observation that in this country the ladies are properly secluded when they pass by a public road. Those ladies of the plaintiff's household may as well go to the temple and perform their worship there by using this public road. I see no reason why we should imply in the grant to the defendants by the plaintiff of his interest in the land, which would include the site of this main road, a different intention, which it is said, would be a matter of convenience to the ladies of the plaintiff's family, that is, of proceeding along this private road. I think the learned Judge of the lower Appellate Court arrived at a correct conclusion when he held that there were no reasons for reading into this document exceptions which must be taken to have been deliberately omitted by the conveying party, the plaintiff, when he executed the document. I think the decision of the learned Judge of the lower Appellate Court is right. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

IN NO. 1505.

This appeal will stand dismissed. The appellants must pay to the respondent his costs in this appeal.

*Appeals dismissed.*PATNA HIGH COURT.
FULL BENCH.

CIVIL REVISION No. 198 of 1916.

January 24, 1917.

Present:—Sir Edward Chamier, Kt., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Atkinson.

RAGHUNATH SINGH—JUDGMENT-DEBTOR
—PETITIONER
—PETITIONER

versus

HAZARI SAHU AND OTHERS—DECREE-
HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66, s. 115—Civil Procedure Code (Act XIV of 1882), s. 287—Government of India Act, 19 5, (s. 6 & 6 Geo. V, C. 61), s. 107—Execution—Sale proclamation—Value of property to be sold, ascertainment of—Court, duty of—High Court, interference by—Jurisdiction—Administrative act.

Order XXI, rule 66, of the Civil Procedure Code, 1908, differs from section 287 of the Code of 1882, in that it requires a Court to draw up a proclamation of sale, after notice to the decree-holder and the judgment-debtor. [p. 873, col. 1]

The action of a Court in settling the terms of a proclamation under Order XXI, rule 66, is a judicial act. [p. 873, col. 1]

It is the duty of a Court in preparing a proclamation of sale to state as fairly and accurately as possible in the proclamation the value of the property. It is absurd to enter in a proclamation two greatly varying estimates of the value of the property [p. 874, col. 1]

Snadumand Khan v. Phul Kaur, 20 A. 412; 25 I. A. 146 2 Q. W. N. 550; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 621, followed.

Rajah Romessur Prashad Narain Singh v. Rai Sham Krissen, 8 C. W. N. 257; *Kashi Pershad Singh v. Jamuna Pershad Sahu*, 3 C. 922; *Saurendra Mohan Tagore v. Hurruck Chandra*, 12 C. W. N. 542; *Lachman Pershad Singh v. Ganga Pershad Singh*, 6 Ind. Cas. 180 15 C. W. N. 713, referred to.

Obiter dictum—The jurisdiction of a High Court to interfere under section 107 of the Government of India Act, 19 5, extends not only to judicial but also to administrative acts of the lower Courts. [p. 873, col. 2.]

Application for revision of an order of the Subordinate Judge, 1st Court, Gaya, dated the 12th August 1916.

Mr. Sushil Madhub Mullick, for the Petitioner.

Mr. K. P. Jayaswal, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an application for revision of an order of the Subordinate Judge (1st Court) of Gaya. A decree upon a mortgage was obtained against the applicant in execution of which the mortgaged property is to be sold. When the Court was preparing the sale proclamation, the first mortgagee said that the value of the property was

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Rs. 7,500 odd. The mortgagor (present applicant) estimated the value at Rs. 65,000 while a puisne mortgagee estimated it at Rs. 20,000. The applicant put in a petition praying that evidence might be taken regarding the value of the property, and he desired to call witnesses on the subject. On August 12th, 1916, the Subordinate Judge recorded the following order: "Heard Pleadings of both sides. The values of properties given by both sides are agreed to be stated in the sale proclamation. Hence the judgment-debtor's prayer for time is rejected as not necessary. Let the value given by both sides be stated in the sale proclamation." The agreement referred to in this order was an agreement between the first and second mortgagees. The mortgagor (present applicant) who was the judgment-debtor did not agree. In fact as already stated, he wished the Court to ascertain the value. The figures given above are those stated to us by the learned Vakil for the applicant. When we examined the sale proclamation, it appeared that the figures stated, by the learned Vakil were not correct and that the difference between the values given by the different parties was proportionately much greater than in the figures given above. I have not examined the figures further, because they do not affect the view which I take of this case. It is certain that the mortgagor wished the Court to enter a very much larger figure in the sale proclamation than either of the mortgagees was prepared to accept. The questions for decision are whether the Subordinate Judge ought to have ascertained the value himself and *secondly*, if he ought to have done so, whether upon the present application this Court can require him to do so.

It was suggested that the action of the Court in settling the proclamation was administrative and not judicial and that no case had been "decided" within the meaning of section 115 of the Code of Civil Procedure. In my opinion, the action of the Court in settling the terms of a proclamation under Order XXI, rule 66, is a judicial proceeding. I would point out that Order XXI, rule 66, differs from section 287 of the Code of 1882 in that it required the Court to draw up the proclamation after notice to the decree-holder and the judgment-debtor. This in-

dicates, in my opinion, that the action of the Court in settling the proclamation is intended to be judicial. I do not think it necessary to consider the question whether a case has been "decided" within the meaning of section 115 of the Code of Civil Procedure. The jurisdiction of this Court to interfere under section 107 of the Government of India Act is clear, whether the action of the Court below was administrative or judicial. It is conceded that no appeal lies in this case.

If, as I hold, this Court has jurisdiction to entertain the present application it ought, in my opinion, to set aside the order now in question and direct the Subordinate Judge to ascertain the value of the properties to be sold. Order XXI, rule 66, requires the Court to cause a proclamation of the intended sale to be prepared. Such proclamation is to be drawn up after notice to the decree-holder and the judgment-debtor and is to specify as fairly and accurately as possible, *inter alia*, "every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property." In *Rajah Ramessur Prashad Narain Singh v. Rai Sham Krissen* (1), it was held that the judgment-debtor was entitled to have a reasonably correct valuation placed upon the property. In *Kashi Pershad Singh v. Jamuna Pershad Sahu* (2), it was said that the Court was not bound to investigate the value of the property, but in *Saurendra Mohan Tagore v. Hurruk Chand* (3), it was pointed out that the remarks made in *Kashi Pershad Singh v. Jamuna Pershad Sahu* (2) were *obiter dicta*. In *Lachman Pershad Singh v. Ganga Pershad Singh* (4), the Court referred to the case of *Saurendra Mohan Tagore v. Hurruk Chand* (3) and held that the Subordinate Judge was wrong in refusing to consider an application made to him to have the sale proclamation amended by inserting in it the proper value of the property to be sold. The learned Judges were of opinion that the question had been settled by the decision of the Privy Council in *Saadatmand*

(1) 8 C. W. N. 257.

(2) 3 C. 922.

(3) 12 C. W. N. 542.

(4) 6 Ind. Cas. 189; 15 C. W. N. 713.

RAHMAT V. ZABITA.

Khan v. Phul Kuar (5). With that view I entirely agree. Their Lordships of the Privy Council were of opinion that a gross misstatement of the value was something more grave than an ordinary irregularity of procedure and that the value of the property was a very material fact and must be considered one of those things which the Court considers material for the purchaser to know, and they observed that it had been enacted in terms (although express enactment was hardly necessary for such an object) that those things should be stated as fairly and accurately as possible. It seems to me that in view of the decision of their Lordships it is not open to any Court in India to hold that it is not the duty of a Court preparing a proclamation to state as fairly and accurately as possible in the proclamation the value of the property. It was suggested that this view of the law laid a very heavy burden on the Court. In the first place, that would be no reason for not enforcing the law. Next, it has never been suggested that the Court should hold an elaborate enquiry and ascertain the exact value of the property. Lastly, in my experience in another province no practical difficulty has been experienced by the Courts in giving effect to the decision of their Lordships of the Privy Council and I see no reason why any greater difficulty should be experienced in this province. In my opinion it is absurd for a Court to enter in the sale proclamation a statement that the property to be sold is valued by one person at Rs. 7,000 and by another at Rs. 70,000 or as in one case Rs. 1,500 by one person and Rs. 1,00,000 by another. The value must be stated as fairly and accurately as possible. An entry of two figures like Rs. 7,000 and Rs. 70,000 in the proclamation is calculated to cause great confusion in the minds of bidders.

I would allow this application, set aside the order of the Subordinate Judge dated August 12th, 1916, and direct him to prepare a proclamation of sale according to law. No order as to costs.

SHARFUDDIN, J.—I agree.

ATKINSON, J.—I concur in the judgment of this Court delivered by the Chief Justice.

Rule made absolute.

(5) 20 A. 412; 25 I. A. 146; 2 O. W. N. 550; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 399 OF 1914.

January 9, 1917.

Present:—Mr. Justice Scott-Smith and

Mr. Justice Shadi Lal.

RAHMAT AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

ZABITA—PLAINTIFF—RESPONDENT.

Burden of proof—Registration—Consideration, receipt of—Presumption.

Where a vendor admits receipt of consideration in respect of a transfer at the time of registration, the onus is on him to show that he did not in fact receive it, and the presumption arising from his admission is not rebutted by his mere denial of such receipt. [p. 875, col 2.]

Wazir Singh v. Jai Gopal, 17 P. R. 1888, referred to.

Second appeal from the decree of the Divisional Judge, Gujranwala Division, at Lahore, dated the 2nd January 1914, affirming that of the Munsif, 1st class, Pakpattan, dated the 26th August 1912, decreeing the claim.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Dr. Muhammad Iqbal, for the Respondent.

JUDGMENT.—This was an action brought by one Zabita for possession of a plot of land on the strength of a sale-deed executed in his favour on the 17th September 1909 by the appellants Rahmat and Ahmad for Rs. 3,500. The Courts below have concurred in decreeing the claim, and the learned Counsel for the appellants admits that on the plea of fraud set up by his clients there is a finding of fact against them, which cannot be impugned in second appeal. He, however, contends that the learned Divisional Judge has found that the sale was really effected in favour of one Gopi, and that the suit should be dismissed because Gopi was prohibited by the Punjab Alienation of Land Act from buying the property from a member of an agricultural tribe. The pleadings of the parties make it absolutely clear that the plaintiff Zabita alleged a sale in his own favour, and this allegation was met by the assertion made by the defendants that the transaction was one of mortgage in favour of Gopi, and that a fraud was practised upon them by which they were induced to believe that they were attesting a mortgage instead of a sale. It will be observed that it was

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not the case of the defendants that they effected a sale in favour of Gopi; and indeed, Rahmat's statement on the 31st March 1911, referred to by the lower Appellate Court, is to the effect that he had sold his land to Zabita. The observations at the end of the judgment of that Court, to which our attention has been drawn, do not warrant the conclusion that the learned Divisional Judge intended to hold that the sale was really made in favour of Gopi. If that had been his finding, there is not the slightest doubt that he would have dismissed the suit. A perusal of the judgment makes it clear that what the learned Judge meant was that Gopi financed Zabita; that there was some understanding between them with respect to this transaction; and that subsequently they fell out. Neither the plaintiff nor the defendants alleged the sale to be one in favour of Gopi, and consequently there was no issue on the subject. The sale-deed, which is a registered document, is clearly in favour of Zabita, and there is not an iota of evidence to prove that he is not the real vendee. The mere suspicion that there might have been some kind of secret understanding between him and Gopi is no reason for dismissing the suit.

The consideration for the transaction comprised three items; on two of which, *viz.*, Rs. 1,950, paid before the Sub-Registrar, and Rs. 1,000, paid by transfers of the vendor's debt in Gopi's books to the vendee, there are clear findings by the lower Appellate Court which cannot be impugned in second appeal, and in fact no attempt has been made to challenge them.

As regards Rs. 550, said to have been paid to the vendors before the date fixed for the registration of the document, the Munsif gave his decision in favour of the plaintiff, but the learned Divisional Judge on appeal has not recorded a definite finding and has simply remarked that the only proof of the payment is the admission of the vendor at the time of the registration. The learned Counsel for the appellants accordingly contends that we should remand the case to the lower Appellate Court with a direction that it should record a clear finding on the passing of Rs. 550; but considering that the

matter is simple enough, and that section 43 of the Punjab Courts Act fully empowers this Court to decide a question of fact not determined by the lower Appellate Court, we do not think that any useful purpose would be served by further prolonging this litigation, which began five years ago. After hearing the learned Counsel we are not prepared to hold that the presumption [*vide Wazir Singh v. Jai Gopal* (1)] arising in consequence of the admission before the Sub-Registrar has been rebutted by the mere *ipse dixit* of the vendors that they received only Rs. 50. The onus is clearly upon them, and they have failed to discharge it.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 17 P. R. 1888.

MADRAS HIGH COURT.

PAUPER APPEAL No. 32 OF 1914.

November 9, 1916.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Srinivasa Aiyangar.

KUPPUSAMY AIYAR (DEAD) AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

A. L. V. R. P. S. VEERAPPA

CHETTIAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 85, 89—Principal and agent—Accounts, suit on—Consignment for sale on commission—Advances to consignee—Settlement, periodical, of accounts—Action brought after stoppage of dealings—'Open, mutual and current account'—Agency, termination of.

A suit for accounts by the plaintiff, who used to send goods to the defendants for sale on commission, receiving advances therefor from time to time and acknowledging sums due by him at periodical settlements of accounts, after the dealings had stopped, is not a suit on an 'open, mutual and current account' within the meaning of Article 85 to Schedule I of the Limitation Act. [p. 876, col. 2.]

The question when an agency terminates must depend on the facts of each particular case. [p. 876, col. 2.]

Quære:—Whether after all dealings between a principal and agent have been closed, the agency continues till the latter accounts for money alleged to be due to the former. [p. 876, col. 2.]

KUPPUSAMY AIYAR v. VEERAPPA CHETTIAR.

Venkatachalam Chetty v. Narayanan Chetty, 26 Ind. Cas. 740; 28 M. L. J. 140; 39 M. 376, approved.

Babu Ram v. Ram Dayal, 12 A. 541; A. W. N. (1890) 9; 6 Ind. Dec. (N. S.) 1089; *Fink v. Buldeo Dass*, 26 C. 715; 3 C. W. N. 524; 13 Ind. Dec. (N. S.) 1057, disapproved.

The plaintiff agreed to supply agricultural produce to the defendant, who was to sell the same and pay over the proceeds to the plaintiff after deducting advances made to the plaintiff on the articles supplied. The dealings commenced in 1901 and stopped in 1906. There were periodical settlements of accounts, the plaintiff executing a promissory note at each settlement for the balance due. Plaintiff sued in 1912 for accounts between 1901 to 1906 and for recovery of the amount found due to him:

Held, (1) that this was not a case of open, mutual and current account within the meaning of Article 85 of the Limitation Act and the suit was consequently barred: [p. 876, col. 2.]

(2) that even on the basis of an agency the agency terminated in 1906 and the suit was barred under Article 89. [p. 876, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 77 of 1912.

Mr. R. Kuppuswami Aiyar, for the Appellants.

Messrs. T. Narasimha Aiyangar and A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT—This appeal is from a suit instituted *in forma pauperis* by the appellant for the taking of accounts against the defendant, to whom he used to send agricultural produce on the understanding that he was to sell the produce and pay over the sale proceeds to the appellant after deducting whatever moneys the respondent advanced to the appellant. The Subordinate Judge dismissed the suit holding, upon the allegations in the plaint, that it was barred by limitation.

The agency, according to the statement in the plaint, began sometime in 1901 and there were no dealings after 1906. This is made clear from the different paragraphs of the plaint, for instance, paragraphs 5, 9 and 12. The last paragraph, *i. e.*, No. 12 mentions that the cause of action for the suit arose from 1901 to 1906 on the dates on which the appellant executed the promissory notes. The promissory notes referred to therein were notes executed by the appellant for the moneys advanced to him. One of these has been printed and our attention has been drawn to it by the learned Pleader for the appellant. That note goes to show that the previous accounts were settled and

as a result of that, the promissory note in question was executed.

It was first of all contended before us that this was a case of open, mutual and current account, but upon the facts stated in the plaint it is difficult to say that this is so. What happened was the plaintiff used to send his goods to the defendant and to borrow from time to time on the security of those goods and for the balance that became due after taking accounts, he used to execute promissory notes. That would strongly suggest that there was no account left to be settled between the parties after the date when the last promissory note was executed.

Then it was argued that this was a case of agency, and the agency would not terminate until the defendant accounts for the moneys alleged to be due to the plaintiff. In support of this contention our attention has been drawn to two cases, one *Babu Ram v. Ram Dayal* (1) and the other of *Fink v. Buldeo Dass* (2). The learned Chief Justice of this High Court in *Venkatachalam Chetty v. Narayanan Chetty* (3) has dissented from the ruling in *Babu Ram v. Ram Dayal* (1), while Mr. Justice Seshagiri Aiyar had to distinguish it from the case he had to deal with. It is unnecessary in view of the fact that, upon the allegations in the plaint itself to which our attention has been drawn, accounts must have closed sometime in 1906, to express any definite opinion whether the view of law laid down in *Babu Ram v. Ram Dayal* (1) and *Fink v. Buldeo Dass* (2) is correct. The question when an agency terminates must depend on the facts of each particular case, and there can be little doubt that in this case the agency had terminated sometime in 1906. We feel some doubt, however, whether the law laid in *Babu Ram v. Ram Dayal* (1) and *Fink v. Buldeo Dass* (2) is correct. We are inclined, as at present advised, to agree with the learned Chief Justice's view as expressed in *Venkatachalam Chetty v. Narayanan Chetty* (3).

It was further argued that there had been an acknowledgment of liability by

(1) 12 A. 541; A. W. N. (1890) 99; 6 Ind. Dec. (N. S.) 089.

(2) 26 C. 7 5; 3 C. W. N. 524; 13 Ind. Dec. (N. S.) 1057.

(3) 26 Ind. Cas. 740; 28 M. L. J. 140; 39 M. 376.

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the agent of the respondent. But the Subordinate Judge has found that the agent was not shown to have been authorised to make any acknowledgment and we think that this finding is correct. The Subordinate Judge's view of the power-of-attorney, Exhibit C, seems to us right. The appeal is dismissed with costs. The appellant must pay the Court-fee payable to the Government.

Appeal dismissed.

V. R. P.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3380 OF 1914.

December 14, 1916.

Present: Mr. Justice Roe and

Mr. Justice Jwala Prasad.

SEW PRASAD AND OTHERS—DEFENDANTS
—APPELLANTS*versus*

RADHA MOHAN SAHAY AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 32—Account books, entries in, admissibility of.

Entries in an account book are inadmissible in evidence under section 32 of the Evidence Act, if it is not proved that the person who made them is dead. [p. 878, col. 1.]

Semle.—Entries of payments of money made through named persons in an account book kept by a deceased servant in the ordinary course of his business are admissible in evidence to prove the payments under section 32 of the Evidence Act; but persons through whom the payments were made must be called to prove that the payments were in fact made. [p. 878, col. 1.]

Appeal against the decree of the District Judge, Saran, dated the 6th August 1914, confirming that of the Munsif, Siwan, dated the 27th January 1914.

Mr. *Rajendra Pershad*, for the Appellants.Mr. *Harnarain Pershad*, for the Respondents.

JUDGMENT.—The appellants in this case, who are mortgagees, are aggrieved by a decree made by the Court below for the redemption of property which has been in usufructuary mortgage for some sixty years.

The pleas taken in the plaint were that the whole sum due upon the mortgage had been liquidated by the retention, in the

hands of the mortgagees, of sums which the mortgagees had undertaken to pay as an annual quit-rent upon the property. The defendants-appellants pleaded in reply that they had in fact paid the quit-rent regularly and in addition had paid large sums as cesses, with the result that not only had the mortgage not been redeemed but a considerable addition had been made to the sum due upon the mortgage.

The lower Courts held as a fact that certain payments towards quit-rent alleged to have been made had not been made; that certain other payments said to have been made towards cesses had not been made and others had been made, and gave a decree for redemption to the plaintiffs on payment into Court of the amount found to be due to the mortgagees upon the account thus made up.

The mortgagors have accepted this decree. The mortgagees have appealed on four grounds, *firstly*, that inasmuch as two of their number had transferred their interests to a third party, who is not upon the record, the suit as a whole is not maintainable; *secondly*, that the payment of quit-rent might have been proved by entries in daily account books for thirty years and that those produced were admissible in evidence under section 34 of the Evidence Act without corroboration; *thirdly*, that in any case whether section 34 applied or not, it had been proved that the persons who made the entries in the books of accounts were dead and that the statements that these sums had been paid had been made in the account books in the ordinary course of business and were, therefore, admissible in evidence under section 32, and *lastly*, that the defendants should not have been directed to pay any part of the costs of the suit.

With regard to the *first* contention, the defendants have been in possession of the property mortgaged over sixty years and have never during this long period given notice to the mortgagor of the transfer of their interest in the property to a third party. Upon an examination of the facts the lower Court has arrived at the conclusion that the alleged transferees are not, and never have been, in possession of the property. In our opinion the lower Courts have arrived at the correct conclusion on this point.

The *second* and *third* grounds may be

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dealt with together. The question is whether the account books are to be received in evidence. With regard to the "C" and "D" series, they purport to have been written and kept by persons of whose death there is no proof and they are, therefore, inadmissible under section 32. This reduces the accounts to be considered to Exhibits A-1 to A-8. Assuming for the sake of argument that the deceased servant kept his master's accounts in the ordinary course of business, it is necessary to consider the nature of the statements of payments made in these account books. On an examination we find that the entries are of sums of rent paid through named persons. There is no evidence that any of those named are dead. It was clearly the duty of those who produced these account books to call the persons through whose hands these payments are said to have been made, to prove that the payments had in fact been made.

Having regard to the above findings we are of opinion that the defendants-appellants were rightly directed to pay costs.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL FROM ORDER NO. 63
OF 1916.

December 4, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

SHEONANDAN—DEFENDANT—
APPELLANT

versus

KASHI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16, 41, 42—Insolvent's property abandoned by Receiver, transfer of, validity of—Vendee, rights of.

Where a Receiver of the estate of an insolvent abandons a particular item of property as worthless and the insolvent after getting his discharge transfers the same, the transfer is not bad and the vendee is entitled to enforce his rights under the transfer. [p. 879, col. 2.]

First appeal against the order of the District Judge, Benares, dated the 23rd December 1915.

FACTS.—This was a suit for a declaration that the plaintiff was mortgagee of the house in dispute and for possession thereof as mortgagee. Pir Mohammad and Rahman mortgaged the house to one Bipat on 15th February 1907 for Rs. 330. On 30th October 1911, Madaran, one of the defendants, executed a *kirayanamah* in favour of Bipat. In the meantime, on 31st May 1907, one Jaikrishna Das obtained a money-decree against Pir Mohammad and on 13th January 1909 the house was sold subject to Bipat's mortgage and was purchased by Sheonandan appellant. On 12th June 1912, Sheonandan executed a mortgage in favour of Mariam, wife of Madaran. On 1st of October 1910, Bipat was declared insolvent and a Receiver was appointed of his property. The Receiver made a report on 15th February 1913, that the insolvent had no realisable assets and on 24th June 1912, the insolvent got his discharge after notice to all the creditors. He sold the house to Kashi plaintiff on 28th October 1914, and the latter brought the present suit for possession, alleging that Sheonandan never got possession and the proceedings taken by him after his purchase were taken in collusion with the judgment-debtors, Pir Mohammad and others. The first Court dismissed the suit, holding that plaintiff did not derive any title from Bipat as the latter had no interest in the house after discharge and so could not confer any title on plaintiff. The lower Appellate Court remanded the suit for trial on the merits, holding that Bipat became owner and could confer title on plaintiff. The defendant appealed to the High Court.

Pandit Baldeo Ram Dave, for the Appellant.—Bipat having been declared insolvent, all his property vested in the Receiver. Section 16 of the Provincial Insolvency Act provides that in such a case the property will vest either in the Court or, if a Receiver is appointed, in the Receiver. Here a Receiver being appointed, the property vested in him.

There is no order of the Court divesting the Receiver and vesting the property in the insolvent. He could, therefore, have no right in the property and the plaintiff has, therefore, no title to bring the suit.

It is only when conditions contemplated in sections 41 and 42 of the Insolvency Act exist that the insolvent gets back the pro-

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perty. If there is a surplus or if the debtor ought not to have been adjudged insolvent, the insolvent becomes entitled to that property. The Insolvency Act never contemplated that the insolvent could get his property while the creditors were still unpaid.

Under the English Act if the insolvent wrongly gets an order of discharge and he is again adjudged insolvent, the original property would be taken possession of by the Court. I submit the same principle should be followed here.

The insolvent has not been re-conveyed the property and he has no title to it which he can transfer.

He has acted dishonestly and the Court should give no assistance to him.

[PIGGOTT, J.—The only question is that if the Receiver thinks that the insolvent has no realisable property and makes a report to that effect and the Court passes an order of discharge, what is the position of the vendee of any property which the Receiver previously thought to be unrealisable.]

I submit that the vendee shall have no rights. The property will vest in the Receiver.

Mr. Harnandan Prasad, for the Respondent, was not called upon.

JUDGMENT.—The facts of the litigation out of which this appeal arises are complicated; but the appeal before us raises a single and a simple point. One Bipat was declared insolvent on the 1st of October 1910. In his schedule he appears to have recorded among his assets his mortgagee rights under a certain mortgage of the year 1907. The Receiver, however, considered those rights worthless and after making such efforts as he thought proper to realize the insolvent's assets for the benefit of his creditors, the said Receiver reported to the District Judge that there were no other assets of the insolvent which, in his opinion, were capable of realization. Upon this Bipat was discharged by an order of the 24th of June 1913. Since that date, that is to say, on the 20th of October 1914, Bipat has found one Kashi who was willing to pay him Rs. 500 for his rights under the mortgage of 1907. The present suit was by Kashi to enforce the rights, if any, acquired by him under this transfer. The Court of first instance, although

it framed a number of issues, dismissed the suit on the single finding that Bipat after his order of discharge had no rights left under the mortgage in question. The point taken was that Bipat's rights had vested in the Court or the Receiver under section 16 of the Provincial Insolvency Act, III of 1907, and that the order of discharge does not operate so as to revert those rights in Bipat. The learned District Judge in appeal has reversed this finding and has remanded the case to the first Court for trial on the merits. We do not know at present whether the plaintiff Kashi has got value for his money or not, that question depends upon the determination of the issues not hitherto tried. We think the District Judge was right. The Receiver having abandoned this particular item of property as worthless, Bipat became entitled to deal with it after the order of discharge, and if he succeeded in getting any one to pay something for his rights, the circumstance that he was declared insolvent in 1910 and got an order of discharge in 1913 would not in itself make the transfer in favour of Kashi bad. We, accordingly, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1926 OF 1915.

October 26, 1916.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

MAHAMAD MEERAN BIBI AND ANOTHER

—DEFENDANTS NOS. 1 AND 11—

APPELLANTS

versus

Sheik MAHAMAD ROWTHER AND
OTHERS—PLAINTIFFS NOS. 1 TO 3 AND

DEFENDANTS NOS. 2 TO 6—RESPONDENTS.

Civil Procedure Code Act V of 1908, s. 100—Appeal, second—Decision on issue by what law parties governed, whether decision on 'usage having the force of law'—Muhammadan Law—Will—Partition decree—Provision for payment of debts.

A decision on an issue in a suit that the parties are governed by one system of law and not by another, is not a decision on a 'usage having the force of law' within the meaning of section 100 (a)

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Civil Procedure Code, which the High Court can interfere with in second appeal. [p. 880, col. 2.]

The expression 'usage having the force of law' in the section means an usage set up in derogation of the ordinary law, and the decision which can be taken up in second appeal under clause (a) of the section is not only on the existence of the usage but also on its having the force of law. [p. 880, col. 2.]

Kakarla Abbayya v. Raja Venkata Papayya Rao, 29 M. 24; 16 M. L. J. 8, *Kunhambi v. Kalanathar*, 24 Ind. Cas. 523; 27 M. L. J. 154; 16 M. L. T. 17; 38 M. 1052; *Ibrahim Rowther v. Mahomed Ibrahim Rowther*, 30 Ind. Cas. 806; 29 M. L. J. 763; (1915) M. W. N. 864; 39 M. 664; *Mohesh Chunder Dhal v. Satrugan Dhal*, 29 C. 343; 29 I. A. 62; 6 G. W. N. 459; 4 Bom. L. R. 372; 5 Sar. P. C. J. 238, referred to.

Under Muhammadan Law, the estate of a deceased person must be applied to the payment of his debts and funeral expenses before the heirs can make partition of it. [p. 881, col. 1.]

Pathumabi v. Vittil Ummachabi, 26 M. 734, referred to.

Where a Muhammadan has by his Will bequeathed certain properties for payment of *mahar* and dower debts and his heirs have filed a suit for partition, it is open to the Court, at the time of passing the final decree, to ascertain the debts due by the deceased and to provide for their payment out of the estate before partition is actually effected. [p. 881, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Trichinopoly, in Appeal Suits Nos. 520 and 549 of 1914, preferred against that of the Principal District Munsif, Kulitalai, in Original Suit No. 102 of 1912.

Dewan Bahadur Mr. L. A. Govindaraghava Aiyar (with him Mr. N. Rajagopalachariar), for the Appellants.

Mr. C. Padmanabha Aiyangar, for the Respondents.

JUDGMENT.—The parties in this case are Muhammadans, that is, Labbais of Trichinopoly District, and in defence of a suit for partition, defendants set up the plea that they were governed by Hindu Law "in the matter of inheritance to the estate of a deceased person", and issue I was framed on that plea. Both the lower Courts have found that the plea is false and that the parties are governed by Muhammadan Law. In second appeal the learned Vakil for appellants seeks to re-open the question as being a question of law and not merely a question of fact. It is argued that the question at issue is whether the decision of the lower Courts is not against some usage having the force of law within the meaning of section 100 of the Code of Civil Procedure. Reliance is placed on the

decision in *Kakarla Abbayya v. Raja Venkata Papayya Rao* (1), where it was held that an issue as to the existence or non-existence of a usage having the force of law could be decided in second appeal upon the evidence. In that case, however, the usage set up was one in derogation of the ordinary law and the question in issue was not only whether such a usage existed, but also whether it was a usage having the force of law. In the present case there is no question of a usage having the force of law, but the question at issue is whether the parties are governed by Hindu or Muhammadan Law, and no question can arise as to whether these systems of law have the force of law. In *Kunhambi v. Kalanathar* (2) it was held that the question whether Mappillas of North Malabar were governed by Muhammadan or Marumakkattayam Law was a question of fact, and this Court refused in second appeal to consider the question on the evidence. Similarly in *Ibrahim Rowther v. Muhomad Ibrahim Rowther* (3), the Chief Justice evidently held the same view as regards the question whether a Labbai family followed the Hindu Law of inheritance, for he remarks: "Of the later cases, this is the first to come before this Court on first appeal so as to enable the Court to appreciate the evidence for itself," and admittedly one at least of the previous cases had come up in second appeal. The question in *Shaik Ibrahim Rowther v. Muhomad Ibrahim Rowther* (3) was substantially the same as in the present case, and we accordingly think that it is a question of fact, which has been decided by the lower Courts and cannot be re-opened in second appeal. We are confirmed in this opinion by the observation of their Lordships of the Privy Council in *Mohesh Chunder Dhal v. Satrugan Dhal* (4) that the question as to the existence of a custom of lineal primogeniture as the rule of succession in a particular family was a question of fact. We have accordingly disallowed any argument for appellants

(1) 29 M. 24; 16 M. L. J. 8.

(2) 24 Ind. Cas. 528; 27 M. L. J. 156; 16 M. L. T. 17.

(3) 30 Ind. Cas. 806; 29 M. L. J. 763; (1915) M. W. N. 866; 39 M. 684.

(4) 29 C. 343 at p. 352; 29 I. A. 62; 6 G. W. N. 459; 4 Bom. L. R. 372; 5 Sar. P. C. J. 238.

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on the question of whether the parties are governed by Hindu Law, as the validity of the finding of the lower Courts is not impeached on any point of law.

The next point taken is that Exhibit III is not a Will, but a settlement of property which is to take effect *in presenti*, and is, therefore, not invalid under Muhammadan Law. We agree, however, with the lower Courts that on a proper construction of the document which purports to be a Will, it is a Will and there is no evidence as to the vesting of the gifts *in presenti* to show that that construction is wrong.

The property mentioned in the Will is in the possession of the first defendant and the recital in the Will is that the properties are bequeathed in order that the first defendant may discharge certain debts, one due on a hypothecation deed executed in favour of the eleventh defendant, one due to the first defendant on account of unpaid *mahar*, and one on account of dowry which the first defendant had brought with her on marriage. The lower Appellate Court has given the first defendant a charge on the plaint property as regards the *mahar* debt, and it is now contended that she is also entitled to a charge on the property mentioned in the Will for the debt in respect of dowry. It must be observed that the 11th defendant does not raise the same plea in respect of the debt due to him. Defendants Nos. 2 to 6 in their written statement denied the existence of the debt for dowry, but no issue was framed and no evidence has been let in as to the genuineness of the debt, nor did the first defendant in her written statement take the plea that she was at least entitled to a charge in respect of it. We do not, therefore, think that any charge can now be given. We may, however, observe that no final decree for partition has yet been passed, and under Muhammadan Law the estate of a deceased person must be applied to the payment of his debts and funeral expenses before the heirs can make partition of it [*Pothumabai v. Vittil Unmachabi* (5)], and although it has been held by a Full Bench of the Allahabad High Court [*Iafri Begum v. Amir Muhammad Khan* (6)] that on the

(5) 26 M. 7-4.

(6) 7 A 822; A. W. N. (1885) 249; 4 Ind. Dec. (N. S.) 636.

death of an intestate the ownership of his estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of his debts, we think it will be open to the original Court at the time of passing the final decree to ascertain the debts due by the deceased and to provide for their payment out of the estate before partition is actually effected.

In the result this second appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 555
OF 1914.

December 13, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

RAMANI MOHAN ROY—DEFENDANT NO. 1
—APPELLANT

versus

JAGUBANDHU KARMAKAR AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata. Litigating under the same title, meaning of—Decree against person as heir of another wrongly described as dead, whether binding upon him when he becomes such heir.

Defendant No. 1 got a decree for *khas* possession of certain property in a contested suit brought against defendant No. 5 as the son and heir of the plaintiff who was wrongly described as dead. Subsequently the plaintiff, on return home from pilgrimage, instituted a suit against defendant No. 1 and defendant No. 5 for recovering possession of the property on declaration of his title, and got a decree. Defendant No. 1 thereupon preferred an appeal, during the pendency of which the plaintiff having died, defendant No. 5 was substituted in his place as his legal representative:

Held, that the decree obtained by defendant No. 1 against defendant No. 5 in the previous suit was not binding as *res judicata* upon defendant No. 5 in the subsequent litigation as he was not litigating under the same title in the two cases [p. 805, col. 1].

Appeal against the decree of the Sub-Judge, Bakerganj, dated the 13th November 1913, affirming that of the Officiating Additional Munsif, Barisal, dated the 23rd June 1913.

FACTS of the case appear from the judgment.

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Babu Gunada Charan Sen, for the Appellant.—The defendant No. 1, my client, got a decree for *khas* possession against the defendant No. 5, who is now the respondent in this appeal, having been substituted as the legal representative of his deceased father for this very property which is now the subject-matter of this appeal; and that decree is binding upon the defendant No. 5. He cannot in this appeal go behind that decree and say that as the legal representative of his deceased father he is entitled to recover the very property which has been taken away from him by a decree of Court in a contested suit between himself and my client, defendant No. 1. An Appellate Court is entitled to take notice of incidents which took place since the decision of the suit. [Refers to *Ram Ratan Sahu v. Mohant Sahu* (1), *Abdul Rahaman v. Sarafat Ali* (2), *Rai Charan Mandal v. Biswanath Mandal* (3)]. No doubt the plaintiff has obtained a decree for the recovery of possession of this property in a suit against my client to which the defendant No. 5 was added as a party, but he is now dead and is now represented by his son and legal heir, the defendant No. 5. How could defendant No. 5 claim the benefit of the decree obtained by his father in the face of the decree which my client defendant No. 1 has got against defendant No. 5 in respect of the same property? It will lead to needless litigation if the decree obtained by the plaintiff, the deceased father of defendant No. 5, is allowed to stand, for as soon as the defendant No. 5 will attempt to enforce this decree he will be met by the decree which my client has got against him. The judgment in the suit in which my client got his decree for *khas* possession against defendant No. 5 has been filed and is before your Lordships, and it shows that the defendant No. 5 would not be able to get this property as long as that decree stands.

[NEWBOULD, J.—Your argument is that the son is estopped.]

(1) 6 C. L. J. 74 at p. 75; 11 C. W. N. 732.

(2) 31 Ind. Cas. 896; 20 C. W. N. 667; 22 C. L. J. 412.

(3) 26 Ind. Cas. 410; 20 C. L. J. 107.

Babu Brojendra Nath Chatterjee, for the Respondent.—The defendant No. 5 is now appearing as the legal representative of the plaintiff, his deceased father, and as such will not be bound in this suit by any decision which was not in a suit between his father and defendant No. 1, the appellant. A decree may have been obtained by defendant No. 1 against defendant No. 5 but that decree cannot be *res judicata* against the plaintiff, and so it cannot be binding upon his legal representative. The defendant No. 5 in this appeal is litigating in a wholly different character from that in which he litigated in the previous suit between himself and defendant No. 1. The decree in the previous suit could never be enforced against the father of defendant No. 5, who was not a party to that suit, and, therefore, it cannot be binding upon his heir and legal representative, whoever he may be, whether the defendant No. 5 or anybody else. The principle of *res judicata* cannot apply here, as the defendant No. 5 is not claiming here in his own right but in the right of a person who was not a party to the previous suit. We do not know whether the previous decree obtained by defendant No. 1 against defendant No. 5 is still enforceable. The question was not raised or considered in any of the lower Courts, and your Lordships ought not be asked to decide a question raised for the first time in second appeal, a question which involves the consideration of many facts and circumstances which are not before the Court. I do not dispute that sometimes an Appellate Court can take cognizance of events occurring after the decision of the suit. This Court may take cognizance of the fact that plaintiff is dead and is succeeded by his son defendant No. 5, against whom a decree was obtained for this property by defendant No. 1, the appellant. But it cannot go further and hold that that decree would be binding as *res judicata* against the defendant No. 5 in a suit in which he is litigating as the legal representative of his father. No doubt defendant No. 5 is the same physical person in both the suits but in the eye of the law his legal individuality in the present appeal is not the same as that in the previous suit.

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The only question for decision in this appeal is whether the lower Appellate Court rightly decided the appeal or not. The decision of the Court of Appeal below, as it is, is conclusive, and no attempt has been made by the other side to question the legality of that decision. But extraneous matters have been brought in, and your Lordships asked to decide a question like an Original Court.

Babu Gumada Charan Sen replied.

JUDGMENT.—The plaintiff was away from home for a number of years and during his absence his son defendant No. 5 managed his properties.

The plaintiff had a *nimhowla* within a certain *osat taluk* which was sold for arrears of rent. The purchaser served notices under section 167 of the Bengal Tenancy Act upon under-tenants and then sold the *osat taluk* to defendant No. 1. Defendant No. 1 brought a suit for *khas* possession against defendant No. 5 as the son and heir of the plaintiff described as dead and got a decree in a contested suit.

The plaintiff on return from pilgrimage brought the suit giving rise to this appeal for a declaration that he was not bound by the decree against defendant No. 5 and for recovery of possession. Both the Courts below decreed the suit of the plaintiff and defendant No. 1 appeals. It has so happened that pending the appeal the plaintiff died leaving defendant No. 5 as his sole heir and the contest is now between defendant No. 1 as the appellant and defendant No. 5 as the respondent.

It is urged before us that the decree for *khas* possession obtained by defendant No. 1 against defendant No. 5 in the previous suit is absolutely binding between the parties and defendant No. 5 cannot fall back upon the decree obtained by his father. The decision of this point depends upon whether defendant No. 5 litigates under the same title in the two cases. He was sued in the previous case as the heir of the plaintiff which he was not at the time and he comes in now as the heir of the plaintiff which he now is. Defendant No. 5 is not litigating under the same title in the two cases and it cannot be said that the matter is *res*

udicata. We do not see how otherwise the decree can be absolutely binding. As the consideration of the facts subsequent to suit cannot help the appellant, it is not necessary to consider whether they should be considered in this case.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORDER NO. 188 OF 1916.

January 19, 1917.

Present:—Mr. Justice Chapman and
Mr. Justice Roe.

Musammât JAGAT MOHINI DASÍ—
APPELLANT

versus.

Syed MOHAMAD IBRAHIM HUSSAIN
KHAN *alias* MANJHE NAWAB AND

ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Decree—Appeal—Execution—Limitation, commencement of.

Where an appeal is preferred against an entire decree, the limitation to execute it runs from the date of the final decree of the Appellate Court. [p. 884, col. 2; p. 885, col. 1.]

A mortgagee obtained a decree *nisi* on foot of his mortgage on 9th July 1902 against the mortgagor and some other persons interested in the mortgaged property. The mortgagor acquiesced in the decree, but the other defendants appealed against the entire decree and the dispute was finally settled by a decree of the Privy Council dated 17th January 1912. The mortgagee applied on 3rd May 1914 to have a final decree made in his favour, and accordingly the decree was made final on 31st March 1915.

Held, that inasmuch as an appeal was preferred against the entire decree, limitation began to run under Article 182 of the Limitation Act only from the date of the final decree, and the application was, therefore, within time. [p. 884, col. 2.]

Appeal against the order of the Sub-Judge, 2nd Court, Patna, dated the 27th May 1916.

Messrs. *Purendra Narain Saha* and *Naresh Chundra Saha*, for the Appellant.

Messrs. *Fakhruddin* and *Amir Hossain*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This is an appeal against an order overruling an objection made in execution of a mortgage decree. The plaintiff in the mortgage suit was the assignee of the bond. The suit was no

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contested by the mortgagor except in so far as she claimed maintenance. It was contested by the other defendants who were interested in some of the mortgaged properties. These other defendants contested the genuineness and the *bona fides* of the mortgage-bond. The suit was decreed. The decree *nisi* directs that if the amount decreed is not paid within ninety days by the mortgagor, the mortgaged properties which are in possession of the mortgagor shall be brought to sale; that if one-third of the amount decreed is not paid by the defendants second party within the time allowed the properties in their possession shall be sold, and a similar order is made in regard to each of the properties in which the remaining defendants are interested. The mortgagor did not appeal against this order but the other defendants did appeal to the High Court. In their appeal they impugned the genuineness of the mortgage-bond; they also alleged that the plaintiff was not the assignee of it; they also alleged that the mortgage transaction was not *bona fide*, and that no consideration had passed. They raised other questions with which we are not at the present moment concerned connected with priority. The decree of the first Court had been made on the 9th of July 1902; the appeal to the High Court was disposed of by a decree dated the 3rd of March 1905, and the appeal to the Privy Council was decreed on the 17th January 1912, in which certain directions were made for an account of certain matters to be made by the Calcutta High Court. On the 29th of April 1913 the High Court disposed of the matter by an order directing that a certain sum should be refunded out of the Rs. 4,000 deposited in Court and that the property of the defendant-mortgagors should be sold in execution of the decree of the Subordinate Judge. On the 3rd of May 1914 an application was made to the Subordinate Judge to make the decree final. In accordance with this application the decree was made final on the 31st of March 1915.

The *first* objection taken before the learned Subordinate Judge was that the order of the Privy Council not having been transmitted under sub-rule 2 of rule

15, Order XLV of the Schedule to the Code of Civil Procedure, the Court had no jurisdiction to make the decree final in the case. The application for the decree to be made final has not been placed before us, but it appears from the application for execution that it was an application made with reference to the preliminary decree of the Subordinate Judge himself and not an application with reference to the decree of the Privy Council. It is also a fact that the High Court had given a direction that proceedings should be taken by the Subordinate Judge. Whether the order of the Privy Council was actually transmitted to the Subordinate Judge or not by the office, it does not appear. I am of opinion that the first objection was rightly overruled.

The *second* objection is one of limitation. It is said that limitation began to run from the decree of the learned Subordinate Judge dated the 9th July 1902 and that, therefore, the application for a decree final was barred in 1915, the period of limitation under the present Limitation Act of 1908 being three years. The decision on this point depends upon the terms of Article 182 of the Schedule to the Limitation Act. That Article provides a period of three years from the date of the decree, or order, or where there has been an appeal, from the date of the final decree or order of the Appellate Court. The question I have to determine is whether there was an appeal in this case against the decree. The argument is that the particular portion of the decree with which I am concerned in the present case was the decree against the judgment debtor, the mortgagor; that there had been no appeal against that decree so far as the mortgagor was concerned and that, therefore, the period of limitation began to run from the date of the decree, and not from the date of the final decree in appeal. It is true that the mortgagor did not appeal against the decree, but the terms of the Article are general and the question to be decided is whether there was an appeal against the decree against the mortgagor. The memorandum of appeal, as I have said, makes it clear that there was an appeal against the entire decree and not only against that portion of the decree which

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affected the judgment-debtors other than the mortgagor. The other judgment-debtors in the appeal to the High Court impugned the genuineness of the mortgage, the *bona fides* of the mortgage and the allegation of the plaintiff that he had purchased it. This was an appeal not merely against that portion of the decree affecting them but an appeal also against the decree as it stood against the mortgagor. It has been contended that that portion of the appeal was not pressed in the High Court. We are not concerned whether it was pressed or not. We have no doubt that there was an appeal against the entire decree; that being so, limitation does not begin to run until the date of the final decree, and the application in execution was not, therefore, barred.

The appeal is dismissed with costs.

ROE, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS FROM ORDERS NOS. 131
& 132 OF 1916.

December 19, 1916.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

Musammât KHATUN BEGAM—

OPPOSITE PARTY—APPELLANT
versus

EJAZ AHMAD AND ANOTHER—APPLICANTS—
RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), ss. 27, 32—
Minor—Guardian, appointment of—Trust—Mutawalli,
minor entitled to be appointed—Court, power of.*

A guardian of the property of a minor interested in a trust can be appointed in respect of his interest under the trust, in order that the interest may be protected and the benefits thereof secured for the minor. [p. 886, col. 2.]

Where under the terms of a trust deed the *mutawalli*-ship devolves upon a minor in respect of whom a guardianship application is made, the District Judge is entitled to pass orders for the performance of the duties of the *mutawalli* pending either the coming of age of the minor or the institution of a regular suit by some person or persons interested in the endowment to contest the arrangement made by him. [p. 887, col. 1.]

First appeals from orders of the District Judge, Badaun, dated the 23th March 1916.

Mr. *Abdul Raouf*, for the Appellant.

Mr. S. M. Y. *Hasan*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—These are two connected appeals from orders passed by the District Judge of Badaun in connection with certain proceedings under the Guardians and Wards Act. By the first of these orders one Ejaz Ahmad was appointed the guardian of the property of three minors, two boys and a girl, children of his own brother, Huzur Ahmad. In so far as the petition of appeal before us is not connected with the other order presently to be considered, it amounts in effect to nothing more than this, that Ejaz Ahmad was not a suitable person to hold the guardianship of the property of these minors. If the record be examined from this point of view, it seems fairly clear from the evidence that no more suitable person for the guardianship of the property of the minors could have been found than Ejaz Ahmad. The appeal is complicated by being connected with the other appeal now before us, which is against a farther order passed by the District Judge, under the following circumstances. In Ejaz Ahmad's application to be appointed guardian of the property of these minors there was a specification of certain immoveable property as the property of these minors. This consisted principally of undivided shares in a number of villages. It came out in the course of the enquiry that the whole of this property was *wakf* property under the Muhammadan Law, that is to say, it had been made the subject-matter of a *wakf* or endowment of a semi-public and semi-private character of the kind legalised, if not previously lawful, by a recent Act of the Legislature on the subject of Muhammadan endowments. Under the terms of this trust one-third of the income of the property was to be distributed for the benefit of the poor, and the remaining two-thirds were to be applied for the maintenance and support of Huzur Ahmad and his children after him. Huzur Ahmad was appointed the first *mutawalli* or trustee of the endowment. There was a provision that after his death he would be succeeded in the trusteeship

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by one or other of his sons, and a further provision was made passing the succession to the brothers of Huzur Ahmad, in the event of the sons not being found suitable for appointment. The District Judge relied upon the authority of Mr. Ameer Ali's book on the Muhammadan Law (*vide* Volume I, page 445), and has held that the office of *mutawalli* in this case must have devolved on one or other of the minor boys in respect of whom the guardianship application was made. Consequently according to Mr. Ameer Ali, the *mutawalli*-ship itself was in abeyance, but it was the duty of the Civil Court, as representing the authority of the State, formerly administered by the *Kazi*, to appoint some person to perform the duties of the office until the minors come of age. Purporting to act under this authority, the District Judge has appointed Ejaz Ahmad, as he puts it, "to be the *mutawalli* of the *wakf* property during the minority of the sons of Huzur Ahmad." He has in effect done what Mr. Ameer Ali lays down as the duty of the Court in such a case.

Now it is contended before us, in respect of both the orders passed by the District Judge, that there can be no guardian appointed of the property of a minor in such a manner as to give the guardian any control over the *wakf* property. The first point taken is that the *wakf* property does not belong to the minors, but to the Almighty, and that there can only be a trustee or *mutawalli* to hold charge of the property, so that the question of appointment of such trustee lies wholly outside the scope of the Guardians and Wards Act. So far as this point goes, the contention seems open to an obvious answer. It may be that the case of a Muhammadan endowment, constituted in accordance with the authority recognised by the new Statute of the Legislature, will bring before the notice of the Courts a number of delicate points for legal determination. This much, however, is clear that endowments such as are now in question, are partly private trusts and partly religious or charitable endowments. Now the minors are persons interested in this trust. They are the principal persons for whose benefit the trust now exists. The immoveable property

itself, the subject-matter of the trust, does not belong to the minors, but the property of the minors consists of their interest in the said trust, that is to say, the benefits which they are entitled to receive under the same. There seems no reason whatever for holding that a guardian of the property of the minors cannot be appointed in respect of their interests under the trust, in order that these interests may be protected and the benefits thereof secured for the minors. The further point raised is a somewhat more difficult one. It is contended that, whatever might be the authority of the District Judge of Budaun in the matter of dealing with this endowment, that authority was not called into requisition by the proceeding under the Guardians and Wards Act which was pending before him. The contention is that there should have been a regular suit, either under the provisions of section 92 of the Code of Civil Procedure or under those of Order I, rule 8, clause (c) of the same Code, or under the Religious Endowments Act, XX of 1863. I do not think that for the purpose of disposing of the appeal now before us it is necessary to lay down principles of law generally applicable to the question of Muhammadan endowments, or to the particular species of Muhammadan endowments with which we are now concerned. The position taken up by the District Judge is that the interests of the minors in this trust require to be protected, and that it is necessary to put the guardian of their property in a position to do this. It has been shown to us that the person actually managing the property is the *lambardar* of the various *mahals* in which the undivided shares forming the trust property are situated. Indeed a point was made before us on behalf of the appellant, to the effect that the Revenue Court has refused to appoint Ejaz Ahmad *lambardar* of these *mahals*. There does not seem to be anything favourable to the appellant in this circumstance. The duty of the guardian of the property of these minors, or of the manager of this endowment, will be to see that the *lambardar* does not appropriate to himself the profits of these shares, but that he duly accounts for, and

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pays them over to some responsible person, in order that they may be applied for the purposes of the trust. Now, according to the principle laid down by Mr. Ameer Ali, the *mutawalli*-ship of this trust is at present in abeyance, but according to the terms of the trust deed, it should eventually devolve on one of the minors in respect of whom the guardianship application is made. Under these peculiar circumstances, it seems to me that the District Judge was so far seized of the question that he was entitled to pass orders for the performance of the duties of the *mutawalli*, pending either the coming of age of the minors, or the institution of a regular suit by some person or persons interested in the endowment to contest the arrangement made by him. In this view of the matter, the orders by the District Judge in this case seem to me appropriate and within his jurisdiction. He had before him all the parties directly interested in the administration of the trust, in so far as that trust is of a private and not of a public character. They had an opportunity of laying their case before him, and for the purpose of the proceedings in issue I think the order passed was within the competence of the Court. I would, therefore, dismiss both the appeals with costs, including fees on the higher scale.

WALSH, J.—I agree. The substantial result is clearly in the interests of the *cestui que trust* and of the minors, for they are both. Indeed it is not seriously disputed on that ground. Properly regarded the application and the order made upon it was merely one under the Guardians and Wards Act, and it is a mere accident that to complete the order of the Court and to make it really workable in the interests of the minors it was necessary to make the appointment of a *mutawalli*. The able argument addressed to us by Mr. Abdul Raoof raises a serious question of really considerable weight. Mr. Abdul Raoof is asking us to do just what the lower Court could not do, namely, to interfere by direct action with the management and charge of this trust. It seems to me that if his client wanted to raise this question it was his business to do so by an ordinary suit, under the Code of Civil Pro-

cedure or under the provisions of Act XX of 1863. Then, of course, the validity of this order *qua* the appointment of a *mutawalli* might be called in question and it might be that the Court would come to a conclusion that some other person ought to be appointed as such *mutawalli*. In that case the present appointment of *mutawalli* will lapse, and the guardian's duty will be to see that the *mutawalli* newly appointed carries out his duty so far as the trust in favour of the minors is concerned. But if Mr. Raoof's argument prevailed in the Court below, the Court would have been left in this unsatisfactory position that having appointed a guardian for the minor's interests, the guardian would have no power to protect the interests of those minors; that was clearly a matter which a Court charged with duties under the Guardians and Wards Act ought to provide for. I think the order of the Court below is perfectly right.

By THE COURT.—First Appeals from Orders Nos. 131 and 132 of 1916 are dismissed with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 442
OF 1914.

July 14, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Sheepshanks.

ASNA BIBI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

JAIGUNNISSA BIBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, rr. 60 to 63—Claim petition, order on—Res judicata—Wakf, validity of, when provisions not carried out by wakif's heirs.

An order in a claim case deciding the question of the validity of a *wakf* is not conclusive as *res judicata* in a suit between the same parties in which the property in dispute is not that which was the subject of the claim case though both were included in the *wakf*. [p. 888, col. 2.]

An order in a claim case is conclusive as between the parties only as regards the particular property in dispute. [p. 888, col. 2.]

Surnamoyi Dasi v. Ashutosh Goswami, 27 C. 714; 14 Ind. Dec. (N. S.) 469; *Koyyana Chittamma v. Doosy Gavaramma*, 29 M. 225; 16 M. L. J. 136 and *Ramu*

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Aiyar v. Palaniappa Chetty, 8 Ind. Cas. 117; 35 M. 35; 8 M. L. T. 381; (1910) M. W. N. 589; 21 M. L. J. 756, distinguished.

Radha Prasad Singh v. Lal Sahib Rai, 13 A. 13; 17 L. A. 150; 5 Sar. P. C. J. 10; 7 Ind. Dec. (N. S.) 33 and *Dinkar Ballal Chakradev v. Hari Shridhar Apte*, 14 B. 206; 7 Ind. Dec. (N. S.) 595, followed.

The validity of a *wakf* is not in any way affected by the fact that since the death of the *wakif* his heirs have not carried out the provisions of the *wakfnama* but have treated the property dedicated as their own. [p. 829, col. 1.]

Appeal against the decree of the Subordinate Judge, Jalpaiguri, dated the 5th June 1914.

Mr. A. Rasul (with him Babu Jyotish Chandra Sircar), for the Appellants.

Babus Jitendra Nath Roy and Nakuleshwar Mukherjee, for the Respondents

JUDGMENT.—In the suit out of which this appeal arises plaintiff sued as the residuary heir of one Shane Ali to recover his share of certain property left by Shane Ali. He has been found to be the residuary heir of Shane Ali, and this finding has not been challenged on appeal.

The learned Subordinate Judge has dismissed his suit holding that the property claimed is *wakf* property, and against this decision plaintiff appeals.

His main ground of appeal is that the question of the validity of the *wakf* is *res judicata*, the alleged *wakf* having been decided in a claim case brought in the course of previous execution proceedings not to have been a *bona fide* document, but to have been put forward for the purpose of defeating the claims of creditors. The property which was the subject of the claim case is not the property which is now in suit. It is argued in support of the appeal that, all the parties to the present suit having been made parties to the claim case, and the order in the claim case not having been challenged by a suit under Order 21, rule 63, that order is conclusive and operates as *res judicata* in respect not only of the property to which it related but of all the property included in the *wakf*. It is admitted on behalf of appellant that there is no authority which directly supports this argument. Reference, however, is made to *Sinnamayi Dasi v. Ashutosh Goswami* (1), *Koyana Chittamma v.*

Doosy Gavaramma (2) and *Ramu Aiyar v. Palaniappa Chetty* (3). None of these cases lends any support to appellant's contention. The first of them decides that an order in a claim case is conclusive against persons whose title is derived from the claimant, whether their position is that of plaintiffs or defendants. The second merely decides the effect of payment of the decretal amount when made more than a year after the order rejecting the claim. The third decides that persons claiming through the parties in a claim case do not cease to be bound by the order if they subsequently acquire other rights. There is nothing in any of these decisions which is of any assistance to appellant. In the present case the appeal must fail, for the reason that apart from any other considerations, an order in a claim case is conclusive only as regards the particular property in dispute: *Radha Prasad Singh v. Lal Sahib Rai* (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5). In this case it is clear that the order in the claim case on the question of the validity of the *wakf* is not conclusive, the property in dispute not being that which was the subject of the claim case, and this ground of appeal fails.

It is next argued on behalf of appellant that the alleged *wakf* was in fact invalid and fraudulent, and was never acted upon. The evidence given by plaintiff's own witnesses is, as the learned Subordinate Judge points out, fatal to this contention. That evidence shows that effect was given in Shane Ali's lifetime to the provisions of the *wakf*, and that the property was in fact treated as dedicated property. There is nothing to show that the transaction was a fraudulent one. The property covered by the *wakf* comprised only a question of Shane Ali's property and there is nothing to show that, as is suggested on behalf of appellant, he was encumbered by debts and wished to defraud his creditors by means of a colourable *wakf*. This being so, the fact that defendants, since the

(2) 9 M. 225; 16 M. L. J. 136.

(3) 8 Ind. Cas. 117; 35 M. 3; 8 M. L. T. 381; 21 M. L. J. 756; (1910) M. W. N. 58.

(4) 3 A. 53; 17 L. A. 150, 5 Sar. P. C. J. 60; 7 Ind. Dec. (N. S.) 33.

(5) 14 B. 206; 7 Ind. Dec. (N. S.) 595.

(1) 27 C. 714; 14 Ind. Dec. (N. S.) 469.

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death of Shane Ali, have not carried out the provisions of the *wakfnama*, but have treated the property as their own, does not in any way affect the validity of the *wakf*. The *wakf* was created by a living man, and is, therefore, irrevocable.

This ground of appeal, therefore, also fails. The result is that the appeal is dismissed. Having regard to the circumstances of the case we make no order as to costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 118 OF 1916.

September 6, 1916.

Present:—Mr. Justice Spencer and

Mr. Justice Phillips.

IMAM BEE AND OTHERS—DEFENDANTS NOS. 2
TO 5—APPELLANTS

versus

MOLLA KHASIM SAHIB AND OTHERS—

PLAINTIFFS NOS. 1 TO 4—RESPONDENTS.

Muhammadan Law—Mujawar, eligibility of women for office of—Right to emoluments—Burden of proof—Custom.

Under Muhammadan Law, a woman can hold a religious office unless there are duties of a religious nature which she cannot perform in person or by deputy. [p. 89C, col. 1.]

Shahco Banoo v. Aga Mahomed Jaffer Bindaneem, 34 C. 117; 7 M. L. J. 52; 4 A. L. J. 30; 9 Bom. L. R. 85; 5 C. L. J. 134; 1 C. W. N. 297; 2 M. L. T. 49; 4 L. B. R. 66; 34 I. A. 46 (P. C.), followed.

Mujawar Ibrahimbi v. Mujawar Hussain Sheriff, 3 M. 95; 5 Ind. Jur. 190; 1 Ind. Dec. (N. S.) 63; *Hussain Beebee v. Hussain Sheriff*, 4 M. H. C. R. 23, explained.

The onus is on those who seek to exclude women, of proving that they are disqualified [p. 889, col. 2.] *Tangirala Chiranjivi v. Raja Manikya Rao*, 25 Ind. Cas. 283; 27 M. L. J. 179, followed.

Where the duties of an office are not very distinctly defined, the safest course to follow is to be guided by the custom of the institution. [p. 890, col. 1.]

The rights of women to hold the office of *mujawar* should be upheld where there is a usage in the institution of getting the duties performed by proxy or deputy, and, in such a case, there is no legal obstacle to their sharing in the endowments of the office and getting their duties performed by proxy. [p. 890, col. 2.]

Second appeal against the decree of the District Court, Kurnool, in Appeal Suit No. 27 of 1914, preferred against that of the District Munsif, Kurnool, in Original Suit No. 657 of 1913.

Mr. A. Krishnaswami Aiyar, for the Appellants.

Mr. S. Doraisami Aiyar, for the Respondents.

JUDGMENT.—The District Munsif held that women were entitled to share in the profits of the *nam* lands attached to the office of *mujawar* of the suit mosque, as the evidence adduced in the case did not prove that women were prohibited from getting the duties of the office performed by deputies. The District Judge considered that the duties to be performed by the *mu awar* were of such a religious and spiritual character that the office could not be held by a woman, and, therefore, that women and persons deriving their title from them could not have any rights to the lands. Both Courts rightly placed the onus on those who sought to exclude women, of proving that they were disqualified [*vide Tangirala Chiranjivi v. Raja Manikya Rao* (1)]; and both found that a custom whereby women were excluded in this institution had not been proved.

On the facts, therefore, the finding is in the appellants' favour. On the question of law whether women should be excluded from the succession, a number of decisions have been cited on either side. Without enumerating them, it may be briefly stated that there is a considerable volume of judicial decisions to the effect that the duties of *saiyadnasheen*, or as it is sometimes called *godd enasheen*, the superior of an endowment and religious preceptor, cannot be discharged by a woman or by a deputy, as the trust involves certain special spiritual duties. On the other hand, it has frequently been held that a woman can be a *mutawalli*, or trustee, who has charge of the secular affairs of an endowment and sometimes has religious duties as well, and that there is no legal prohibition against a woman holding a *mutawalli*-ship where there is nothing to the contrary in the rules made by the founder or in the usage governing the particular institution.

As stated in the note at the foot of page 343 of Macnaghten's Principles and Precedents, "the office of trustee may be held by a woman, and the duties may be discharged by proxy, whereas the office of superior

(1) 25 Ind. Cas. 283; 27 M. L. J. 179.

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requires personal qualification: *Vide* App. Tit. End. 28, 31".

Now when we come to the office of *mujawar* we find two Madras decisions, *Hussain Beebee v. Hussain Sherif* (2) and *Mujavar Ibrambibi v. Mujavar Hussain Sherif* (3). In both of these decisions it was held in respect of the same endowment that a woman was not competent to perform the duties of *mujawar*. In accordance with these decisions, it is stated by Mr. Ganapathi Aiyar in his book on Hindu and Muhammadan Religious Endowments that the office of *mujawar* is a subordinate office, which entails on the holders the performance of religious duties and cannot, therefore, be held by a female.

If these two cases can be said to lay down the proposition enunciated by Mr. Ganapathi Aiyar, it seems to us that they go too far, as being opposed to the dictum of the Privy Council in *Shahoo Banoo v. Aga Mahomed Jaffer Bindaneem* (4) which lays down that an office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy; but we do not think that they do lay down any such broad proposition.

When the case of *Mujavar Ibrambibi v. Mujavar Hussain Sherif* (3) is closely examined, it is seen that that was a first appeal and the learned Judges found on the evidence that it had not been proved that the plaintiff, who was a woman, had ever participated in the profits or performed the duties either in person or by proxy and that there was no evidence that the office of *mujawar* in this particular institution had ever been held by a woman. Reliance was also placed by the Judges on the previous decision to the same effect in *Hussain Beebee v. Hussain Sherif* (2). The earlier decision proceeded upon a comparison of the office of *mujawar* with that of *gaddinasheen* and upon the admission of Mr. Mayne, who appeared for the appellants, that he was unable to find any authority in Muhammadan Law for saying that a woman was competent to hold any religious office in connection with a mosque.

But in the case before us we have evidence, which both the lower Courts have accepted, that there is a usage in this institution of getting the duties of *mujawar* done by proxy, and in one instance a woman has enjoyed a share in the profits and has had the duties performed by a man who lived in her house. Even the 1st plaintiff now deposes somebody to read for him, as he cannot himself read.

From the description of the duties of the office, which include lighting and cleaning the mosque, spreading mats and feeding travellers, they appear to be more on a level with the secular duties of *mutawalli* than with the religious duties of *sajjadanashen*. It is true that the witnesses speak of certain members of their family also preaching and calling to prayers, but this they may have done because they were *imams* or *muazzins* and not by reason of their holding the office of *mujawar*. In fact, plaintiff's witness No. 3 says that his father acted as *imam* on behalf of Ismail Sahib and read the *khutba* and the *fatiha* during his period of delegation.

Where the duties of the office are not very distinctly defined, the safest course to follow is to be guided by the custom of the institution. This being in the present case in favour of deputies being appointed, we see no obstacle to women sharing in the endowments of this office and getting their duties performed by proxy.

Accordingly, allowing the appeal, we set aside the decree of the District Judge and restore that of the District Munsif with costs of the appellants in this and the lower Appellate Court.

Appeal allowed

V.R.P.

(2) 4 M. H. C. R. 23.

(3) 3 M. 95; 5 Ind. Jur. 190; 1 Ind. Dec. (N. S.) 623.

(4) 34 C. 118; 17 M. L. J. 52; 4 A. L. J. 20; 9 Bom. L. R. 85; 5 C. L. J. 134; 11 C. W. N. 297; 2 M. L. T. 49; 4 L. B. R. 66; 34 L. A. 46 (P. C.).

PANCHANAN MAHTO v. KUNAI MAHTO.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 69 OF 1916.

January 11, 1917.

Present:—Sir Edward Charnier, Kt.,
Chief Justice, and Mr. Justice Sharfuddin.

PANCHANAN MAHTO—

APPELLANT

versus

KUNAI MAHTO AND OTHERS—

RESPONDENTS.

Chota Nagpur Tenancy Act (VI B. C. of 1905), ss. 212, 215—Sale in execution of decree—Right to deposit purchase-money—'Claims', meaning of—Jurisdiction of Court to determine whether person depositing money is interested in the holding sold—Appeal, whether lies—Jurisdiction.

A person cannot get a sale set aside under section 212 of the Chota Nagpur Tenancy Act merely upon his putting before the Court a series of statements which may be totally untrue. The Court is bound to enquire into the truth of the allegations made in the application. [p. 892, col. 1.]

The word "claims" used in section 212 of the Chota Nagpur Tenancy Act is used in the sense of asserting that a thing is one's own or affirming one's possession of a thing. [p. 892, col. 1.]

In execution of a decree for rent a tenure was sold. A person claiming to hold *dar-mokarari* interest in the tenure claimed to be entitled to deposit in the Court the sum indicated by section 212 of the Chota Nagpur Tenancy Act to get the sale set aside. The first Court rejected the application but on appeal the Judicial Commissioner held that he was entitled to deposit the sum in Court:

Held, that an appeal lay to the Judicial Commissioner from the order of the first Court. [p. 891, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Mullick, dated the 10th August 1916, reported as 36 Ind. Cas. 829, affirming the order of the District Judge, Manbhum-Sambalpur, dated the 22nd April 1915, reversing that of the Deputy Collector, Purnia, dated the 4th September 1914.

Mr. Naresh Chunder Sinha, for the Appellants.

Mr. Rajendra Prasad, for the Respondents.

JUDGMENT.

CHARNIER, C. J.—In execution of a decree for rent a tenure was sold to the appellant. Thereupon the respondents came forward and alleging that they held a *dar-mokarari* interest in the tenure under a certain person for whom, according to them, the judgment-debtors were *benamidars*, claimed to be entitled to deposit in Court the sums indicated by section 212 of the Chota Nagpur Tenancy Act. The first Court rejected their application, but on appeal the Judicial

Commissioner held that they were entitled to pay the money into Court and the Judicial Commissioner's decision was affirmed by a Judge of this Court sitting alone.

The first question argued before us was whether there was a right of appeal to the Judicial Commissioner. In my opinion there can be no doubt that there was a right of appeal, inasmuch as the order challenged by the appeal was plainly an order passed after a decree and relating to the execution thereof within the meaning of section 215 of the Chota Nagpur Tenancy Act.

The second question argued before us was whether the respondents were entitled to make an application under section 212 of the Act. That section provides that

"When any immoveable property has been sold under this Chapter in execution of a decree, any person who owned such property immediately before the sale, or who claims an interest therein under a title lawfully acquired before the sale, may, at any time within a period of thirty days from the date of the sale, apply to have the sale set aside on his depositing in the Court of the Deputy Commissioner

(a) for payment to the purchaser—a sum equal to five *per centum* of the purchase-money, and

(b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation and sale, have been received by the decree-holder:

Provided that if a person applies under section 213 to set aside the sale of his immoveable property, he shall not be entitled to make an application under this section.

(2) If the said deposits are made within the said period, the Court shall pass an order setting aside the sale, and the provisions of section 315 of the Code of Civil Procedure shall apply in the case of a sale so set aside."

The contention put forward on behalf of the respondents, which has been accepted by two of the Courts below, is that the respondents were entitled to make an application under this section even though

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they may have no interest whatever in the property under a title lawfully acquired before the sale. It is not contended that they owned the property before the sale. It is contended that the word "claims" is sufficiently satisfied by an assertion in the application that the applicant is entitled to this or that interest under a title lawfully acquired before the sale, that the auction-purchaser has no right to challenge the correctness of the allegations made in the application, that the Court has no business to enquire into the truth of those allegations, and that all that the Court has to do is to see that the person making the application has alleged that he has an interest in the property under a title lawfully acquired before the sale. If this is the true construction, the section puts a high premium on false allegations and I cannot think that it can have been the intention of the Legislature to allow a person to have a sale set aside under section 212 merely upon his putting before the Court a series of statements which may be totally untrue. Attention was drawn to the fact that in a similar provision in the Code of Civil Procedure, namely, Order XXI, rule 89, the words employed are "holding an interest therein" by virtue of a title acquired before such sale, and that in a somewhat similar provision in the Bengal Tenancy Act (section 171) the words used are "having an interest which would be voidable on the sale." I am not prepared to admit that the difference in the language employed in these three provisions indicates any difference in intention on the part of the Legislature. The word "claim" is commonly used both in the sense of demanding delivery of a thing rightly or wrongly and in the sense of asserting that a thing is one's own or affirming one's possession of a thing. In my opinion there can be no doubt that the word "claims" used in section 212 of the Chota Nagpur Tenancy Act is used in the sense of asserting that a thing is one's own. It seems to me that there can be no doubt that the Court to which an application is made under section 212 is bound to enquire into the truth of the allegations made in the application. In the present case no enquiry was held whatever. In my opinion the construction which has been

placed upon the section by two of the Courts below is erroneous and the case should be sent back to the Court of first instance, in order that an enquiry may be held into the allegations made by the respondents. I would allow this appeal and order accordingly. Costs throughout should be costs in the cause.

SHARFUDDIN, J.—I agree.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 931 OF 1915.

November 15, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.

SUBBA NAICK — PLAINTIFF —

PETITIONER

versus

RAMA AIYAR AND ANOTHER — DEFENDANTS

—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 7, 34—Guardian, conditional appointment of, when takes effect—Interim acts of natural guardian, validity of.

Where a guardian is appointed under the Guardians and Wards Act unconditionally the order takes effect at once, although under section 34 of the Guardians and Wards Act he may be required to furnish security subsequently; but where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished. [p. 894, col. 2.]

Goppammal v. Srinivasa Aiyangar, 34 Ind. 43; 30 M. L. J. 504; *Mungairam Marwari v. Gursahai Nand*, 17 C. 347; 16 I. A. 195; 13 Ind. Jur. 449; 5 Sar. P. C. J. 463; 8 Ind. Dec. (N. S.) 770; *Gopri Chundar Bose v. Gonesh Chunder Srimani*, 4 O. L. J. 112; *Srinivas Prosad Singh v. Kesro Prosad Singh*, 12 Ind. Cas. 745, 14 C. L. J. 489; *D. Fries v. Creed*, (1865) 34 L. J. Ch. 607; 11 Jur. (N. S.) 360, 12 L. T. 262; 13 W. R. 632; 146 R. R. 714; *Edwards v. Edwards*, (1876) 2 Ch. D. 291 at p. 296; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713; *In re Roundwood Colliery Company Lee v. Roundwood Colliery Co.*, (1897) 1 Ch. 373 at p. 393; 66 L. J. Ch. 186; 76 L. T. 641; 45 W. R. 324; *Ridout v. Fowler*, (1904) 1 Ch. 653, 73 L. J. Ch. 325; 90 L. T. 147, referred to.

There is nothing in section 34 of the Guardians and Wards Act taking away the general power possessed by the Court of imposing conditions upon persons who are appointed guardians, and any rule which makes the appointment of a guardian to take effect only on furnishing security is not *ultra vires*. [p. 893, col. 2; p. 894, col. 1.]

Where a guardian is appointed conditionally on his furnishing security, all *bona fide* acts done by the natural guardian of the minor before the security is actually furnished by the Court's nominee are valid. [p. 894, col. 2.]

SUBBA NAICK v. RAMA AIYAR.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Small Cause Suit No. 332 of 1915.

Mr. K. V. Krishnaswami Aiyar, for the Petitioner.

Mr. P. S. Vaidyanatha Aiyar, for the Respondents.

JUDGMENT.—In this case the facts are that a promissory note belonging to a minor was endorsed over by his mother, after it was decided in an application under the Guardians and Wards Act that a third party should be appointed guardian of the said minor. In the proceedings above referred to, the District Judge of Ramnad, Mr. Dutt, held on the 9th of January 1914 that the mother was not the proper guardian, and that one Srinivasa Aiyangar should be appointed guardian of the minor's property. It seems clear that the statement in the body of the judgment that "I appoint Srinivasa Aiyangar accordingly" has been inserted incautiously. The subsequent proceedings place it beyond doubt that it was not the intention of the District Judge to make any appointment on the date of the order. Srinivasa Aiyangar was directed to furnish security. The successor of the District Judge passed proceedings on the 26th September 1914 accepting the security-bond and issued an order of appointment to Srinivasa Aiyangar. The mother of the minor, who undoubtedly was the natural guardian of her son, endorsed the promissory note in favour of the plaintiff in this case in May 1914, that is, between the date of the order declaring that a stranger guardian should be appointed and the date on which the order entrusting the guardianship was actually issued to that stranger.

The question is whether the act of the mother is null and void. We are not concerned in this petition with the question whether the mother acted *bona fide* in endorsing the promissory note. We are only concerned with the bare legal question whether the endorsement was of no effect. Section 7, clause 2 of the Guardians and Wards Act, says that an order under clause 1 shall imply the removal of any guardian who had not been appointed by a Will or other instru-

ment, or appointed or declared by the Court. It was argued that the moment the District Judge held that the stranger should be appointed in the place of the mother, the latter was impliedly removed from her natural guardianship. It is clear that the new guardian would have had no power to manage the minor's properties until he had furnished the requisite security. The result of holding that the natural guardian was removed by the bare declaration of the Court that a new guardian should be appointed, would be to leave the minor's properties unprotected and uncared for during the interval. It was suggested that as the Court is charged with the welfare of the minor, it may be expected to administer the minor's estate during this period. But the Court would not be cognizant of all the assets and effects of the minor and would not be in a position to direct the institution of suits which are likely to become barred, unless there is some party who is in a position to supply the requisite information to the Court. Reliance was placed upon certain observations of Sadasiva Aiyar, J., in the case reported as *Goppammal v. Srinivasa Aiyangar* (1). The learned Judge points out that the rules framed by the High Court, namely, rules 240 to 242 and forms in 92 and 93 are *ultra vires*. He says that the only provision for demanding security from the guardian is that contained in section 34, and that under that section, the security follows upon the appointment and does not precede it. With all respect, we do not think that section 34 compels us to hold that any rule which makes the appointment of a guardian to take effect only on furnishing security would be *ultra vires*. Section 7 gives an absolute discretion to the Court to appoint a guardian. The appointment may be absolute, as in the case of persons well known and respected, or it may be conditional, as in the case of person about whose solvency the Court has no knowledge. Clause (a) of section 7, which speaks of a guardian being appointed, does not negative the suggestion that such an appointment may be made conditional upon the furnishing of security.

(1) 34 Ind. Cas. 432; 33 M. L. J. 508.

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Section 34 is a further provision which enables a Court to demand security even in the case of persons originally appointed unconditionally. It may be in the interests of the minor that there should be a prompt appointment of a guardian, and the Court may, after making the appointment to take effect at once, insist upon the guardian giving security. It is that class of cases that section 34 provides for. It does not take away the general power possessed by the Court of imposing conditions upon persons who are appointed guardians. The learned Vakil for the respondent drew our attention to the case of *Mungriram Marwari v. Gursahai Nand* (2). What was held in that case was that where there is unconditional order of appointment, the fact that it is not issued to the appointee does not take away his rights of acting under that order. It is not an authority for the proposition that a conditional appointment is effective before the condition is satisfied. There are certain observations in *Gopal Chunder Bose v. Gonesh Chunder Srimani* (3), which detached from the facts of the case might lend some support to the contention of the counter-petitioner. But it is clear that what the learned Judge intended to lay down was, that where an application was made before the ward attained the age of 18 years and a guardian was appointed subsequently, the order took effect as if on the date of the application so as to prolong the period of minority to 21 years. The exact point which we are considering was not in the mind of the learned Judge in that case. The analogy of Order XL, rule 1, as to the appointment of Receivers lends support to the view which we have stated. Mr. Justice Mookerjee, after a very elaborate examination of the case-law in India and in England, came to the conclusion in *Srinivas Prosad Singh v. Kesho Prosad Singh* (4) that if a Receiver is appointed without any direction as to security, the order takes effect at once and that he is validly in possession, though no security has been given; but that if the appointment is conditional upon the furnishing of security, the giving of security is a condition pre-

cedent, and that there would be no effective appointment till the security has been given. Applying that principle, we may say that where a guardian is appointed unconditionally, the order takes effect at once, although under section 34 of the Guardians and Wards Act, he may be required to furnish security subsequently. But where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished. That this is the view taken in England is clear from *Defries v. Creed* (5). In *Edwards v. Edwards* (6) Lord Justice James says that "A Receiver becomes such on giving security." In *In re Roundwood Colliery Company, Lee v. Roundwood Colliery Company* (7) Lord Justice Lindley says that the order of appointment would never be really effective until the security is furnished. That was followed in *Ridout v. Fowler* (8).

We see no difficulty in applying the analogy of these cases to a conditional order of appointment as guardian. In our opinion, therefore, the order appointing Srinivasa Aiyangar became effective only in September 1914, and as the promissory note was endorsed in May 1914, it is not *prima facie* invalid.

The order of the Subordinate Judge dismissing the suit must be set aside: and he will restore the suit to file and dispose of it according to law. Costs up to date will be costs in the cause.

Petition allowed; Case sent back.

V.R.P.

(5) (1865) 34 L. J. Ch. 607; 11 Jur. (N. S.) 360; 12 L. T. 262; 13 W. R. 632; 146 R. R. 714.

(6) (1876) 2 Ch. D. 291 at p. 296; 45 L. J. Ch. 391; 34 L. T. 47; 24 W. R. 713.

(7) (1897) 1 Ch. 373 at p. 393; 66 L. J. Ch. 186, 75 L. T. 641; 45 W. R. 324.

(8) (1904) 1 Ch. 658 at p. 663; 73 L. J. Ch. 325; 90 L. T. 147.

(2) 17 C. 347; 16 L. A. 195; 13 Ind. Jur. 449; 5 Sar. C. J. 463; 8 Ind. Dec. (N. S.) 770.

(3) 4 C. L. J. 112.

(4) 12 Ind. Cas. 745; 14 C. L. J. 489.

AKLU AHIR v. RAM LAKSHAN SAHU.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3332 OF 1914.

December 11, 1916.

Present:—Mr. Justice Jwala Prasad.

AKLU AHIR AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

RAM LAKSHAN SAHU AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897), Ch. VI—Landlord and tenant—Evidence of title—Batwara papers, admissibility of.

Batwara papers are admissible in evidence to prove a landlord's title against the tenants who were parties to the Batwara proceedings.

Appeal from a decision of the Additional District Judge, Shahabad, dated the 17th August 1914, affirming the decree of the Munsif, 3rd Court, Arrah, dated the 17th February 1914.

Mr. Monmotha Nath Mukerji, for the Appellants.

Mr. Harihar Pershad Singh, for the Respondents.

JUDGMENT.—The respondent, who is the proprietor of *Touzi* No. 4076, brought a suit out of which this appeal has arisen, for a declaration that the land in suit was their *zeraif* land and was wrongly recorded in the Survey Record of Rights as the *kasht* land of the defendants. The prayer in the suit was for recovery of possession, which the plaintiffs said they had lost after the Survey Record of Rights on the 15th of December 1910. Both the Courts have held that the land in suit is the *zeraif* land of the plaintiffs; the defendants have appealed to this Court.

It is contended on their behalf that the lower Appellate Court has decided this case entirely on the basis of the *Batwara* proceedings under Act V of 1897 and that the *Batwara* papers cannot override the presumption raised by the Survey Record of Rights. The contention does not appear to be sound. In the first place, the *Batwara* papers under the present Act (Act V of 1897) are admissible in evidence against the defendants-tenants who were parties to the proceeding. Under Chapter VI of the *Batwara* Act a regular Record of Rights is prepared and is published in the locality and a copy of the entries is given to the landlords and the tenants concerned under section 48 of the Act.

PANCHANON v. RAMENDRA SUNDAR TRIBEDI.

It has not been seriously contended that the *Batwara* proceedings are not admissible in evidence against the defendants. The lower Court has not only decided this case on the basis of the *Batwara* papers but has also based its finding upon the oral and documentary evidence on behalf of the plaintiffs-respondents. It is contended that the lower Appellate Court has omitted to decide the question of limitation that arose in this case and, therefore, the point has been left undetermined. There is no reference in the judgment of the lower Appellate Court showing that this point was at all raised in that Court by the appellants. It further appears that in the face of the finding of the first Court that the disputed lands were in possession of the respondents and that they were dispossessed in 1910, the question of limitation does not arise and this may have been the reason of the point not having been raised in the lower Appellate Court. I, therefore, agree with the finding of the Court below and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1264 OF 1914.

December 5, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

PANCHANON CHOUDHURY AND OTHERS

—DEFENDANTS NOS. 1 TO 5 AND 7—

APPELLANTS

versus

RAMENDRA SUNDAR TRIBEDI AND

OTHERS—PLAINTIFFS AND DEFENDANT

No. 6—RESPONDENTS.

Bengal Regulation VIII of 1819, ss. 8, 18—Co-sharer zemindars—Application for sale—Notice—Place of service.

When co-sharer zemindars jointly making an application for the sale of a *patni* under Regulation VIII of 1819 have several *kutcheries*, the notice required by section 8 of the Regulation must be served upon each *kutchery* and the service of notice at the *kutchery* of any individual co-sharer would

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not be a sufficient compliance with the provisions of the Regulation.

The provisions of Regulation VIII of 1819 must be strictly complied with.

Appeal against the decree of the District Judge, Murshidabad, dated the 25th February 1914, reversing that of the Subordinate Judge, Murshidabad, dated the 31st March 1913.

FACTS of the case appear from the judgment.

Babu Mohendra Nath Roy (with him Babu Baranushibasi Mukerji), for the Appellants. — Various irregularities were alleged, but the findings are that all notices and proclamations were duly served; only the service at the *zemindars' kutchery* was defective in this that it was not served in the *kutchery* of the defendants Nos. 3 to 5. The finding, however, is that they are joint landlords with defendants Nos. 1, 2 and 6. On that finding separate service at three *kutcheries* was not at all necessary, the words of the Regulation being it "shall be stuck up at some conspicuous part of the *kutchery*", which contemplates only one *kutchery*.

Taking it for granted that the notice had not been served in order to set aside a sale under the *Putni* Regulation, a sufficient plea has to be established (see section 14, paragraph 2). Non-observance of every formality prescribed by the Regulation cannot be a sufficient plea for setting aside a sale, unless the plaintiffs allege and show substantial injury or likelihood of injury. They have neither alleged nor shown any. It does not appear how the plaintiffs were prejudiced by non-publication of the notice, when a similar notice was served in the neighbouring *kutchery*.

Babu Dwarkanath Chakraborty, (with him Babus Shih Prasad Bhattacharye, Hemendra Nath Sen and Gopal Chandra Chakraborty), for the Respondents, was not called upon to reply.

JUDGMENT.—The defendants Nos. 1 to 6 were the *zemindars* of a *mahal*, which was let out in *putni* to the plaintiffs. These *zemindars* had three *kutcheries*,—the defendants Nos. 1 and 2 had one *kutcheri*, defendants Nos. 3 to 5 had another near by, and defendant No. 6 had a third, and they used to realise the *putni* rent in certain proportions. They, however, joined in making an application for the sale of the *putni* under Regulation VIII of 1819 for arrears of rent

for 1818 and the *putni* was sold and purchased by defendant No. 7. The plaintiffs brought a suit for setting aside the sale, and it has been held by both the Courts below that the notice required by section 8 of the Regulation to be served on the *sudder kutchery* of the *zemindar* was served on the *kutchery* of defendants Nos. 1 and 2, as also on the *kutchery* of defendant No. 6, but was not stuck up at the *kutchery* of defendants Nos. 3 to 5. The learned Subordinate Judge held that, as the *kutchery* of defendants Nos. 3 to 5 was adjacent to that of defendants Nos. 1 and 2, the service at the latter *kutchery* was sufficient; the learned Judge on appeal has held that it was not.

It is contended in second appeal before us that the learned Judge is wrong, that the only ground upon which he could set aside the sale, was that under section 14 there was a sufficient plea for adopting such a course and that this is not necessarily connected with the service of the notice under section 8.

We think that the provisions of Regulation VIII of 1819 for the sale of *putni* tenures are peculiarly penal and their destructive effect upon under-tenures is proverbial. The provisions of such a Regulation must be strictly complied with. Section 8 of the Regulation provides that "the *zemindar* shall be exclusively responsible for the observance of the forms above prescribed."

Now, "the forms above prescribed" include the notice to be served at the *sudder kutchery* of the *zemindars*. If they have several *kutcheries*, notice must be served upon each *kutchery*. So long as they choose to hold separate *kutcheries*, they may by contract realise rent separately. But when they have to make an application under Regulation XVIII, they must join and the service of notice at the *kutchery* of any individual co-sharer would not be a sufficient compliance with the provisions of the Regulation.

In this view of the case, we dismiss the appeal with costs.

Appeal dismissed.

RAMANATHAN CHETTY v. SOMASUNDARAM CHETTIAR.

NARAYAN DAS v. KHUNNI LAL.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 29 OF 1916.

November 16, 1916.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.

RAMANATHAN CHETTY, MINOR, BY HIS
NEXT FRIEND SEETHAI ACHI—

2ND COUNTER-PETITIONER—

APPELLANT.

versus

A. R. A. R. S. M. SOMASUNDARAM
CHETTIAR AND OTHERS—PETITIONERS

Nos. 1 to 5 AND 7 TO 9—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 2, O.
XXI, r. 66—Proclamation of sale—Order fixing upset
price—Decree—Appeal.*

An order of a Court tentatively fixing, for the purpose of an auction-sale, the market value of the property and deciding the figure at which the bidding should commence, cannot be regarded as a conclusive determination of any right of parties and is not a decree within the meaning of section 2 of the Code of Civil Procedure. No appeal lies against such an order.

Sivagami Achi v. Subrahmaniam Ayyar, 2 M. 259; 14 M. L. J. 57, referred to.

Deoki Nandan Singh v. Banshi Singh, 10 Ind. Cas. 371; 14 C. L. J. 35, followed.

Appeal against the order of the Court of the Subordinate Judge, Ramnad at Madura, in Civil Execution Petition No. 105 of 1915, (Original Suit No. 142 of 1912 on the file of the same Court).

Messrs. A. Krishnaswami Aiyar and M. Patanjali Sastri, for the Appellant.

Mr. C. S. Venkatachariar, for the Respondents.

JUDGMENT.—This is an appeal against a proclamation under Order XXI, rule 66, of the Code of Civil Procedure, fixing the market value and upset price of the property to be sold. The respondent takes the preliminary objection, relying on the Full Bench decision in *Sivagami Achi v. Subrahmaniam Ayyar* (1), that no appeal lies. To this, the appellant relies that this decision proceeds on the basis that such an order is administrative and not judicial, and that the deletion of the old section 283 from the present Code implies that the Legislature intended to stamp the order with a judicial character. However, this may be, (and we express no opinion on the point) we are clear that an order of the Court, tentatively fixing

for the purpose of an auction sale the market value of the property, and deciding the figure at which the bidding should commence cannot be regarded as a conclusive determination of any right of parties, so as to come within the definition of a decree given in section 2 of the Code of Civil Procedure. This being so, no appeal would lie. The view we have taken is in consonance with that adopted by a Bench of the Calcutta High Court in *Deoki Nandan Singh v. Banshi Singh* (2), a case disposed of under the present Code of Civil Procedure.

The appeal is dismissed with costs.

Appeal dismissed.

V.R.P.

(2) 10 Ind. Cas. 371; 14 C. L. J. 35.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 404 OF 1914.

December 6, 1916.

Present:—Sir Henry Richards, Kt.,
Chief Justice, and Justice
Sir P. C. Banerji, Kt.

NARAYAN DAS AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

KHUNNI LAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, object of—Suit for private purposes—Abuse of process of Court—Legal Remembrancer, duty of—Good faith—Permission, when to be granted.

The institution of a suit, under section 92 of the Civil Procedure Code, 1903, for the private purposes of some individual or individuals is an abuse of the process of the Court. The section is intended to enable suits to be brought for the benefit of persons interested in a trust, and is not intended to enable persons to gain private ends by putting forward men of straw to institute suits to put their adversaries or the trust funds to wholly unnecessary and improper costs. [p. 899, col. 1.]

When an application is made to the Legal Remembrancer for permission to bring a suit under section 92, the applicants ought with the utmost good faith to set forth and specify in their petition the reason for and the object of the intended suit, and before granting permission the Legal Remembrancer should satisfy himself that the proposed suit is *prima facie bona fide* and that the applicants are interested in the trust. [p. 899, cols. 1 & 2.]

Ex parte Skinner, In the matter of Lawford Charity, (1817) 2 Mer. 453; 35 E.R. 1013, referred to.

(1) 27 M. 259; 14 M. L. J. 57.

NARAYAN DAS & KHUNNI LAL.

First appeal from the decision of the District Judge, Bareilly, dated the 4th of September 1914.

Mr. P. N. Banerji, Dr. S. N. Sen and Mr. Sarat Chander Chaudhari, for the Appellants.

Mr. B. E. O'Connor, Hon'ble Dr. Tej Bahadur Sapru, Hon'ble Dr. Sunder Lal, Hon'ble Mr. Moti Lal Nehru and Rama Kant Malavaya, for the Respondents.

JUDGMENT.—This appeal arises out of a suit purporting to have been brought by the plaintiffs under section 92 of the Code of Civil Procedure. The facts are that in the year 1826 Beni Ram and Tulsi Ram made a gift of certain property in Bareilly for charitable and religious purposes. The manager (*sarbarakar*) was directed to lay out a grove, construct a temple and a well on the land with the income of the gifted property, or with his own funds, for public benefit and worship. It seems that the *sarbarakar* did not carry out his trust, on the contrary the temple was not built the grove was not planted and the land (the subject-matter of the gift) was mortgaged and alienated. The result was that one Chote Lal and others obtained the sanction of the Legal Remembrancer and brought a suit under section 539 of the Code of Civil Procedure of 1852, asking that the Manager, Bate Krishen, should be dismissed and praying for the appointment of a trustee in his place. A number of persons were made defendants to this suit as persons who had taken mortgages or become transferees of parts of the trust property. Amongst other defendants was Raja Lalta Prasad. This suit ended in a compromise decree which will be found at page 24 of the respondents' book. Bate Krishen was removed from the trusteeship, Khunni Lal was appointed trustee in his place, certain of the alienations and transfers that had been made were declared to be invalid, and the Raja was allowed to retain portions of the property in his possession on which he had built; the compromise went on to provide that Khunni Lal should obtain possession and commence constructing a *dharamsala* on the land decreed. It appears that Khunni Lal's father had made a Will leaving a sum of Rs. 40,000 to be disposed of for charitable

purposes. It was intended that the *dharamsala* should be built and endowed out of part of this money. This settlement was undoubtedly a *bona fide* settlement, the public were represented by the plaintiffs in the suit. The new trustee was well provided with funds from his father's Will and the building of the *dharamsala*, (assuming that the sanction of the Municipal Board to its erection could be obtained,) would be of public benefit. The Court accepted the compromise and made a decree. It would rather appear that the new trustee's difficulties and troubles then began in real earnest. Opposition of various kinds was given to his efforts to obtain the permission to construct the *dharamsala*. At length, however, all these difficulties were overcome and the foundations of the *dharamsala* laid. Then the present suit was instituted and the complaint is that he did not build a temple, and that he is building the *dharamsala* on part of the land.

We have no doubt that it is his intention to build the temple. Photographs are in Court which show the temple in the course of construction, and the building of the *dharamsala* is one of the acts complained of. We are perfectly satisfied that the defendant Khunni Lal has not committed any breach of his duties as trustee, as laid down in the order of the Court in 1909 passed on the compromise. The present suit is in reality based upon the contention that inasmuch as in the original gift by Beni Ram and Tulsi Ram it was provided that the land should be used for the purpose of a temple, a grove and well, the building of the *dharamsala* is a departure. It may be conceded here that if the question *bona fide* arose as to whether or not there should be a departure from the original terms of the gift of Beni Ram and Tulsi Ram, the Court on being asked to settle a scheme would not depart from the original intentions of the donors. But the case does not come before us in that way. Section 92 provides that any two or more persons having an interest in the trust and having obtained in writing the consent of the Legal Remembrancer, may institute a suit for any of the purposes mentioned in the section. These purposes are the removing of a trustee, appointing

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a new trustee, vesting any property in a trustee, directing accounts and inquiries, declaring what proportion of the trust property or of the interest therein should be allocated to any object of the trust, authorising the whole or any part of the trust property to be let, sold, mortgaged, or exchanged, and settling a scheme. It seems to us that the only possible relief which the plaintiffs would be entitled to in the present case would be the removal of Khunni Lal from the trusteeship and the appointment of a new trustee in his place on the ground that he had committed a breach of trust. We may point out that if Khunni Lal owes his appointment to the order of the Court in the previous suit, he has committed no breach. We have no doubt that he intends to build the temple and the *dharamsala*, and as far as possible the grove also will be planted. The plaintiffs themselves in the plaint set forth that Khunni Lal was appointed under the order of the Court. To go back for a moment to the general merits of the case the only interest in the trust which the present plaintiffs have is as members of the public. In vain have we asked a suggestion of how the public have in any way been damaged by the building of the *dharamsala*. It is quite clear that so far from being damaged the public will largely gain. In the written statement it is clearly and distinctly stated that the real person behind this litigation is Raja Lalta Prasad. If this be the fact, we think that the bringing of a suit, under section 92, for the private purposes of some individual or individuals is really an abuse of the process of the Court. That section is intended to enable suits to be brought for the benefit of the persons interested in the trust. It is not intended to enable persons to gain private ends by putting forward nominees probably men of straw to institute suits which will put their adversaries or the trust funds to wholly unnecessary and improper costs. We are a little surprised that the sanction of the Legal Remembrancer was given to the institution of the present suit. We think that when an application is made to the Legal Remembrancer for permission to bring a suit under section 92, the applicants

ought with the utmost good faith to set forth and specify in their petition the reason for and object of the intended suit and we think that before granting permission the Legal Remembrancer should satisfy himself that the proposed suit is at least *prima facie bona fide* and that the applicants are "interested in the trust." Under somewhat similar circumstances Lord Eillon said in the case of *Ex parte Skinner, In the matter of Lawford Charity* (1) "I desire to have it understood that no petition under the Act ought to receive that sanction (*i.e.*, of the Attorney-General) except by the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information" We imagine that if it had been brought to the notice of the Legal Remembrancer that in 1909 a suit brought in respect of this very charity had been compromised and that Khunni Lal had been acting in accordance with the order of the Court passed in that suit; and if his attention had been further called to the fact that the real object of the suit was to prevent a *dharamsala* being built on the land in accordance with the express terms of the compromise, he would never have given permission to the institution of the present suit. In our opinion it is sufficient, in affirming the decision of the Court below, to say that we do not believe that this is a *bona fide* suit brought for the purpose of obtaining any of the reliefs mentioned in section 92 of the Code of Civil Procedure.

We believe that the suit has been brought not for any public purpose but for some private ends. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) (1817) 2 Mer. 453; 35 E. R. 103.

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MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDERS NOS. 83
AND 84 OF 1915

AND

CIVIL REVISION PETITIONS NOS. 704 AND 705
OF 1915.

September 21, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Krishnan.

S. VENKATAKRISHNA PATTAR—
DECREE-HOLDER AND 1ST ATTACHING CREDITOR—
APPELLANT IN C. M. S. A. No. 83 OF 1915 AND
PETITIONER IN C. R. P. No. 704 OF 1915
R. KRISHNA PATTAR—3RD ATTACHING
CREDITOR AND 1ST DECREE-HOLDER IN
O. S. No. 25 OF 1913—APPELLANT
IN C. M. S. A. No. 84 OF 1915 AND
PETITIONER IN C. R. P. No. 705 OF 1915.

versus

R. VENKATAKRISHNA PATTAR—

RESPONDENT IN ALL.

*Civil Procedure Code (Act V of 1908), ss. 2, 47, 73,
115—Rateable distribution applications, order on—Ap-
peal—Revision.*

Respondent, judgment-debtor, applied for payment to him of a certain sum of money lying in Court deposit and realised by the sale of his partition decree by the Court. Certain creditors who had applied for rateable distribution of the same objected to the application. The Court decided that the money was not attachable by the decree-holders as their decrees were against the respondent's family property, whereas the money in Court was his separate property. The decree-holders appealed against the said order. The Appellate Court held that no appeal lay and dismissed the appeals. They then preferred appeals and revision petitions separately to the High Court against the order in appeal.

Held, that the order was virtually one under section 47, Civil Procedure Code, and was appealable, and that no revision petition lay. [p. 902, cols. 1 & 2.]

Bithal Das v. Nand Kishore, 23 A. 106; *Balmer Lawrie & Co., v. Jadu Nath Banerjee*, 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202; *Kashi Ram v. Mani Ram*, 14 A. 210; A. W. N. (1892) 56; 7 Ind. Dec. (N.S.) 505 and *Venkataperumal v. Venkata Reddi*, 29 Ind. Cas. 231; 29 M. L. J. 96; (1915) M. W. N. 334; 17 M. L. T. 427; 39 M. 570, referred to.

Per *Oldfield, J.*—An order obtained by an attaching creditor under section 73, Civil Procedure Code, ordinarily embodies expressly or impliedly three distinct decisions (1) that his application for execution is generally valid; (2) that the fund in Court is available towards satisfying his claim; and (3) that he is entitled to a particular portion of it. When an objection to the order is based on the invalidity of the execution application or the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under section 47, though it may be contained in an order passed ostensibly under section 73, Civil Procedure Code. [p. 901, col. 1.]

Per *Krishnan, J.*—The order, so far as it affected each decree-holder separately, was an order between him and the judgment-debtor and related to the execution of his decree, as it refused his prayer to pay towards his decree a certain sum of money of his judgment-debtor representing his rateable share in the whole amount, which he claimed was attachable. It is thus an order falling under section 47, Civil Procedure Code, and is clearly appealable. [p. 902, col. 2.]

In so far as an order under section 73 of the Code of Civil Procedure can be treated as an order under section 47 between the parties to a suit, an appeal lies at the instance of either party, where such an appeal does not affect orders in favour of third parties such as other decree-holders. [p. 903, col. 2.]

Appeals against the orders of the District Court of South Malabar, in Appeals Nos. 647 and 625 of 1914, preferred against those of the Subordinate Judge, Palghat, in Civil Miscellaneous Petition No. 1234 of 1914.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Palghat, in Civil Miscellaneous Petition No. 1234 of 1914, (Original Suit No. 27 of 1911.)

Mr. P. S. Narayanaswami Aiyar, (with him, Mr. O. V. Ananthakrishna Aiyar), for the Appellant.

Mr. K. R. Subramania Sastriar, (with him, Mr. N. A. Krishner), for the Respondent.

These appeals and revision petitions coming on for hearing on the 14th September, 1916 and having stood over for consideration till this day the Court delivered the following

JUDGMENT.

OLDFIELD, J.—The grounds, on which relief is asked for in these appeals, against appellate orders would justify interference under section 115 of the Code of Civil Procedure. It is, therefore, unnecessary to decide whether appeals will lie or whether the remedy in these cases should be sought in revision.

The appellants, petitioners, are two creditors, who hold decrees against the plaintiff, decree-holder in Original Suit No. 27 of 1911 on the file of the Court of the Subordinate Judge of Palghat, and who apparently after obtaining transfer of their decrees from the decreeing Courts, are claiming rateable distribution of money belonging to plaintiff, which is in the Subordinate Judge's Court. This money represents the balance of plaintiff's share in family property, awarded to him by that Court on

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partition, and sold by it in order to discharge the claim of Government to a portion under Order XXXIII, rule 10. One creditor in Execution Appeal No. 529 of 1914 claimed rateable distribution; and, a fact which may be material when the merits are considered, the Subordinate Judge held in his order that he would be entitled to it, after the claim of Government had been satisfied. Later the plaintiff asked for a cheque for the amount standing to his credit; and, on the creditors opposing, the order we are concerned with was passed, rejecting their claims on their merits, because their decrees were against plaintiff's family property, whilst the money in Court belonged to him as a separated member. On appeal against this, the lower Appellate Court decided that no appeal lay; and we have to decide whether it was right. It proceeded, as plaintiff's argument has done here, on the ground that the Subordinate Judge's order, being one under section 73 of the Code of Civil Procedure, is not appealable with reference to any special provision and is not an order under section 47, which would be appealable as a decree.

This takes no account of the fact, which in my opinion is material, that the order obtained by an attaching creditor under section 73 of the Code of Civil Procedure ordinarily embodies expressly or impliedly three distinct decisions that (1) his application for execution is generally valid, (2) the fund in Court is available towards satisfying his claim, and (3) he is entitled to a particular proportion of it. For, though the special procedure prescribed requires that one order only shall be passed, that, as was held in *Radha Gobind Shah v. Shaikh Oozer Jemadar* (1) and *Bithal Das v. Nand Kishore* (2) cannot deprive the judgment-debtor of his right to a decision on the first two points above referred to; and the fact that those cases dealt with section 295 of the former Code of Civil Procedure does not affect their value as expositions of the principle involved.

The foregoing leads to a distinction between the third and the first and second of the points enumerated, because in a decision on the third only the creditors are interested, since, whatever the manner of

division of the fund, the judgment-debtor's debts will be discharged to the same total extent, whilst in decision on the first and second each creditor is interested with him separately and directly and his and the creditor's interest would be the same, if there were no question of rateable distribution at all. Cases of collusion between him and an individual creditor will be subject to special considerations, on which it is unnecessary to enter for the present purpose. Here the conclusion must be that, when the objection to the order under section 73 is based on the invalidity of the execution application or, as in this case, on the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under section 47, although it may be contained in an order passed ostensibly under section 73 of the Code of Civil Procedure.

This was recognised directly in *Balmer Lawrie and Co. v. Jadu Nath Banerjee* (3) and is the foundation of the decision in *Kashi Ram v. Mani Ram* (4) where the question was of the validity of the execution application, but the judgment-debtor was not made a party and consequently the parties to the proceedings were not parties to any common suit. In this Presidency there is no doubt one case, *Pungalur Chenamma v. Rajah of Karvetinagar* (5) in which it was held generally that orders passed in connection with rateable distribution are not appealable, notwithstanding that the judgment-debtor was the respondent. But it does not appear that argument was attempted with reference to the distinctions drawn above or the nature of the question raised. Moreover in *Venkataperumal v. Venkata Reddi* (6) that decision was distinguished on the ground that in it the appellant was a decree-holder creditor to whom a suit was open. In any case, however, that ground of distinction was (with all respect) inadequate, since the suit contemplated in section 73 (2) is by a person entitled to receive part or all of the assets against a person not entitled to receive

(3) 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202.

(4) 14 A. 210; A. W. N. (1892) 56; 7 Ind. Dec. (N. S.) 505.

(5) 23 Ind. Cas. 422; 1 L. W. 234.

(6) 29 Ind. Cas. 231; 29 M. L. J. 96; (1915) M. W. N. 334; 17 M. L. T. 427; 39 M. 570.

(1) 15 W. R. 219.

(2) 23 A. 106.

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the same, and, apart from section 47, there is no reason why the judgment-debtor should not be covered by the first of these descriptions, if, as was alleged in *Venkataperumal v. Venkata Reddi*, (6) the creditors had received more than they were entitled to. That case related to the right of certain decree-holders to rateable distribution of the money in Court without making a fresh application, when their previous application had not been formally disposed of, although all the reliefs asked for in it had been given; and it would, it may respectfully be suggested, have been a sufficient ground of distinction that the real question, whether there was a valid execution application, was one of those above referred to as covered by section 47. It should be added that *Venkataperumal v. Venkata Reddi*, (6) is directly consistent with this view in so far as it recognises explicitly that orders passed under section 73 are appealable, if they affect parties to the suit and that in the absence of any denial in the section of the right of appeal to parties, who have it under section 47, they should not be deprived of it.

In these circumstances the conclusion must be in favour of the creditors' right of appeal. The lower Appellate Court's order is set aside and the appeals are remanded to it for re-admission and disposal on the merits, the Appeals against Appellate Orders being allowed with costs in this Court, costs in the lower Courts to abide and follow the event. The civil revision petitions are dismissed without costs.

KRISHNAN, J.—I agree with my learned brother that the appellants, decree-holders, had a right of appeal to the lower Court under sections 47, 2 and 96 of the Code of Civil Procedure against the order of the Subordinate Judge and that the District Judge was in error in rejecting their appeals as incompetent.

The order appealed against was passed on a petition by the respondent, the judgment-debtor, in the three decrees under execution in the Subordinate Judge's Court, which prayed that a certain sum of money realised by the sale of his partition decree by the Court should be paid out to him after deducting the sale

expenses and the amount of Court-fees due to the Government and that the claim of the decree-holders to attach it should be rejected. That order decided that the money was not attachable by the decree-holders as their decrees were against the respondent's family property whereas the money in Court was his separate property. The Court, therefore, disallowed the claim for rateable distribution of all the decree holders and directed the money to be paid to the judgment-debtor. It seems to me quite clear that this order so far as it affected each decree holder separately was an order between him and the judgment-debtor and related to the execution of his decree, as it refused his prayer to pay towards his decree a certain sum of money of his judgment-debtor representing his rateable share in the whole amount, which he claimed was attachable. It is thus an order falling under section 47 of the Code of Civil Procedure and is, clearly appealable.

Does the fact that the three decree-holders had applied under section 73 of the Code of Civil Procedure for rateable distribution and that the Subordinate Judge had rejected the applications of all of them take away their right of appeal against their judgment-debtors? I do not think so. It is no doubt true that one decree-holder cannot appeal against another decree-holder from an order under section 73 of the Code of Civil Procedure. That has been often laid down. See *Kashi Ram v. Mani Ram* (4) and also *Balmer Lawrie & Co. v. Jadu Nath Banerjee* (3). The *ratio decidendi* is that an order between two rival decree holders is not an order between parties to any suit and cannot, therefore, be treated as an order under section 47 of the Code of Civil Procedure. A decree-holder's remedy against his rival decree-holder is by suit as provided for in section 73 of the Code of Civil Procedure. But that cannot affect a right of appeal that he has against his judgment-debtor, under the other provisions of the Code. Such a right of appeal has been recognised in *Sarab i Convaryi v. Kala Raghunath* (7) and in the case of a judgment-debtor appellant

(7) 12 Ind. Cas. 911; 86 B. 156; 18 Bom. L. R. 1193.

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in *Venkataperumal v. Venkata Reddi* (6). If a judgment-debtor has a right of appeal because the order falls under section 47 of the Code of Civil Procedure the decree-holder must equally have that right. In fact as the learned Judges observe in the case last cited orders under section 73 of the Code of Civil Procedure are appealable so far as they affect parties to a suit.

The learned Vakil, for the respondent, relied upon the case of *Pungalur Chennamma v. Rajah of Karvetinagar* (5) for his contention that no appeal lay from any portion of an order under section 73 of the Code of Civil Procedure at the instance of the decree-holder even as against his judgment-debtor. That decision was based on the ground that "every decree-holder (party to the order under section. 73) was interested in any order that might be passed in appeal." The facts of the case are not properly stated in the report but on examining the record in Court I find that the order appealed against held that there was no pending application by the appellant under section 73 of the Code of Civil Procedure and it directed the whole money to be paid out to the other attaching decree-holder. The appellant sought in appeal to get that order reversed and his rateable share of the money paid to him, which had already been ordered to be paid to his rival decree-holder. The appeal though in form against the judgment-debtor was in substance to get back the money paid to the second decree-holder and was thus one in the result of which the latter was manifestly interested. Their Lordships dismissed the appeal. In the present case it is not necessary for us to consider whether we should follow this ruling as here we have a case in which the relief asked in appeal does not affect the rival decree-holders. The claim for the rateable distribution has been dismissed *in toto*. Each appellant in his appeal only asks that that portion of the judgment-debtor's money which would have fallen to his share if rateable distribution had been allowed should be paid over to him. There is thus in appeal no conflict between the interests of the decree-holders *inter se* but only between their inter-

ests and that of the judgment-debtor. It seems to me that the present case is thus clearly distinguishable from the case of *Pungalur Chennamma v. Rajah of Karvetinagar* (5) though it must be conceded, with due respect to the learned Judges, that the ground of distinction taken by them in *Venkataperumal v. Venkata Reddi* (6) is hardly valid. The fact that there is a remedy by suit available cannot affect a person's right of appeal as it is a right and not a matter of the Court's discretion in which case alone the existence of another remedy will be material. The case may, however, be distinguished on the ground that the appeal by the judgment-debtor did not in any way imperil the order passed in favour of the decree-holders not parties to the appeal; and no question *between* the decree-holders arose for decision in appeal.

For the purposes of the present appeals it is sufficient to hold, as I do, that in so far as an order under section 73 of the Code of Civil Procedure can be treated as an order under section 47 of the Code of Civil Procedure between the parties to a suit an appeal lies at the instance of either party where such an appeal does not affect orders in favour of third parties such as other decree-holders. For the same reason that an appeal lies to the lower Court a second appeal lies to the High Court and the civil revision petitions, therefore, fail.

I will, therefore, allow the second appeals against Appellate Orders and reversing the orders of the District Judge remand the appeals to him for disposal on the merits according to law. The respondent will pay the appellants' costs of the appeals in the High Court, costs in the lower Courts will abide and follow the result. The Civil Revision Petitions are dismissed without costs.

Appeal allowed; Revision petition dismissed.

V. R. P.

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KARIMUNNESSA v. EKIWA.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 24 AND 63 OF 1915.

January 5, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

IN No. 24

Srimati KARIMUNNESSA CHOW-
DHURANI WIDOW OF Syed MIR ALUM

—DEFENDANT—APPELLANT

versus

Srimati EKIWA—PLAINTIFF—

RESPONDENT

IN No. 63

Syed BADRUL HYDER CHOWDHURY
AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALI ASHRAF CHOWDHURY AND OTHERS
—DEFENDANTS—RESPONDENTS.*Muhammadian Law—Waqf—Dedication, partial, to religious and charitable objects—Charge on property—Annuity, claim of, under waqf instrument—Interest, right to.*

The question whether a *waqf* is valid or not must depend on the circumstances existing at the date of the execution of the deed. The true test is whether, having regard to all the circumstances of the case, the dominating purpose and intention of the grantor was to provide for charitable and religious objects. [p. 905, col. 2.]

Bazlul Ghana Mia v. Adak Patari, 19 Ind. Cas. 896; 17 C. W. N. 1018, referred to.

Where, under the terms of a *waqf*, a portion of the property was to go for religious and charitable objects, the main object of the settlor being to benefit his daughter and her successors:

Held, that the *waqf* was not valid as such, but the religious and charitable trusts constituted by it would be a valid charge on the property. [p. 906, col. 1.]

Mahomed Ahsanulla Chowdhury v. Amarchand Kundu, 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (n. s.) 871, *Alamgir Khan v. Kamrunnessa Khanum*, 4 C. L. J. 442, referred to.

A person claiming an annuity under the terms of a document in the nature of a *waqf* is not entitled to interest. [p. 906, col. 2.]

Appeals against the decrees of the District Judge, Noakhali, dated the 4th December 1914, affirming and reversing those of the Subordinate Judge of that District, dated the 25th February 1914, and the Munsif, Additional Court at Sudharam, dated the 24th November 1913.

FACTS appear fully from the judgment.

Moulvi Nuruddin Ahmed, for the Appellants.—The simple question for determination in this case is whether the *waqfnama* in question constitutes a valid deed of trust. The deed begins with the words, "As I

desire to perpetuate my property, etc." That shows the object of the grantor. A *waqf* the main object of which is to make the property inalienable is invalid. The provisions relating to charity are very vague. I submit that there was no real gift to charity and the main idea running through the deed is to benefit the family of the grantor, and, therefore, the *waqf* should be considered as invalid. Moreover, the finding is that by a family arrangement to which the plaintiff was a party this *waqfnama* was treated as null and void. So the plaintiff is estopped from claiming any annuity under the trust. Again, under the Muhammadan Law no annuity can be created by a deed of trust amounting to a *waqf*.

[RICHARDSON, J.—What amounts to substantial gift to charity.]

As to that—see *Bazlul Ghani Mia v. Adak Patari* (1).

Moulvi Fazlul Huq, for the Respondents.—The latest case on this point is *Mujib-un-nissa v. Abdur Rahim* (2). If there is a substantial gift to charity, it does not matter to what extent the grantor's family is benefited.

[FLETCHER, J.—Quite so. But the gift to charity in this case is very insignificant and not at all substantial. Moreover, it was never the object of the grantor to make any such gift. In calculating the extent of the gift to charity the gift to the grantor's descendants in any shape whatsoever must be excluded.]

Moulvi Fazlul Huq.—Although the question of the interpretation of a document is a mixed question of fact and law, yet it may involve, as in this case, so many questions of fact that the finding of the lower Courts on the question of interpretation may be conclusive. See *Bikani Mia v. Shuk Lal Poddar* (3). On the merits I rely on *Bazlul Ghani Mia v. Adak Patari* (1).

JUDGMENT.

FLETCHER, J.—These two appeals are preferred against a decision of the learned District Judge of Noakhali. The decision appealed against affirmed two other decisions; one of them being pronounced by

(1) 19 Ind. Cas. 896; 17 C. W. N. 1018.

(2) 23 A. 233; 28 I. A. 15; 5 C. W. N. 177; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829.

(3) 20 C. 116; 10 Ind. Dec. (n. s.) 79.

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the Subordinate Judge of Noakhali and the other being pronounced by the Munsif at Sudharam. The two cases in substance involve only one question and the rights of the parties must be governed according to the view that we take of a particular document called a *wagf*. The *wagf* in question is a document executed in the year 1291 by a Muhammadan lady named Srimati Budrunnessa Chowdhurani who was the daughter of Muhammad Afzul Chowdhuri and the wife of Sri Dowlut Gazi Chowdhuri. The deed after the appropriate recitals proceeds to state that the executant is in possession of the properties mentioned in the document. Then it states that she owes a particular debt of Rs. 310 but otherwise she is not indebted to anybody. Then the document runs in these terms:—
 “I have thought it proper that, in my lifetime, I should according to my Muhammadan religion, settle the property mentioned in the schedule hereinafter given according to the scheme herein laid down with the object of my future good as well as with the object of providing and not disappointing my successor or successors or other person or persons. To attain this object, I could not do any other act but make the *wagf*. Accordingly I have endowed and made for ever a *wagf* of the property mentioned in the schedule given below, names and details with *sudder jama* of which are also set forth. (2) “The income of the properties mentioned in Schedule I is reserved for the repairs to my dwelling house, repairs to the mosque in front of the dwelling house of my husband in *Perganah* Melorkul as also for repairs to the tank, as well as it is reserved for meeting the expenses of lightning, paying the wages of *khatib*, the expenses of Durga Bati of Sha Neamah, the expenses of travellers and guests, for *khateni* and *maulood shariff* and for charitable purposes. (3) The income from the property mentioned in schedule II is to be applied to providing breakfast during *Ramzan* and meeting the expenses of the two *eads* in the sum of Rs. 25 per annum making repairs to my dwelling house and the four enclosures in the sum of Rs. 100 per annum, paying to my daughter Srimati Karimunnessa Rs. 25 per month, to Ghani Mian, a member of my family, that is to say,

the son born to my aforesaid husband from the womb of his *khadema* Rs. 8 per month, to Ahmed Mian Rs. 8 per month and to Yakina Banoo, the daughter born to my husband of the womb of his another *khadema* Rs. 10 and Srimati Hasina Banoo Rs. 4 per month.” It is not necessary to go through the rest of the provisions of the deed in detail. The *mutwaliship* was kept in the family. Clause (5) of the document contains a very significant provision, namely, that the husband of the executant with the consent of their daughter might make a Will, though it is not clear that the Will which he might make was to override all trusts or the other conditions of the *mutwaliship*. But the other clauses in the document show quite clearly that the intention was that the family house and the tank should be kept in repairs and that those should be enjoyed by the daughter and her successors and also that the income of the property and any portions that might be added thereto should go to the only child of the founder Karimunnessa and her successors. It seems to me quite clear on these terms that what the settlor had in view was that, although a certain portion of the property was to go for objects religious and charitable, the main object was the benefit of the daughter and her successors. The lady died and one of these suits was brought by Srimati Ekina Banoo who was the illegitimate daughter of her husband to recover the arrears of the annuity or stipend as it was called which was given to her by the deed. The first question is whether, having regard to the Privy Council decisions prior to the recent Act, this deed was a valid deed of endowment as a *wagf*. The Privy Council decisions laid down generally that the test as to whether a deed was a valid deed of *wagf* was whether the property in substance had been dedicated to religious and charitable purposes. The case in *Bazlul Ghani Mia v. Adak Patari* (1) is an illustration where that rule was applied but each case must depend on the circumstances existing at the date of the execution of the deed. The true test is whether, having regard to all the circumstances of the case the dominating purpose and intention of the grantor was to provide for the charities. Applying that test to the present case, I am of opinion that was

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not the purpose and intention of the grantor. The decisions of this Court, however, show that, even if the document may not be wholly good but there are religious and charitable trusts constituted by the document, these trusts may be declared to form a valid charge on the property. That is, I think, the view that we can take with regard to the religious and charitable trusts as set out in this particular document. This view relating to the charge was recognized not only in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (4) but also in the case of *Alamgir Khan v. Kamrunnessa Khanum* (5). Now, what are the trusts in this case? The trust for keeping the mosque in repairs is, of course, a valid religious and charitable trust. No Muhammadan would argue otherwise. The question in dispute in this case is with reference to the annuity to Ekina Banoo who is an illegitimate daughter of the husband of the founder. The learned Judge has found that she was destitute and unprovided for by her father and that without the small annuity of Rs. 10 per month, she would have nothing to live on. In that view, I think the annuity in her favour and the other illegitimate children can be supported as a charitable gift. I think that we ought to affirm the decision appealed from as regards the arrears of the annuity due to Ekina Banoo. It is said that some observations have been made by the learned Judge with reference to these annuities having been satisfied by some other transactions the nature of which apparently the learned Judge of the lower Appellate Court was not aware of, nor are we. How, therefore, we can say that Ekina Banoo's annuity has been satisfied by some unknown other consideration, I do not know. That disposes of the suit brought by Ekina Banoo excepting that there is a cross-objection preferred by her claiming interest. The question of interest is a matter in the discretion of the Court and the Judges in the Courts below obviously were entitled to allow or refuse interest. What was the view of the learned Judges in refusing interest we do not know. It seems that they came to the conclusion that some-

thing had been given in lieu of interest. I do not think that in a case that arises out of a document of the character of a *waqf*, we ought to award interest in favour of the person claiming under the terms of the document.

The other appeal arises out of a suit brought by one Budral Haidar Chowdhuri and others to recover possession of the lands mentioned in the deed of *waqfnama*. The Judge of the lower Appellate Court has dismissed that suit holding that the *waqf* was good. In the view, we have taken, the *waqf* as regards the interest other than that validly dedicated was not a valid dedication by the founder. In that view, the plaintiffs are entitled to recover possession of those lands, although, of course, they are bound to satisfy and keep down the charges mentioned in the *waqfnama* which we have held to be valid in so far as they affect the lands which the plaintiffs are entitled to recover in this suit.

Only one other question remains to be dealt with and that is the question of costs. Both parties having succeeded in one portion, it will be convenient if we make no order as to costs in either appeal.

RICHARDSON, J.—I agree in the orders proposed.

Appeal No. 24 dismissed;

Appeal No. 63 allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 578, 583 AND 584 OF 1915.

September 11, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

S. SUBBA RAO AND OTHERS—

PLAINTIFFS—PETITIONERS IN ALL

versus

N. PERUMAL REDDY—DEFENDANT

—RESPONDENT IN C. R. P. No. 578.

NARAYANA LAKSHMANA REDDY—

DEFENDANT—RESPONDENT IN C. R. P. No. 583.

P. MUNIAPPA REDDY—DEFENDANT—

RESPONDENT IN C. R. P. No. 584.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Jurisdiction, ouster of, by plea of res judicata—'Competency of Court'—Decision as to jurisdiction, affirmance of, by common Court of Appeal or Revision, effect of—Rent, suit for—Jurisdiction, finding on, whether res judicata in rent suits for later years—Civil

(4) 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. S.) 871.

(5) 4 C. L. J. 442.

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or Revenue Court—Madras Estates Land Act (Mad. I of 1908), ss. 3, (2), 189—Provincial Small Cause Courts Act (IX of 1887), s. 25.

The doctrine of *res judicata* does not apply to questions of jurisdiction, in other words, the plea of *res judicata* to oust or confer jurisdiction is an incompetent plea. [p. 908, col. 2.]

The finding of a Court on an issue joined by the parties that a particular Court or a particular class of Courts has jurisdiction to try a case or a case of a particular nature, is not *res judicata* in a subsequent suit, whether the decision was given purely as a question of law or on the facts found in the particular case. A Court cannot be compelled to try a case which it has in reality no jurisdiction to try by preventing the parties from proving the facts which show it. The finding cannot comply with the requirements of section 11, Civil Procedure Code, unless it is that of a competent Court, and the competency of that Court to record the finding has to be determined by the facts and considerations put forth in the later suit. [p. 909, cols. 1 & 2.]

Plaintiffs sued defendants for rent for *Fasli* 1322 in a Small Cause Court. Defendants pleaded that the suit was cognizable by the Revenue Court, as the land for which rent was claimed was an estate under section 3 (2) of the Estates Land Act. The plaintiffs urged that the plea was *res judicata* by virtue of the finding of the same Court in a prior suit for rent for *Fasli* 1321, which the High Court refused to disturb in revision under section 25 of Act IX of 1887:

Held, that neither the finding in the former suit nor the mere refusal of the High Court to interfere with it operated as *res judicata*. [p. 907, col. 2; p. 909, col. 2.]

Ledgard v. Bull, 13 I. A. 134; 9 A. 191; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561; *Minakshi Naidu v. Subramanya Sastri*, 11 M. 26 at p. 36; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18, referred to.

Per *Oldfield, J.*—The refusal of the High Court to interfere with the Munsif's decision under section 25, Act IX of 1887, did not supersede that decision or substitute any new decision for it. Although the High Court, as the appellate authority from both Civil and Revenue Courts, might have been a 'competent Court' and its confirming decision might have been *res judicata* between the parties if the question had been raised in an appeal, the decision relied on by the plaintiffs is useless for that purpose. [p. 907, col. 2.]

Per *Krishnan, J.*—The jurisdiction of a Court created by a Statute is determined by the Statute itself; it can neither be added to nor determined by any act of the litigant parties and such jurisdiction cannot be conferred on a Court by any estoppel operating between the parties. The plea of *res judicata* is really a plea of a species of estoppel, *i.e.*, estoppel by judgment or verdict, and such a plea to oust or confer jurisdiction is an incompetent plea. [p. 908, col. 2.]

A Court of Appeal or Revision, when it comes to a finding of its own, really finds only what the Trial Court should have found if it was acting correctly and legally, and for purposes of *res judicata*, that finding can be treated as the correct finding of the first Court and not as a finding of the Appellate or Revisional Court as the Original Court. [p. 909, col. 2.]

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif, Sholingpur, in Small Cause Suit Nos. 741, 748 and 749 of 1914.

Mr. B. Narasimha Rao, for the Appellants.

Mr. V. Ramadoss, for the Respondents.

JUDGMENT.

OLDFIELD, J.—These suits were brought to recover rent from defendants, and the question is whether they were rightly filed in the Court of the District Munsif, or should have been filed in the Revenue Court.

The first question is whether the matter is *res judicata* in plaintiffs' favour in consequence of the judgments in the litigation which ended in Civil Revision Petition No. 124 of 1913. There is first the judgment of the District Munsif. But it cannot comply with the requirements of section 11, Civil Procedure Code, unless it is that of a competent Court; and the competency of the District Munsif's Court is the very point in dispute and can only be determined as regards the former litigation with reference to the considerations applicable to that now before us. No clear authority directly in point has been referred to. But in the circumstances it is not possible to hold that the plea of *res judicata* based on the previous judgment of the District Munsif affords any separate ground for a decision in plaintiffs' favour. There is then the judgment of this Court in the civil revision petition above referred to. But it amounted merely to a refusal to interfere under section 25, Act IX of 1887, with the District Munsif's decision; and it accordingly did not supersede that decision or substitute any new decision for it. Although, therefore, this Court, as the Appellate Authority from both Civil and Revenue Courts, might have been a 'competent Court,' within the meaning of section 11, Civil Procedure Code, and its confirming decision as to jurisdiction might have been *res judicata* between the parties, if the question had been raised in an appeal, the decision relied on by plaintiffs, is useless for that purpose. In these circumstances the *res judicata* relied on is not established.

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On the merits the Revenue Court's jurisdiction is now alleged on the ground not taken in the previous litigation, that plaintiffs, suing for rent as *inamdars* under a grant subsequent to the Permanent Settlement in 1802, are land-holders under the Estates Land Act. There is no question as to the law; and on the only question arguable in revision, whether Exhibits I, II and III, which refer only to the Hindu year, refer to that year in one cycle or another, we agree with the lower Court. Plaintiffs, therefore, must fail.

The civil revision petitions are dismissed with costs.

KRISHNAN, J.—The chief question argued before us in these revision petitions is one of "*res judicata*." The facts necessary to be stated to understand the plea are these. The present plaintiffs had previously sued the defendants in the Small Cause Court for *tirwa* or rent due by them as tenants of certain *inam* lands of theirs for *Fashi* 1321. Defendants had raised the plea that the Court had no jurisdiction as the suits were exclusively cognisable by the Revenue Court, the *inam* being an estate falling under section 3, clause 2, of the Madras Estates Land Act. On the evidence then adduced by the defendants the Court held that it was not such an estate and that it had jurisdiction to try the suits and gave the plaintiffs decrees for rent against the various defendants. These findings were accepted by the High Court and the revision petition filed by the defendant was dismissed. The plaintiffs have again sued the defendants in the Small Cause Court for the rent of the same lands for the succeeding *Fashis* 1322 and 1323; and it is from those suits the present revenue petitions have been filed.

Defendants again raised the plea that the Small Cause Court had no jurisdiction on the same ground as before and the plaintiffs have pleaded in answer that the defendants were barred by *res judicata* from raising such a plea on account of the previous decision as to jurisdiction. The Munsif overruled the plaintiffs' contention and allowed defendants to adduce evidence which they did more fully than before and found that the plaintiffs' *inam* was a *dharimilla* one given by the

zemindar after the Permanent Settlement, that it was an estate within the meaning of section 3 clause 2 (d) and (e) of the Estates Land Act and that the suits were, therefore, not cognisable by him but only by the Revenue Court. He, therefore, returned the plaints to be presented to the proper Court.

It was argued before us that the question of Civil Court's jurisdiction was *res judicata* between the parties and, therefore the Munsif was wrong in allowing evidence and coming to a contrary conclusion. No authority has been cited to support the contention that the doctrine of *res judicata* applies to questions of jurisdiction. On principle it seems to me that such a contention cannot be valid. The jurisdiction of a Court like that of the lower Court created by Statute is determined by the Statute itself; it can neither be added to nor diminished by any act of the litigant parties. The Privy Council has laid down in *Ledgard v. Bull* (1) and again in *Minakshi Naidu v. Subramanya Sastri* (2) that no amount of consent or waiver of parties can give jurisdiction to a Court which has not got it, though, if a Court has jurisdiction, a party may be barred by his conduct from objecting to irregularities in the institution of the suit. The parties may make a judge their arbitrator and give jurisdiction to him as such but that question is not material here. It seems to me that, for the same reasons as in the case of consent and waiver, jurisdiction cannot be conferred on a Court by any estoppel operating between parties. The plea of *res judicata* is really a plea of a species of estoppel *viz.*, estoppel by judgment or by verdict. I think, therefore, that such a plea is not available to give jurisdiction to a Court which it otherwise has not; in other words a plea of *res judicata* to oust or confer jurisdiction is an incompetent plea.

This view receives some support from the language of section 11, Civil Procedure Code, for under it, for a plea of *res judicata* to be upheld, the Court before which it is raised must first satisfy itself that the

(1) 13 I. A. 134; 9 A. 191; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561.

(2) 11 M. 26 at p. 36; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18.

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first suit was heard and decided by a Court competent to try the subsequent suit. It is only then that the bar by *res judicata* arises; and therefore, that bar cannot refer back to the competency of the Court itself; and the question of competency cannot thus be decided by the application of the doctrine of *res judicata*.

It was, however, pointed out that in the present cases the jurisdiction itself depended on findings of fact as to the origin and the nature of the plaintiffs' *inam* and it was argued that the findings on these points should at least be treated as *res judicata*; and it was further urged by way of analogy with reference to cases which have held that, though the principle of *res judicata* may not apply to a pure question of law, see *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (3) and *Venku v. Mahalinga* (4) and *Chamanlal v. Bapubhai* (5), it does apply to a mixed question of law and fact, see *Koyyana Chittemma v. Doosy Gavaramma* (6) and *Bishnu Priya Chowdhurani v. Bhaba Sundari Debya* (7) that it should be held to apply to a question of jurisdiction when it depended on facts as in the present cases, even though it may not apply if the question of jurisdiction was a pure question of law.

It seems to me this contention is untenable as the question of jurisdiction is essentially different from any mere question of law. Jurisdiction is the very foundation which entitles the Court to deal with a particular case and dispose of questions arising in it between the parties. If I am right in my view that jurisdiction cannot be conferred or affected by any estoppel between parties but is a matter the Court has to decide for itself, I do not see how the Court can be prevented from considering the real facts of a case or from allowing parties to prove such facts. A Court cannot be compelled to try a case which it has in reality no jurisdiction to

do, by preventing the parties from proving the facts which show it.

I do not think the fact that the High Court in revision accepted the former finding of the Small Cause Court makes any difference on this question. Questions of *res judicata* have to be decided with reference to the findings of the Court that tried the suit in the first instance; and that, under Explanation II to section 11, Civil Procedure Code, irrespective of any provision as to the right of appeal, the Court of Appeal or of Revision, even when it comes to a finding of its own, really finds only what the Trial Court should have found if it was acting correctly and legally; and for purposes of *res judicata* that finding can only be treated as the correct finding of the First Court and not as a finding of the Appellate or Revisional Court, as the Original Court.

If plaintiffs' argument as to *res judicata* is accepted, it will nullify the effect of section 189 of the Estates Land Act between the parties with reference to the rent of the suit lands. I do not think a view which leads to this position should be adopted.

I agree that the plea of *res judicata* fails, that we should accept the finding of the lower Court that the *inam* is a *dharimilla* one and the Small Cause Court has no jurisdiction and that these civil revision petitions should be dismissed with costs.

Petitions dismissed.

V.R.P.

PATNA HIGH COURT.

CIVIL REFERENCE No. 5 of 1916.

December 13, 1916.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.

MAHADEO RAI—DEFENDANT—APPLICANT
versus

Maharajah KESHO PERSHAD
SINGH BAHADUR, DUMRAON—

PLAINTIFFS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B.C. of 1885), ss. 3 (5), 105
—Landlord and tenant—Holding declared kabil lagun
—Rent assessed—Suit by landlord for damages for use

(3) 5 M. 304; 2 Ind. Dec. (N. s.) 211.

(4) 11 M. 893; 12 Ind. Jur. 421; 4 Ind. Dec. (N. s.) 274.

(5) 22 B. 669; 11 Ind. Dec. (N. s.) 1028.

(6) 29 M. 225; 16 M. L. J. 136.

(7) 28 C. 318.

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and occupation previous to assessment of rent, nature of — Small Cause Court, jurisdiction of.

Where a holding was entered in the survey as *kabil lagan* and a rent fixed for it under section 105 of the Bengal Tenancy Act, and the landlord sued the tenant for damages for use and occupation of the land previous to the assessment of rent:

Held, that the sum claimed was 'rent' within the meaning of section 3 (5) of the Bengal Tenancy Act and therefore the suit was not cognizable by a Small Cause Court. [p. 910, cols. 1 & 2.]

Reference made on the 24th July 1916 by the District Judge, Shababad, against the decree of the Subordinate Judge, Shahabad, dated the 8th March 1916.

Messrs. *Sushil Madho Malik and Uma Charan Laha*, for the Appellant.

Mr. *Rai Krishna Saha*, for the Respondent.

JUDGMENT.—This case comes before us on reference from the District Court of Arrah. The facts briefly are that the Dumraon Raj were plaintiffs in an action for damages for use and occupation of lands held by the defendant. These lands were entered in the survey as *kabil lagan*. A rent was fixed upon them in due course under section 105 of the Bengal Tenancy Act. For damages for use and occupation for the years previous to the proceedings under section 105, the present suit was brought by the plaintiffs in the Small Cause Court, the period of limitation claimed by the plaintiffs being six years under Article 120 of the Schedule.

The plaintiffs set forth in their plaint that the defendant had been in occupation of the lands without any *kashtkari* right with the permission of the Dumraon Raj since eight or nine years and that their possession over the said land was a permissive one. The defendant in his written statement contended that the decision of the Settlement Authorities that the land in respect of which damages had been claimed was *kabil lagan* was an erroneous decision. He reiterated the grounds taken in the proceedings under section 105 that these lands formed part of his ancestral holding and that he was liable neither for rent nor for damages in regard to his occupation of them. He asserted also that since this was a suit between landlord and tenant, the sum claimed must be classed as "rent" under the Bengal Tenancy Act and the suit was not cognizable by the

Court of Small Causes. This objection was disallowed by the Small Cause Court Judge and the parties were directed to proceed to trial. On this the defendant left the Court and the suit was decreed *ex parte* against him. The defendant then took the case before the District Court and asked for a reference to this Court under Order XLVI, rule 7, of the Civil Procedure Code. The learned Judge has made the reference on the ground that as pointed out in the case reported in *Lalji Panday v. Berhamdeo Panday* (1), the suit was not cognizable by the Small Cause Court.

It must be conceded at the outset that the case referred to is by no means on all fours with the present case. In that case the suit was one for damages under section 156, clause 4, of the Bengal Tenancy Act and it is distinctly set forth in the section itself that the damages to be awarded under the section are to be awarded as rent. Clearly, therefore, damages awarded under section 156 are rent and the suggestion that a suit for such damages is cognizable by a Small Cause Court is untenable. The case before us is one of an entirely different character. If the sum claimed cannot be described as rent within the meaning of the Bengal Tenancy Act there is no bar to the trial of the suit in the Small Cause Court. Damages against a trespasser may be claimed in the Small Cause Court. The sole question for decision is a question of fact whether the defendant was a tenant or a trespasser. The written statement of the defendants, as I have stated clearly, claims a status as tenants under the plaintiff. In the plaint there is nothing that can be construed as a suggestion that the defendants were trespassers. The suit now before us is a suit by a landlord to recover damages from a tenant for failure to make an agreement with him to pay a fixed sum as rent during the period of his occupation. If the defendant is a tenant and if the plaintiff is a landlord the sum now claimed is a sum payable on account of the use or occupation of land held by a tenant and is rent within the meaning of the Bengal Tenancy Act. The plaintiff is

(1) 13 Ind. Cas. 29; 16 C. W. N. 89.

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undoubtedly the landlord. The defendant claims to be the tenant and is described by the plaintiff as holding under permission. That to my mind is indistinguishable from the position of a tenant. I would, therefore; set aside the decree made by the Small Cause Court and would direct that the plaint be returned to the Court having jurisdiction to try the suit. The plaintiff will pay the costs of this reference. Hearing fee two gold mohurs.

Decree set aside; Plaint returned.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 556
OF 1914.

July 18, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Newbould.

RAM SUNDER GOPE SIKDAR AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

HARIBALA DHUBI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 13, 35, 67—Criminal Procedure Code (Act V of 1898), s. 145, possessory order under, recital of claim in.—Admissibility in proof of title.

Recitals of the claims of parties contained in possessory orders passed under section 145 of the Criminal Procedure Code, whether *inter partes* or not, are not admissible in evidence to prove title under section 13 of the Evidence Act or on general principles. [p. 912, cols. 1 & 2.]

Denomoni Chowdhurani v. Brojo Mohini Chowdhurani, 29 C. 187; 29 I. A. 24; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224; 6 C. W. N. 386 and *Basi Nath Pal v. Jagat Kisore Acharjee*, 35 Ind. Cas. 298; 23 C. L. J. 583 at p. 585; 20 C. W. N. 643, referred to.

Neither are they admissible under section 63 as an account of the contents of a document, not being oral, nor as entries in a public record under section 35. [p. 912, cols. 1 & 2.]

Parbutty Dassi v. Purno Chunder Singh, 9 C. 586; 4 Ind. Dec. (N. S.) 338, distinguished.

Thama v. Kondan, 15 M. 378; 5 Ind. Dec. (N. S.) 616, disapproved.

Sunder Das v. Fatimul-ul-nissa Begam, 1 C. W. N. 513 and *Isab Mondal v. Queen-Empress*, 25 C. 348; 5 C. W. N. 65, referred to.

Appeal against the decree of the Subordinate Judge, First Court, Mymensing, dated the 24th November 1913, reversing that of the Mansif, First Court, Kishoregunj, dated the 16th September 1912.

Babus Broja Lal Chuckerbutty and Birendra Kumar Dey, for the Appellants.

Babu Kali Kinker Chakraborty, for the Respondents.

JUDGMENT.

D. CHATTERJEE, J.—The question in this case is whether the plaintiff has a *jote* right in the disputed lands. The lower Appellate Court has held that he has and that would ordinarily conclude a second appeal. It is contended, however, that for arriving at that finding the lower Appellate Court has relied upon the recital of a previous statement of the defendants contained in Exhibit 7, a judgment in a case under section 145 of the Criminal Procedure Code, whereas that recital is not admissible in evidence. Reliance is placed in support of this contention on the case of *Denomoni Chowdhurani v. Brojo Mohini Chowdhurani* (1), in which the Judicial Committee held that orders under section 530 of the old Criminal Procedure Code (corresponding with section 145 of the present Code) are admissible on general principles as well as under section 13 of the Evidence Act to show the fact that such orders were made: "This necessarily makes them evidence of the following facts all of which appear from the orders themselves, viz., who the parties to the dispute were; what the land in dispute was, and who was declared entitled to retain possession." For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the orders has to be ascertained, this enumeration does not include the claims of the contending parties. The proceeding under section 530 in that case was, however, not *inter partes* and the learned Vakil for the respondent has attempted to distinguish it on that ground from the present which is a case of an *inter partes* order. There is authority for holding that a recital in a judgment not *inter partes* is not admissible in evidence *Basi Nath Pal v. Jagat Kisore Acharjee* (2). The question raised in the present case is, however, as to the admissibility in evidence of a recital of the

(1) 29 C. 187; 29 I. A. 24; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224; 6 C. W. N. 386.

(2) 35 Ind. Cas. 298; 23 C. L. J. 583 at p. 585; 20 C. W. N. 643.

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claim of one of the parties contained in a possessory order under section 145 *inter partes*. I think it makes no difference so far as this point is concerned as to whether the proceeding is or is not *inter partes*: the recital of the claims of the contending parties is however a part of the proceeding terminating in the judgment or judicial opinion pronounced by the Judge and the primary evidence of these claims is the pleadings of the parties. The recital of the claims in the judgment is the statement of the Judge as to what the said claims were, and must, therefore, be admissible or not as such statements. "There may be cases in which a judgment is the only proof of the assertions of the parties. But it may be objected that a claim is asserted or denied, in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available are not they the proper evidence of the claim made?" Woodroffe and Ameer Ali on Evidence under section 13, page 182, Fifth Edition. I think the proper evidence of the claims would have been the written statements, if available, and there is nothing to show they are not. But supposing that it were shown that the original written statement was not available; would the statement of the Judge or Magistrate as contained in the order be admissible as secondary evidence of the contents of the written statement. Section 63 of the Evidence Act makes oral accounts of the contents of a document given by some person who has himself seen it admissible as secondary evidence of the contents of the document. Even if we can take it for granted that the Magistrate had seen the written statement, the account is a written account and not an oral account. The distinction is important for an oral account must be given by a witness whose accuracy may be tested by cross-examination.

An attempt has been made in some cases to bring evidence of this kind under section 35 of the Evidence Act as an entry in a public record.

In the case of *Parbutty Dassi v. Furno Chunder Singh* (3), a recital in an old decree

was held admissible under section 35 as under the old practice the Courts were enjoined to set out the pleadings in detail. The authority of this case has been doubted in the case of *Sunder Das v. Fatim-ul-nissa Bagam* (4) and even if it were good law, the order in this case is a very recent one and there is no law which directs the Magistrate in a case under section 145 to set out the pleadings of the parties. The Madras High Court followed the case of *Sunder Dass in Thama v. Kondan* (5), but with great deference, I do not see my way to the same conclusion. In the case of *Isab Mandal v. Queen-Empress* (6), a written statement of a party recorded by a Police Officer who was examined as a witness to say that the statement had been made was held not to come within the description of a record within the meaning of section 35. On principle also I think it would be very dangerous to allow such recitals to be used as evidence as the recital must be a very partial one and the whole written statement if produced might bear a different complexion altogether. In this view of the matter, I do not think that the learned Judge was right in using the recital in Exhibit 7 as evidence against the appellant. As the learned Judge places a very great reliance on this recital in deciding the question of title, I would allow the appeal and send the case back to the lower Appellate Court to decide the question of title independently of the recital in Exhibit 7. Costs to abide the result.

NEWBOULD, J.—I agree.

Appeal allowed; Case remanded.

(4) 1 C. W. N. 513.

(5) 15 M. 378; 5 Ind. Dec. (N. S.) 616.

(6) 28 C. 348; 5 C. W. N. 65.

(3) 9 C. 586; 4 Ind. Dec. (N. S.) 1038.

MUHAMMAD MAHBOOB v. BHAGOO MAHO.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 2739 OF 1914.

December 19, 1916.

Present:—Sir Edward Chamier, Kt.,
Chief Justice, and Mr. Justice Sharfuddin.
Syed MUHAMMAD MAHBOOB—

APPELLANT

versus

BHAGOO MAHO—RESPONDENT.

Landlord and tenant—'Rent-decree', decree in suit for rent against some only of several joint tenants, whether is—Auction-purchaser, position of

Where all the persons entitled to a holding are not made parties to a suit for recovery of rent, the decree obtained in such a suit is not a 'rent-decree' and the auction-purchaser in execution of such a decree would at the most be entitled only to the right, title and interest of the judgment-debtors [p 912, col. 2]

Appeal against the decree of the Sub-Judge, Muzaffarpore, dated the 8th June 1914, confirming that of the Munsif, Muzaffarpore, dated the 13th September 1913.

Mr. Mustafa Khan, for the Appellant.

Mr. Baiyanath Narain Sinha, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—It appears that an occupancy holding which consisted of 6 *bighas* odd was the property of three persons, Chethru, Palukdhari and Dhanukdhari. Chethru was the nephew of Palukdhari and Dhanukdhari was some kind of cousin of Chethru and Palukdhari. The appellants in this case who are the 16-anna proprietors of the village in which the holding lies, brought a suit for rent in 1904 and obtained a decree in 1905. In the same year the defendants 1st party who appear to have purchased the interest of Dhanukdhari in the holding, paid the entire decree money into Court under section 171 of the Bengal Tenancy Act and subsequently obtained possession of the entire holding. Some years later the appellants brought another suit for rent in respect of this holding and obtained a decree in July 1908, in execution of which they claim to have bought the holding for Rs. 217. On attempting to take possession the appellants were obstructed by respondents 1st party and brought the present suit in September 1912. The Courts below have agreed in dismissing the suit. It is quite clear that the appellants brought this suit claiming

that they had purchased the holding in execution of a rent-decree and were, therefore, entitled to disregard the rights of respondents 1st party altogether. Both Courts below have held that the decree was not what is called a rent decree and, therefore, the appellants must be taken to have purchased only the rights of the defendants to the second rent suit. The defendants to that suit were the two sons of Chethru, one of whom was at the time a minor. Palukdhari was dead at the time of that suit and had left no heirs. Dhanukdhari had died but had left a widow and daughters. The appellants did not implead the widow and daughters of Dhanukdhari as defendants to the second rent suit. On that ground the lower Appellate Court has held that the decree was not what is called a rent-decree and, therefore, the holding did not pass to the appellants at the auction-sale free of encumbrances. The lower Appellate Court also held that the decree was bad in consequence of the failure of the appellants to have a guardian appointed for Ram Saran, one of the defendants who was a minor.

It is unnecessary for us to go into the question whether the purchase at auction is rendered invalid by reason of the fact that no guardian was appointed to represent Ram Saran in the suit, for it is clear that on the findings recorded by the lower Appellate Court the heirs of Dhanukdhari were not parties to the suit. Therefore, all the persons entitled to the holding were not parties to the suit and the appellants must be taken to have purchased at most only the rights of the two sons of Chethru. It seems to follow that the appellants are not entitled to a decree for possession against the respondents 1st party. But it is contended that Dhanukdhari, Palukdhari and Chethru were all joint in estate and, therefore, the widow and daughters of Dhanukdhari took no interest in the holding. No such case as this was put forward in either of the Courts below and it is impossible for us in second appeal to presume that all three were joint in estate. I observe, moreover, that one of the witnesses called by the appellants at the trial who spoke to the relationship between the three persons, was extremely vague about it. It is impossible to ascertain exactly what relationship there was between Dhanukdhari and Palukdhari. It appears to me that the appellants must be

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taken to have acquired only the interests of the two sons of Chethru. The case as brought by the appellants has failed. In my opinion on the facts as found the decision of the lower Appellate Court is correct, and I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 244 OF 1915.

October 17, 1916.

Present:—Mr. Justice Oldfield and

Mr. Justice Krishnan.

GATIGANTI SUBBARAYUDU AND OTHERS

— DEFENDANTS— APPELLANTS

versus

ARUMILLI SURAYYA— PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 17—Plaint, amendment of, grounds for—Alteration necessitated by recent decision—Limitation—Discretion of Court.

The sanctioning of leave to amend a plaint is a matter within the discretion of the Court. [p. 915, col. 1.]

In certain circumstances, where no substantial change is made in the plaint averments and the claim was not barred on the day when the plaint was filed, leave to amend should not necessarily be refused on the ground that the plaint as amended would be barred by limitation [p. 915, col. 1.]

Mohammed Zahoor Ali Khan v. Musammatt Thakooranee Ruffa Koor, 11 M. L. A. 468; 4 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 E. R. 177, referred to.

Ordinarily, however, delay in asking for leave to amend and the resulting argument from limitation are not to be disregarded, when the Court is called on to exercise its discretion in the matter. Each case must be dealt with on its merits. [p. 915, col. 1.]

Mulla Veetil Seethi Kutti v. Korambath Parutholi Achutan Nair, 10 Ind. Cas. 218; 21 M. L. J. 475; *Serugan Chetty v. Krishna Aiyangar*, 13 Ind. Cas. 268; 10 M. L. T. 557; 22 M. L. J. 139; 36 M. 378, referred to.

Leave to amend a plaint on the ground that an alteration is necessitated in consequence of a recent judicial decision and that there was a pardonable mistake regarding it in the plaint, will not be granted after a long delay and where the decision has effected no change in the existing law. [p. 915, col. 1.]

Mulla Veetil Seethi Kutti v. Korambath Parutholi Achutan Nair, 10 Ind. Cas. 218; 21 M. L. J. 475; *Narayanawami Aiyar v. Krishnamurti Aiyar*, 26 Ind. Cas. 927; 17 M. L. T. 48; (1915) M. W. N. 122, *Viswanathier v. Aiyarier*, 26 Ind. Cas. 383, referred to.

Appeal against the decree of the Court of the Additional Temporary Subordinate

Judge, Rajahmundry, in Appeal Suit No. 7 of 1915 (Appeal Suit No. 241 of 1914, on the file of the District Court of Godavari), preferred against that of the Additional District Munsif, Amalapuram, in Original Suit No. 24 of 1913.

Mr. B. Narasimha Rao, for the Appellants.

Mr. V. Ramadoss, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The plaintiff sued, alleging in his plaint that he had been obstructed by defendants in taking possession of property purchased by him in a Court sale held under a mortgage-decree, which he and others had obtained against the 6th and 7th defendants. He asked for possession and removal of the obstruction. The plaint averred that the sale by the 6th and 7th defendants to the 1st defendant and the re-sale by the 1st defendant could not affect the plaintiff. Issues were framed in 1911, and over two years later, though before trial, the plaintiff, apparently with reference to the decision in *Kutti Chettiar v. Subramania Chettiar* (1), which had been published in 1909, applied for leave to amend by substituting an averment that the sales to and by the 1st defendant were valid and a prayer for a direction to 1st to 5th defendants to redeem and for possession in case they failed to do so. The District Munsif refused leave to amend, apparently treated the original attack on the 1st defendant's title as abandoned and dismissed the suit. The lower Appellate Court held that the amendment should have been allowed, and remanded the suit for re-trial on that basis.

The amendment was allowed first on the ground that it consisted only in the insertion of a prayer for an appropriate instead of an inappropriate remedy. That was not the case, since, as pointed out above, it also involved the substitution of an affirmation of the validity of the 1st defendant's purchase for a denial of it, the foundation of the claim being thus entirely changed. Next, the lower Appellate Court thought it immaterial that the new claim proposed by the amendment would have been barred at its date, because it would not have been barred when the plaint was filed; and it

(1) 4 Ind. Cas. 1077; 10 M. L. J. 722; 32 M. 485.

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has, no doubt, been recognised in a number of cases from *Mohummud Zahoor Ali Khan v. Musummat Thakooranee Rutla Koer* (2) onwards that in such circumstances leave to amend should not necessarily be refused on the ground of limitation. But it does not follow, and it is not the law, that delay in asking for leave to amend and the resulting argument from limitation are to be disregarded, when the Court is called on to exercise its discretion in the matter. *Vide* the observations in *Mulla Veettill Seethi Kutti v. Korambath Paruthooli Achutan Nair* (3). Each case must be dealt with on its merits; and it is possible that the extreme limit of indulgence was reached in *Sevugan Chetty v. Krishna Aiyangar* (4) on which the plaintiff has relied. But, although the facts there are obscure, they appear to differ from those in question before us, since they included no change in the plaintiff's averments, but only an addition to the claim made. Here there is no such recent decision as to the law and pardonable mistake regarding it as was in question in *Mulla Veettill Seethi Kutti v. Korambath Paruthooli Achutan Nair* (3) and *Narayanawami Aiyar v. Krishnamurti Aiyar* (5) and *Viswanathier v. Aiyavier* (6). On the contrary, there was great delay in asking for the amendment and no suggestion of any special reason for granting indulgence. The lower Appellate Court's order allowing amendment is, therefore, unsustainable and is set aside.

The District Munsif apparently did not deal with the merits of the plaintiff's original case or try the issues framed. It does not appear that that case was ever abandoned. The suit must, therefore, be remanded to the District Munsif for restoration to file and disposal on its merits on those issues. The plaintiff will pay the defendants' costs in the lower Appellate Court and here. Costs to date before the

District Munsif will follow the result and be provided for in the decree to be passed.

KRISHNAN, J.—I agree.

Appeal allowed; Case sent back.

V. R. P.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 3932 TO 3934
OF 1913.

December 12, 1916.

Present:—Mr. Justice Jwala Prasad.

AJODHYA PRASAD SINGH—

APPELLANT

versus

JAGDEO SINGH AND OTHERS—

RESPONDENTS.

*Bengal Tenancy Act (VIII B.C. of 1885), s. 87—
Abandonment—Forfeiture—Usufructuary mortgage with
possession, whether amounts to abandonment.*

Mere execution of a usufructuary mortgage and delivery of possession to the mortgagee of his holding by a tenant who continues to reside in the village, does not entail forfeiture of the tenancy nor does it amount to an abandonment of the holding within the meaning of section 87 of the Bengal Tenancy Act. [p. 916, col. 1.]

Upendra Nath Bose v. Bansi Tanti, 22 Ind. Cas. 416; 40 C. 870, referred to.

Appeal against the decree of the District Judge, Darbhanga, dated the 19th September 1913, reversing that of the Munsif, Samastipur, dated the 13th February 1913.

Mr. Ganesh Dutta Singh, for the Appellant.

Mr. Chandra Sekhar Banerji, for the Respondents in No. 3933.

JUDGMENT.—The appellant in this case is the landlord of village Mathi, Perganah Saresa. The defendant No. 1 took a usufructuary mortgage from the defendant No. 2 of his *rai-yati* right in certain lands held by defendant No. 2 in village Mathi. This mortgage-bond was executed on the 13th September 1901, and defendant No. 1 is in possession of the lands from that time. The plaintiff has brought this suit for a declaration that the original tenant of the lands defendant No. 2 has abandoned his holding, by reason of his having executed the usufructuary bond in favour of defendant No. 1 and having parted with the possession of the holding. There is a prayer for recovery of possession

(2) 11 M. I. A. 468; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 167; 2 Sar. P. C. J. 320; 20 E. R. 177.

(3) 10 Ind. Cas. 218; 21 M. L. J. 475.

(4) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(5) 26 Ind. Cas. 927; 17 M. L. T. 48; (1915) M. W. N. 122.

(6) 26 Ind. Cas. 383.

JOYANUDDIN KHAN v. JAMIRUDDIN SARKAR.

also. The lower Appellate Court has held that the original tenant still resides in the village and that the transfer by usufructuary mortgage was only a partial transfer of the right of the original tenant. The lower Appellate Court, therefore, has come to the conclusion that the execution of the mortgage-bond and the possession delivered under that to the defendant No. 1 does not amount to an abandonment under section 87 of the Bengal Tenancy Act. There is no suggestion in the plaint that the original tenant abandoned his residence. The suit is not based upon that ground and I agree with the views of the lower Appellate Court that all the conditions required by section 84 have not been fulfilled in the case. It has been held over and over that mere execution of a usufructuary mortgage by a tenant and the delivery of possession to the mortgagee does not entail forfeiture of the tenancy nor abandonment of the holding *vide Bhupendra Nath Bose v. Bansi Tanti* (1) where all the authorities on the point have been referred to.

I, therefore, hold that there is no abandonment under section 87 and agree with the views of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 22 Ind. Cas. 416; 40 C. 870.

CALCUTTA HIGH COURT.

CIVIL REVISION No 622 OF 1916.

January 9, 1917.

Present:—Mr. Justice Fletcher and

Mr. Justice Richardson.

JOYANUDDIN KHAN—DECREE-HOLDER—
PETITIONER

versus

JAMIRUDDIN SARKAR—

JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 17, sub-r. (1)—Execution, application for, rejected as not in accordance with law, whether saves limitation—Limitation Act (IX of 1908), Sch. I, Art. 112—Consent decree, execution of—Mistake or ambiguity—Executing Court, power of, to look into petition of compromise—Instalment decree—Default—Option of decree-holder to claim execution of whole amount.

An executing Court can go behind a consent decree and look at the terms of the compromise in accordance with which the decree was passed, in order properly to understand what the decree was. [p. 917, col. 2.]

An application for execution of a decree rejected by a Court under Order XXI, rule 7, sub-rule (1), as not being an application in accordance with law, will not operate to save limitation under Article 182 of the Limitation Act. [p. 917, col. 2.]

When, under a decree payable by instalments the whole decretal amount becomes due on default in the payment of one instalment, the decree-holder has not the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments. [p. 918, col. 1.]

Chunder Komal Das v. Bisassurree Dassia, 13 C. L. R. 243, not followed.

Rule against the order of the Subordinate Judge, Ranpur, in Miscellaneous Judicial Case No. 75 of 1915.

FACTS material to the report will appear from the judgment and the arguments.

Babu Hemendra Chandra Sen, for the Petitioner.—The learned Court was clearly wrong in going behind the decree. It is the decree and the decree only which he can look to. He cannot consider the *solehnamah* on which the decree is based. The learned Judge was not at all entitled to look into the terms of the compromise.

I am not barred by limitation, inasmuch as the application for execution of the 10th July 1914 was quite in accordance with law. I am perfectly within time. It is not necessary to apply for execution when the decree is one year old. The prayer for issue of notice is a step-in-aid of execution. Refers to Order XXI, rule 22, Civil Procedure Code.

[FLETCHER, J.—Order XXI, rule 17, says that the Court must first entertain the application. Order XXI, rule 22, is independent of rule 7.]

The whole decree is not barred, *vide Chunder Komal Das v. Bisassurree Dassia* (1), *Bir Narain Pandia v. Darpa Narain Prodhan* (2), *Sitab Chand Nahar v. Hyder Malla* (3), *Rup Narain Bhattacharya v. Gopi Nath Mondol* (4), *Asmutullah Dalal v. Rully Churn Mutter* (5). Article 72, Schedule I of the

(1) 13 C. L. R. 243.

(2) 20 C. 74; 10 Ind. Dec. (N. S.) 50.

(3) 24 C. 281; 1 C. W. N. 229; 12 Ind. Dec. (N. S.) 854.

(4) 11 C. W. N. 903.

(5) 7 C. 56; 5 Ind. Jur. 525; 3 Ind. Dec. (N. S.) 586.

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Limitation Act, deals with instalment bonds and has nothing whatever to do with instalment decrees. But here we are concerned with an instalment decree and not an instalment bond. So how am I beyond time? Article 152, clause 7, applies to instalment decrees. The decree being an instalment decree, the decree-holder is entitled to the immediate payment of the whole amount or to the recovery of the money by instalments, *vide Chunder Komal Das v. Bisassuree Dassia* (1).

Babu Girda Prasanna Sanyal for Babu Atul Chandra Gupta, for the Opposite Party, was not called upon.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the opposite party to shew cause why the order complained of should not be set aside. The present applicant is a decree-holder. He brought a suit on the 10th May 1911 against five persons to recover certain moneys due on a promissory note. The suit was decreed on compromise. The compromise petition was dated the 1st July 1911 and the decree passed on the terms of the compromise was dated the 10th July of the same year. Under the terms of the compromise, it was provided that a certain sum should be paid by each of the various defendants and by instalments and that, default being made in the payment of one of the instalments, the whole amount would become due. The decree itself stated the instalments but it omitted, by an error presumably, to state the condition as to the whole amount becoming due on default being made by the judgment-debtors in the payment of the instalments. An application was made for execution on the 10th July 1914 against all the five defendants. That application was rejected by the learned Judge on the ground that the prayer for execution was not in accordance with the terms of the decree. The present application was then made on the 10th November 1915 against the defendant No. 2 alone and the learned Judge dismissed this application too on the ground that the decree is barred by limitation. Against this order the present Rule has been obtained.

The first point that has been argued is that the Court is not entitled to go be-

hind the decree, but is bound to take the decree and not consider what appears in the *solenamih* or the petition of compromise. The order-sheet shows that the suit was decreed in accordance with the terms of the compromise and it was necessary for the Court, in order to properly understand what the decree was, to look at the terms of the compromise. That being so, the Judge was clearly entitled to consider the terms of the compromise.

The next point that was taken was that the application for execution dated the 10th July 1914 was an application made in accordance with law in a proper Court for execution and that, therefore, the limitation was saved by that application. But what happened in that case was that the application was dealt with by the learned Judge under the provisions of Order XXI, rule 17, sub-rule (1) of the Code of Civil Procedure, namely, that the Court having ascertained that the requirements of rules 11 to 14 of the said Order had not been complied with rejected the application. It is clear from the terms of sub-rule (2) of Order XXI, rule 17, that, when a Court rejects an application under Order XXI, rule 17, sub-rule (1), the application in that case shall not be deemed to have been an application in accordance with law, because that sub-rule shows that, when the Court permits an application to be amended and then receives it, the application then and only then can be deemed to have been an application in accordance with law. I am of opinion that in this case the application dated the 10th July 1914, having been rejected under Order XXI, rule 17, sub-rule (1), as not being an application in accordance with law, that application would not be one that would save limitation.

Then the next point that was argued was that, in any case, the decree being payable by instalments, the decree-holder had the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments. In support of that view, the decision of this Court in the case of *Chunder Komal Das v. Bisassuree Dassia* (1) has been relied upon. That decision has not been followed in many cases

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and I prefer to follow the decisions which have taken a contrary view.

In the result, the present Rule fails and must be discharged with costs, one gold mohur.

RICHARDSON, J.—I agree.

Rule discharged.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 105 AND 106 OF 1916.

October 10, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Phillips.

DEVINENI PATTAYYA AND OTHERS—
DEFENDANTS—APPELLANTS IN L. P. A. No. 105
AND

CHELASANI BHADRAYYA AND OTHERS—
DEFENDANTS—APPELLANTS IN L. P. A. No. 106—
versus

KANDUKURI KOTIAH—PLAINTIFF—
RESPONDENT (IN BOTH).

Hereditary Village Offices Act (Mad. III of 1895), ss. 13, 21—Service inam lands, suit for recovery of—Jurisdiction of Civil Court.

A claim for the recovery of lands which are the emoluments of a service *inam*, must be laid before the Collector when the defendants contest the plaintiff's right to the office and allege an independent right in themselves. [p. 918, col. 2.]

In all cases where it is necessary for the plaintiff to allege, for the maintenance of his suit, that the land claimed is an emolument of a service *inam*, the jurisdiction is with the Collector under section 13 of Madras Act III of 1895. Where, however, the claim is to dispossess a trespasser and no question of title is involved, or where the land is claimed as the plaintiff's private property, the jurisdiction of Civil Courts is not ousted. [p. 918, col. 2.]

Kesiram Narasimhulu v. Narasimhulu Patnaidu, 30 M. 126; 16 M. L. J. 514; 1 M. L. T. 381; *Muvola Seetharam Naidu v. Doddi Rami Naidu*, 5 Ind. Cas. 137; 7 M. L. T. 181; 20 M. L. J. 91; 33 M. 208; *Gavura Ramanna v. Adabala Rattayya*, 5 Ind. Cas. 136; 7 M. L. T. 136; 20 M. L. J. 94; 33 M. 235; *Kesaram Narasimhulu v. Vuddanda Narasimhulu Patnayudu*, 16 M. L. J. 333; 1 M. L. T. 102, referred to.

Appeals, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Seshagiri Aiyar, reported as 33 Ind. Cas. 658, in Civil Revision Petitions Nos. 924 and 925 of 1913, presented against the order of the District Court, Kistna at Masulipatam, in Miscellaneous Applications Nos. 28 and 29 of 1912, respectively (preferred against the order of the District Munsif, Bezvada, in Original Suits Nos. 388 and 392 of 1911, respectively),

Mr. V. Ramesam, for the Appellants.

Mr. V. Ramadoss, for the Respondent.

JUDGMENT.—We are unable to agree with the opinion of the learned Judge that the suit in question was cognizable in a Civil Court. Essentially the suit was one to recover the emoluments of a carpenter's and blacksmith's service *inam* and thus the jurisdiction of the Civil Court is taken away by section 21, Madras Act III of 1895. We are of opinion that in all cases where it is necessary for the plaintiff to allege for the maintenance of his suit that the land in suit is an emolument of a service *inam*, the jurisdiction will remain with the Collector under section 13 of the Act. This is the principle laid down in the Full Bench decision in *Kesiram Narasimhulu v. Narasimhulu Patnaidu* (1). In suits where the plaintiff seeks to recover on the ground of a bare trespass and no question of title is involved, as in *Muvola Seetharam Naidu v. Doddi Rami Naidu* (2), or on the ground that the land is his private property, as in *Gavura Ramanna v. Adabala Rattayya* (3), the suit is not based on any cause of action arising out of the plaintiff's right to recover the property as an emolument of an office; and in such cases the Civil Court's jurisdiction may not be ousted. In such cases it is not necessary that the plaint should contain any mention of the fact that the land is an emolument of an office. But in the present case it was declared in the plaint that the plaintiff and his ancestors had been enjoying, as of right, the carpenter and blacksmith *inam* and had been rendering service in connection therewith, and that when the plaintiff demanded the defendants Nos. 1 to 4 and 7 to 9 to deliver over possession of the land, they ignored his right and intimated to him that defendants Nos. 7 to 13 had an independent right to the property. Where, as in the present case, the defendants set up a rival claim to the office, it is obviously necessary for the claim to be adjudicated by the Collector

(1) 30 M. 126; 16 M. L. J. 514; 1 M. L. T. 381.

(2) 5 Ind. Cas. 137; 33 M. 208; 7 M. L. T. 181; 20 M. L. J. 91.

(3) 5 Ind. Cas. 136; 33 M. 235; 7 M. L. T. 136; 20 M. L. J. 94.

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and not by a Civil Court. Mr. Ramadoss argued from the second proviso to section 13 that in a case where it is not disputed that the emoluments of the office consist of land, a suit will always lie in the Civil Court, because in such a case it is not necessary for the Collector to assume that the assignment of revenue constitutes the emoluments. This view found favour with Subramanya Aiyar, J., in *Kesaram Narasimhulu v. Vuddanda Narasimhulu Patnayudu* (4) and he consequently was of opinion that in all cases where the emoluments of the office consist of the land itself, the suit should be brought in the Civil Court. Moore, J., who sat with him did not agree in this view and when the case came up on appeal before three Judges in *Kesaram Narasimhulu v. Narasimhulu Patnayudu* (1), the opinion of Subramanya Aiyar, J., was overruled.

We allow these appeals with costs and restore the order of the District Judge, which supported the view of the District Munsif, that the suits were cognizable by the Revenue Court and that the plaint should be returned for presentation to such Court.

Appeals allowed.

V.R.P.

(4) 16 M. L. J. 333; 1 M. L. T. 102.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 134 OF 1916.

January 15, 1916.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

ABDUL BARY SADAGAR—PLAINTIFF—
APPELLANT

versus

BELAYAT ALI SADAGAR—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 5 (b), 6 (b) — Surety, withdrawal of—Order permitting withdrawal without notice to parties, effect of—Recission of order, legality of—Continuing guarantor, position of—Contract Act (IX of 1872), s. 150.

A person who stands surety for a judgment-debtor under Order XXXVIII, rule 5 (b), Code of

Civil Procedure, cannot withdraw from the guarantee at any time by simply giving notice of his intention not to be a surety any longer. [p 90, col. 2]

Raj Narain Mookerjee v. Ful Kumari Debi, 29 C. 68; 6 C. W. N. 7, distinguished.

An order of a Court discharging a surety without notice to the parties can be rescinded on the application of any of the parties. [p. 920, col. 2.]

Obiter.—Where the guarantee is a continuing one the surety may withdraw as to any future transaction, but where a surety has given a guarantee to cover a definite case he cannot simply by a notice to the creditor withdraw the guarantee so as to nullify altogether the effect of the security. [p 92, col. 2]

Appeal against the order of the District Judge, Chittagong, dated the 14th January 1916, affirming that of the Munsif, 2nd Court at that place, dated the 17th July 1915.

FACTS material to the report will appeal from the judgment.

Babu *Dwarkanath Chakrabarty* (with him Babu *Chandra Sekhar Sen*), for the Appellant.—The question is whether the surety could be discharged at all; at any rate, if the surety could be discharged at all, whether the Court could do so without any notice to the decree-holder.

There is no provision in the Code for discharging a person who stood surety under Order XXXVIII, rule 5, though there is provision for discharging a person who stood surety for the appearance of a defendant (see Order XXXVIII, rules 2 and 3).

Section 130 of the Indian Contract Act is not applicable to the present case as the section only applied to a continuing guarantee, but in the present case the surety has given a guarantee to cover a definite case. Even assuming the guarantee to be a continuing one, the section only contemplates future transactions.

The case of *Raj Narain Mookerjee v. Ful Kumari Debi* (1) is not at all applicable to the present case. There the surety was discharged as to future transactions.

Moreover the Court had no jurisdiction to pass the order behind my back.

Babu *Khitish Chandra Sen*, for the Respondent.—The Court can discharge a surety (see Order XXXVIII, rule 3).

The case of *Raj Narain Mookerji v. Ful Kumari Debi* (1) is applicable to the present case, as the discharge there related to both present and future transactions.

(1) 29 C. 68 6 C. W. N. 7.

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At any rate when the Court had discharged the surety by its order and there was no appeal from that order, the decree-holder cannot make my client liable. The order is binding between the parties.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of Chittagong dated the 14th January 1916, affirming the decision of the Munsif of the same place. The appellant before us obtained a decree for money against one Nawab Ali. The respondent to the appeal was a person who stood surety for the judgment debtor Nawab Ali for the amount of any decree that might be passed against the judgment debtor. A case of that nature is no doubt a simple case; but in view of what happened in the Courts below the matter seems to have created some difficulty. The decree-holder, who is the appellant before us, made an application under the terms of order XXXVIII, rule 5, Code of Civil Procedure, for attachment before judgment. A Rule was issued and it was made absolute in the ordinary terms that unless the defendant gave security to the satisfaction of the Court for the amount of any decree that might be passed against him in the suit, his property should be attached. The defendant did give security, the surety being the present respondent to this appeal. Subsequently, on the 17th August 1914, the respondent, the surety, made an application to the Judge to be released from his security-bond. The Judge heard that application without issuing notice to the plaintiff, the present decree-holder, and made an order on the 15th August 1914 "that the defendant do file fresh security-bond for the same amount of money within a week, in default, the plaintiff's application for attachment before judgment may be granted. The plaintiff and his Pleader are absent. The surety be released from the terms of the security-bond." The order seems to have been made without notice to the plaintiff, who obviously had a considerable interest in the matter. Upon coming to know of that order, the plaintiff applied to the Judge to annul that order and the Judge on the 4th September 1914 annulled the order till the hearing of the matter, and it is obvious from another order of the same date that the defendant

had failed to give any further security and the order of the 15th August was treated as annulled. The learned Judges in the Courts below seem to have considered that, in a case of this nature, the surety could withdraw from the guarantee at any time by simply giving a notice that he intended not to be a surety any longer. In my opinion that is not so. Section 130 of the Indian Contract Act only says that a continuing guarantee may be revoked at any time as regards future transactions. It is a well known class of cases and there have been many cases in the English Courts in which a surety has been allowed to withdraw, where the guarantee has been found to be a continuing guarantee, which the guarantee in the present case is not, as to any future transaction. But no case has ever established that where a surety has given a guarantee to cover a definite case, he can simply by a notice to the creditor withdraw the guarantee so as to nullify altogether the effect of the security. The decision in *Raj Narain Mookerjee v. Ful Kumari Debi* (1) has got nothing to do with this case at all. That decision shows that the guarantee that was given by the surety in that case was, in fact, a continuing guarantee and that the surety could withdraw not absolutely from the guarantee but with reference to any future transaction. That has got nothing to do with the point raised in this case. The Judge in the case, having made the order without notice to the other side that the surety could withdraw from the security, was obviously competent to rescind that order on the application of the plaintiff, the present decree-holder. He did do so, the effect being, as it ought to be, that the security given by the present respondent for the amount of any decree that might be passed against the defendant stands good and is a valid security. In my opinion, the decisions of the Courts below are wrong. We ought, therefore, to reverse them and allow the appeal with costs both in this Court as well as in the lower Courts. We assess the hearing-fee at fifty rupees.

RICHARDSON, J.—I agree. The order of the 15th August 1914 discharging the respondent was, as I understand, made without notice to the plaintiff. That order was at the best suspended by the order of the 4th

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September 1914 and it was never revived. So far as I can see, the Courts below were wrong in law in the conclusion that they came to that the respondent had been, in fact, discharged.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 5 OF 1913.

August 31, 1915.

Present:—Mr. Stuart, A. J. C., and Mr.

Syed Mohammad Ali, A. J. C.

Sheikh WALI MUHAMMAD AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat DAULAT-UN-NISSA, DECEASED,
AND AFTER HER DEATH MUNIR AHMAD,
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Pauper-plaintiff paying Court-fee pending enquiry—Muhammadian Law—Will, acceptance of terms of, effect of—Estoppel.

Where a plaintiff applies in good faith for leave to sue as a pauper but, on his application being opposed, pays in the necessary Court-fee pending an enquiry into his pauperism, limitation runs against him only up to the date of filing the application and not up to the date of paying in the Court-fee [p 923, col. 2.]

Stuart Skinner v. William Orde, 2 A. 241; 4 Sar. P. C. J. 31 6 I. A. 126; 4 C. L. R. 331; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 68; *Jankahary Sukul v. Janki Koer*, 28 C. 427 and *Amjad Ali v. Sarfaraz Ali*, 4 O. C. 250, followed.

Abbasi Begam v. Nanhi Begam, 18 A. 206; A. W. N. (1896) 33; 8 Ind. Dec. (N. S.) 547, dissented from.

If a person entitled to succeed as an heir to a deceased Muhammadan who has left a Will, accepts the provisions of the Will and derives benefits thereunder, he is estopped from subsequently repudiating it and claiming the benefits of the Muhammadan Law of succession. [p 924, col. 1.]

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 23rd October 1912.

Syed Zahur Ahmad, for the Appellants.

JUDGMENT.—Appeals Nos. 5 and 9 of 1913* are concerned with questions of succession to the estate of a certain Mir Muhammad, who died on the 27th November 1899. It is agreed that Mir Muhammad was married to a certain Hakima Bibi, by whom he had two sons, Wali Muhammad and Amir Ahmad Raza, and that he eventually married a certain Daulat

or Daulat un-nissa, by whom he had two legitimate sons called Munir Ahmad and Muhammad Raza and two legitimate daughters called Zubaida and Amina. He also had by Daulat-un-nissa four daughters called Zahida, Mukima, Wasila and Obedia. On the one side it is stated that these four daughters were born before their parents were married. On the other side it is stated that they were born in lawful wedlock. Mir Muhammad purchased a 4-annas share in the village of Ashrafpur in the name of his son Wali Muhammad, and he purchased a 3-annas 4 pies share in the same village in the name of his son Amir Ahmad Raza. Two years before the death of Mir Muhammad he executed a Will on 15th November 1897. Under the terms of this Will he confirmed the possession of Wali Muhammad and Amir Ahmad Raza over the shares in Ashrafpur which stood in their names and certain other plots of land which had been similarly purchased on their behalf. Mir Muhammad had purchased a 4 annas share in Ashrafpur in his own name. Under the terms of the Will he bequeathed a share of two annas, that is to say, half the share purchased in his own name to Munir Ahmad and the remaining share of two annas to Muhammad Raza. The interests in the village of Ashrafpur were divided in this manner. The remainder of his landed property, interests in mortgages, houses money and household goods, were divided under the terms of the Will into four equal shares to which his four sons succeeded. He deliberately excluded both his widows and his daughters from any share in the property, but he provided under the terms of the Will that the sons should support their mothers in suitable comfort, that the daughters should be supported in a similar manner from the income of the estate so long as they remained unmarried, that arrangement should be made for their marriages, and that a sum of Rs. 500 should be spent on the occasion of the marriage of each daughter. If the widows were unable to live happily in the family, provision was made for a small income to be settled upon them in event of their separation and if the daughters became widows or were ill-treated or neglected

*See *Infra* page 926—Ed.

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by their husbands, their brothers were to take them back into the family circle and support them or to give them a small allowance for their separate maintenance. The terms of this Will did not exclude the women of the family from reasonable benefit and, as we read them, left it an open question whether it would be for the greater benefit of a widow or a daughter to accept the advantages secured to her under the terms of the Will, or to reprobate its provisions and claim the share due to her under the Muhammadan Law. In the case of an intelligent and shrewd woman who could invest her capital, secure the proceeds of her investments, and manage her property to advantage, it would certainly have been better for her to reprobate the terms of the Will and insist on her rights under the Muhammadan Law of succession. But in the case of a woman who felt her incapacity to control a small capital, the prospect of securing a comfortable position for her life being placed beyond the possibility of want, and having nothing to fear from her own errors of judgment, might well be held sufficient reason for accepting the terms of the Will. Decision would largely depend on personal idiosyncrasies, and whereas one might be well advised in reprobating the terms of the Will, another might be equally well advised in approbating them. After the death of Mir Muhammad the whole of the family appear to have accepted his last dispositions and to have been perfectly contented to abide by them. But on the very last day within which such suits could be brought under the law of limitation, practically all the surviving members of the family instituted suits for their shares according to the provisions of the Muhammadan Law. It has been explained to us that the sons brought these suits as a precautionary measure, although they were satisfied with their position according to the provisions of the Will. They feared, however, that, if they did not bring these suits and the Will were found to be invalid, they might be deprived both of their rights under the Will and their rights under the law of succession. In the end most of the parties have arrived at arrangements which have satisfied them. Both two appeals have arisen against the decision of the

learned Subordinate Judge who decided the case.

The first is appeal No. 5, which is brought by Wali Muhammad and Amir Ahmad Razi against the decision of the learned Subordinate Judge awarding Daulat or Daulat-un-nissa a share in the property under the provisions of the Muhammadan Law. After the institution of this appeal Daulat-un-nissa died and she is represented by her children as respondents. No appearance has been put in on their behalf and the appeal has been argued against them *ex parte*.

The second is appeal No. 9, which has been brought by Zahida Bibi, Mukima Bibi and Obeda Bibi, whose claims were dismissed by the learned Subordinate Judge on the finding that they were not born in lawful wedlock but had been born to Daulat-un-nissa before her marriage with Mir Muhammad. The facts so far stated are common to both appeals.

We now proceed to decide appeal No. 5 of 1913. The first point taken by the learned Counsel for the appellants is to the effect that the suit is barred by limitation. The plaintiff originally applied for leave to sue as pauper. Her application was opposed and before it was decided whether she was or was not a pauper, she paid in the necessary Court-fee. There has been no decision on her application for leave to sue as a pauper. On the date that she paid in the Court-fee the period of limitation for the suit had expired. Their Lordships of the Privy Council decided in the case of *Stuart Skinner William Orde* (1) that where a person, being at the time a pauper, petitioned under the provisions of Act VIII of 1859 for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtained funds which enabled him to pay the Court-fee and his petition was allowed upon such payment to be numbered and registered as a plaint, his suit should be deemed to have been instituted from the date when he filed his pauper petition, and limitation ran against him only up to that time. In *Ahbasi Begam v. Nanhi Begam* (2) a Bench of the Allahabad

(1) 2 A. 241; 4 Sar. P. C. J. 31; 6 I. A. 126; 4 C. L. R. 331; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 685.

(2) 18 A. 208; A. W. N. (896) 33; 8 Ind. Dec. (N. S.) 843.

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High Court [distinguished that decision and held that, where a person applied for leave to sue as a pauper for the recovery of certain dower alleged to be due to her and, upon her right to sue as a pauper being disputed by the persons proposed by her in her application for leave to sue as a pauper as defendants to the suit, paid into Court the Court fee necessary for a regular suit to recover the amount claimed, her suit was barred by limitation, because on the date when she paid in the Court-fee the period of limitation had expired. The learned Judges who decided this suit distinguished the ruling of their Lordships of the Privy Council on the grounds that the case of *Stuart Skinner v. William Orde* (1) was decided under a prior Code of Civil Procedure, and that it was decided apparently to some extent on the belief that there was a practice in the Courts in India which justified what had taken place in that case. They were of the opinion that the provisions of Act XIV of 1882 differed materially from the provisions of Act VIII of 1859 upon the point. The question came up again in the case of *Janakdhary Sukul v. Janki Koer* (3), before a Bench of the Calcutta High Court. The learned Judges who decided that case dissented from the view taken by the Allahabad High Court in the case of *Abbasi Begam v. Nanhi Begam* (2). They considered that the language of section 310 of Act VIII of 1859 was substantially the same as the language of section 413 of Act XIV of 1882, except that the words "unless precluded by the rules for the limitation suits" were excluded from section 413. The exclusion of those words in the latter Code appeared to the learned Judges not to strengthen the argument upon which the Allahabad decision proceeded. They decided that in such circumstances the period of limitation would run from the date of application for leave to sue as a pauper.

We have now to deal with the third Code. The provisions of section 413, Act XIV of 1882, have been reproduced in Order XXXIII, rule 15, of the present

Code and there is no substantial difference between the words of the present Code and the words of the previous Code. We have examined the general provisions of Act VIII of 1859, upon the subject and we are satisfied that the law as it is upon the point in no way differs materially from the law as laid down in Act VIII of 1859. The principles laid down in *Stuart Skinner v. William Orde* (1) govern the present case. These principles were applied in the case of *Anjad Ali v. Sarfaraz Ali* (4). Their Lordships laid down that if there had been no fraud on the part of the plaintiff in filing his petition to be allowed to sue as a pauper, the limitation should run from the date of filing the petition to sue as a pauper. We find that in this case the plaintiff committed no fraud, and that her application to sue as a pauper was made in good faith. We agree with the decision in *Janakdhary Sukul v. Janki Koer* (3) and decide the point of limitation against the appellants.

The next point raised is that *Musammât Daulat-un-nissa*, having accepted the provisions of the Will, is debarred from asserting her rights under the Muhammadan Law of succession. We find on the evidence that *Musammât Daulat-un-nissa* became guardian of her sons Munir Ahmad and Muhammad Raza, who were then minors, and that, as guardian of her sons, she accepted the benefits of the Will on their behalf. She remained guardian from 1899 to 5th September 1904, and on the evidence she received the income of their portion of the estate on their behalf, and shared in the benefits of that income. Further she is proved to have lived at the expense of her sons, that is to say, to have lived out of the income of the estate from the date of the death of Mir Muhammad up to the date of her own death. If she had contested the Will both on her own behalf and on behalf of her sons, she would have reduced the shares of her sons to their shares under the Muhammadan Law, that is to say, they would have obtained a share of 7/20ths in the total property. Instead of this they obtained

(3) 28 C. 427.

(4) 4 Q. Q. 250.

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a share of 4 annas out of 11 annas and 4 pies in the village of Ashrafpur and a share of one half in most of the remaining property. If she reprobated the Will on behalf of herself and her sons, they ran the risk of obtaining less than 4 annas in the 11-annas and 4-pies share in Ashrafpur and nothing in the other plots purchased in the names of Wali Muhammad and Amir Ahmad Raza. For the Courts might have decided that the 4-annas share purchased in the name of Wali Muhammad was his separate property, and that the share of 3 annas and 4 pies purchased in the name of Amir Ahmad Raza was his separate property and that neither of those shares came into the succession. They might have decided similarly with regard to the other plots purchased in the names of these persons. If such were the case, her sons would have obtained a share of 7/20ths out of 4 annas in Ashrafpur instead of the whole of the 4-annas share and in any circumstances they would have obtained only 7/20ths instead of one-half in most of the remainder of the property. Thus her acceptance of the benefits of the Will may well have conferred a substantial benefit upon her minor sons. That benefit would have been greater or less according to the decision of the Courts as to the title of the shares in Ashrafpur and in certain plots purchased in the names of Wali Muhammad and Amir Ahmad Raza. The Subordinate Judge decided the point against Wali Muhammad and Amir Ahmad Raza, but his decision is open to question; but owing to the view that we take it is not necessary to decide the point. In any case her minor sons gained by accepting the terms of the Will and she as their guardian accepted that benefit on their behalf. Further as we have already noted in a previous portion of this judgment, she obtained a substantial return for foregoing her rights under the law of succession. She obtained a secured income, a secured position in the family, and a sheltered life up to the date of her death. In those circumstances we do not agree with the learned Subordinate Judge that she did not assent to the provisions of the Will. We find that she accepted the provisions of the Will not only on behalf of her minor sons

but also on her own behalf, and that it was not open to her on the date on which she instituted the suit to reprobate the terms of the Will and claim the benefits of the Muhammadan Law of succession. In those circumstances her suit should have been dismissed for this reason alone.

We accordingly allow this appeal and direct that the suit of Daulat-un-nissa shall stand dismissed. Her heirs shall be liable to pay the costs of Daulat-un-nissa in the lower Court. The appellants are allowed their costs in both Courts to be obtained from such assets as may have been left in the hands of the heirs of Daulat-un-nissa from her estate.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 591 OF 1916.

December 5, 1916.

Present:—Mr. Justice Jwala Prasad.

GHASITA SINGH—APPELLANT

versus

Musammât BHAGMANI KOER AND ANOTHER
—RESPONDENTS.

Ejectment, suit for—Plaintiff to prove his title—Burden of proof.

In a suit for ejectment a plaintiff must succeed on the strength of his own title and cannot rely upon the weakness of the defendant's title. [p. 92f, col 2.]

Appeal against the decree of the Sub-Judge, Arrah, dated the 14th March 1916, affirming that of the Additional Munsif, Sasaram, dated the 23rd December 1914.

Mr. Sarat Chandra Mukerji, for the Appellant.

Rai Tribhuvan Narain Sahni, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for declaration of his title to and for recovery of possession over a house. The house in dispute belonged originally to one Lila Sonar. He sold it to Musammât Pooyia on 23th March 1893, by a registered sale-deed. The plaintiff alleges that Musammât Pooyia had purchased the house out of the funds of her father Hardeyal and not out of her husband's money, and that he purchas-

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ed the house from *Musammot Pooyia* by a *kobala* dated January the 2nd, 1912. The plaintiff alleged that the defendant No. 1 is occupying the house as a tenant of the plaintiff on a rent of 4 annas a month and had no right to the house beyond that of a tenant and that after the death of *Musammot Pooyia* the defendant No. 1 is asserting her own claim to the house and is refusing to vacate it. *Musammot Pooyia* was the widow of one Madho Sonar. *Musammot Bhagmania*, defendant No. 1, is the second wife of the said Madho Sonar. Defendant No. 2, Ram Dass Sonar, is the minor son of Madho Sonar by his second wife defendant No. 1. They are in possession of the house.

On the above allegations the plaintiff brought this suit in the Court of the Munsif of Sasaram to recover possession of the house from the defendants. The defendants resisted the claim of the plaintiff on the ground that the house in dispute did not belong to *Musammot Pooyia*, the vendor of the plaintiff, that it was purchased by Madho Sonar with his own funds in Pooyia's name and that *Musammot Pooyia* had no right to sell the house to the plaintiff and the plaintiff's *kobala* of the 2nd of January 1912 was executed without any consideration. The defendants further claim to be in possession of the house as heirs of Madho Sonar.

The Munsif decided issue No. 7 against the plaintiff. This issue is: "Whether the *kobala* dated the 2nd of January 1912, in favour of the plaintiff is made for consideration or not, and whether it was good and binding or not?" The learned Sub-Judge in appeal has accepted this finding of fact of the first Court and it must be accepted as conclusive by this Court in second appeal. The plaintiff has, therefore, failed to prove his title based on the sale-deed of the 2nd of January 1912 executed by *Musammot Pooyia*, and cannot succeed in a suit for recovery of possession. It is, however, argued that as the first Court has held that *Musammot Pooyia* was not the *benamidar* of Madho Sonar, the husband of *Musammot Pooyia*, the plaintiff's vendor, which finding has not been rebutted by the learned first Appellate Court, the property in dispute was the *stridhan* of *Musammot Pooyia* and hence

the defendants have no right in the property as not being the heirs to the *stridhan* of Pooyia. This contention is unsound.

In the first place the findings of the Munsif do not warrant a conclusion that the property in dispute is the *stridhan* of *Musammot Pooyia*. The Munsif held that the consideration money of the *kobala* was paid by Madho Sonar, the husband of *Musammot Pooyia*, and not by *Musammot Pooyia* or her father Hardeyal, as alleged by the plaintiff. The fact that *Musammot Pooyia* was not the *benamidar* of Madho Sonar does not go to show that it was the *stridhan* of *Musammot Pooyia*. It is neither the case of the plaintiff nor is there any finding of fact that the money with which the property was purchased, or that the property purchased, was given as an absolute gift to *Musammot Pooyia* by her husband. All that the Munsif says is that "it is undisputed law that a husband's gift of immoveable property to a wife does not make the said property to be her *stridhan*." This is a statement of law about which the Munsif may be right or wrong. But there is no finding anywhere that there was any absolute gift to the wife. The house was purchased by *Musammot Pooyia* with the money of the husband. She is dead. The house has, therefore, been inherited by the defendants, the widow and the son of Madho Sonar, and they are rightly in possession of the same.

In the second place, even if it be *stridhan* of *Musammot Pooyia* the plaintiff, who does not claim to be the heir of *Musammot Pooyia*, cannot evict the defendants, howsoever weak their title to the property may be. In a suit for ejectment the plaintiff must succeed on the strength of his own title and cannot rely upon the weakness of the defendants' title. It has concurrently been held by both the Courts below that the plaintiff has failed to prove his title based on the *kobala* set up by him. The suit has been rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

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 OUDEH JUDICIAL COMMISSIONER'S
 COURT.

FIRST CIVIL APPEAL NO. 9 OF 1913.

August 31, 1915.

Present:—Mr. Stuart, A. J. C., and
 Mr. Mohammad Ali, A. J. C.

Musammāt ZAHIDA BIBI AND OTHERS—
 PLAINTIFFS—APPELLANTS

versus

WALI MUHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Muhammadian Law—Legitimacy—Acknowledgment of
 parentage—Treatment,*

It is open to a Muhammadan to legitimatise an illegitimate child by acknowledgment of his paternity, but to establish such legitimation it is necessary to prove an intention evidenced by a formal and deliberate act. [p. 932, col. 1.]

Khajah Hidayat Oollah v. Rai Jan Khanum, 3 M. I. A. 295, 1 Sar. P. C. J. 282; 18 E. R. 510; *Mahomed Baiker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum*, 8 M. I. A. 136; 3 W. R. (P. C.) 37; 1 Suth. P. C. J. 400; 1 Sar. P. C. J. 728; 19 E. R. 481, *Rook Begum v. Shahzadah Walagowhur Shah*, 3 W. R. 187, *Ashrafodd Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan*, 11 M. I. A. 4; 7 W. R. 1; (P. C.); 1 Suth. P. C. J. 659; 2 Sar. P. C. J. 223; 20 E. R. 37; *J. P. Wise v. Sunduloonissa Chowdranee*, 11 M. I. A. 177; 7 W. R. 13 (P. C.); 1 Suth. P. C. J. 667; 2 Sar. P. C. J. 249; 20 E. R. 18, *Bibee Nujeeboonissa v. Bibee Zumeerun*, 11 W. R. 426; *Mahammad Azmat Ali Khan v. Lalli Begum*, 8 C. 422; 9 I. A. 4; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (n. s.) 269; *Sudakat Hossein v. Mahomed Yusuf*, 10 C. 663; 11 I. A. 31; 8 Ind. Jur. 212; 4 Sar. P. C. J. 519; 5 Ind. Dec. (n. s.) 446; *Muhammad Allahdad Khan v. Muhammad Ismail Khan*, 10 A. 289, 6 Ind. Dec. (n. s.) 193; *Abdul Razak v. Aga Mahomed Jaffer Bindanim*, 21 C. 666; 21 I. A. 56; 4 M. L. J. 131; 6 Sar. P. C. J. 389; 10 Ind. Dec. (n. s.) 1074 and *Ghazanfar Ali Khan v. Kaniz Fatima*, 6 Ind. Cas. 674; 32 A. 345; 14 C. W. N. 690 (P. C.); 7 A. L. J. 579; 11 O. L. J. 619; 12 Bom. L. R. 447; 8 M. L. T. 59; 20 M. L. J. 579; 13 O. C. 170, considered.

Where in a case it was found on the facts that a Muhammadan had seduced a maid-servant, who had grown up in his household and was considerably loved by him, had begotten children from her, and had then repaired the wrong by marrying her; that he had given food and shelter to those children; and that in a Will subsequently executed by him he had referred to them simply as his daughters and provided for their maintenance, marriages and support:

Held, that from the above circumstances it could not be inferred that he had intended to legitimatise those children. [p. 932, col. 2.]

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 23rd October 1912.

Mirza Sami Ullah Beg, for the Appellants.

Syed Zakur Ahmad, for Respondents
 Nos. 1 and 3 to 6.

JUDGMENT.—The circumstances in which this appeal has arisen are detailed in our decision of to-day's date in First Civil Appeal No. 5 of 1913* and need not be repeated. We have to consider, whether the learned Subordinate Judge arrived rightly at the decision that Zahida, Wasila, Mukima and Obeda were born to Daulat or Daulat-un-nissa and Mir Muhammad before the two latter became legally married, and are thus illegitimate.

The story told on behalf of the contesting respondents is that Mir Muhammad, who was a retired Government official of respectable standing and of some means and who was married to a lady called Hakima Bibi, took into his house about 1877 a girl of the *Bhat* caste who had been left an unprotected orphan, that she subsequently became converted to the Muhammadan religion and received the name of Daulat, that she worked in the house as a domestic servant and attracted the notice of Mir Muhammad who made her his mistress, and that as a result of this connection the four women whose names have already been enumerated were born to the pair. According to the story, the friends and neighbours of Mir Muhammad were scandalized on account of his connection with the servant woman, and as a result of their protests he subsequently married her by the forms of the Muhammadan religion. After their marriage two sons and two daughters were born to them. This is the story as told by the contesting respondents.

The appellants' case is that their mother was not a *Bhatin*, that she was not an orphan who was taken into the house out of charity but that she was the daughter of a respectable Sheikh, that she was married to Mir Muhammad over forty years ago, and that all of them were born in wedlock. Evidence has been called to support both stories, and the learned Subordinate Judge found that the evidence of the witnesses called to prove the story told by the defendants-respondents established the truth of their allegations. We proceed to examine this evidence.

[After discussing the evidence produced by the parties, the learned Judicial Commissioners proceeded as follow:—]

*See *sheikh Wali Muhammad v. Musammāt Daulat-un-nissa*, 37 Ind. Cas. 921; 3 O. L. J. 647—Ed.

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We have now examined the evidence produced by the respondents and the evidence produced by the appellants, and we have no hesitation in agreeing with the learned Subordinate Judge that the evidence adduced by the respondents establishes the truth of their story, and that the evidence adduced by the appellants does not establish the truth of their story. The learned Subordinate Judge has laid stress on a document (Exhibit No. A 108), which purports to be the draft of a Will made by Mir Muhammad before his marriage with Daulat, in which he describes Daulat as his mistress and refers to the appellants and their deceased sister as his illegitimate children. There is a mass of evidence which we see no reason to discredit, which proves that this document is in the handwriting of Mir Muhammad and it was apparently found among his papers by the respondents. It is not signed by him, but its contents nevertheless go in some way to support the truth of the respondents' story. Apart from that fact, however, we are satisfied on the oral evidence that Daulat was originally a famine orphan, that she resided in the house of Mir Muhammad as a servant, that an illicit connection arose between her and her employer, that the three appellants and their deceased sister were born from that connection, and that Mir Muhammad married Daulat after they had been born. This is our finding on the facts.

The learned Counsel for the appellants has argued that the circumstances that Mir Muhammad treated these four girls as his daughters, that he arranged for the marriages of some of them to men of reasonable respectability, that he provided for their maintenance in his Will, and that he referred them in his Will as his daughters, are sufficient to establish their legitimacy.

With regard to the question of treatment, in so far as it is shown by the circumstances that Mir Muhammad provided these women with food and shelter, that he arranged for their marriages and that he made some provision for their support in his Will, we find that there is nothing in those incidents to show their legitimacy. On the facts that we have found Mir Muhammad was not likely to

have treated the daughters born to him from his wife before marriage in a manner different to the manner in which he would have treated daughters born in wedlock. His connection with Daulat was not a mere casual intimacy. He evidently had considerable affection for her. She had grown up in his household. He seduced her, begot children from her, and then repaired the wrong by marrying her. The fact that he subsequently treated her in an honourable manner and gave her the rights and privileges of a wife would go to show that he would extend a similar treatment to the children born before wedlock, and nothing can be derived from the circumstance that he treated these women in this manner to show that they are legitimate.

The difficult point of acknowledgment in Muhammadan Law has been the subject of many decisions of their Lordships of the Privy Council. The first decision to which we refer is the case of 1844, *Khajah Hiluyt Ollah v. Rai Jan Khanum* (1). Here their Lordships found that the law as laid down by Mr. Macnaghten quoted at pages 317 and 318 is stated correctly. Their conclusion may be summarised in their own words at page 318: "The effect of that appears to be, that where a child has been born to a father of a mother, where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place." At page 323 they stated: "With reference, then, to the law, as laid down by Mr. Macnaghten, and which appears to be acknowledged at the Bar to be law: without going into the question of the oral evidence, whether there was an express acknowledgment of the child by Fyz Ali Khan, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment, both of the mother and of the child, for a period of between seven and eight years, under circumstances, in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been

(1) 3 M. I. A. 295; 1 Sar. P. C. J. 282; 18 E. R. 510

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continued, except from the presumption of the cohabitation, and of the son being the issue of the loins of Fyz Ali Khan." Their Lordships laid down in this case that, where a Muhammadan man and woman had been living together as man and wife by common repute, where the woman had been treated by the man as his wife, where her son had been treated as his son, and where there was no insurmountable obstacle on the evidence to a presumption that marriage had taken place, the Courts could rightly presume the existence of such a marriage under the Muhammadan Law. But obviously if there had been direct evidence that a marriage had taken place, and that the child had been born before the date of such marriage, there would be no presumption as to that child's legitimacy.

In the next case, that of *Mahomed Barker. Hossain Khan Bahadur v. Shurfon Nissa Begum* (2), their Lordships of the Privy Council in 1860 decided that according to the Muhammadan Law the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

A Bench of the Calcutta High Court decided in 1865 in *Rook Begum v. Shahzadah Walagowhar Shah* (3) that according to the Muhammadan Law a public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption, the onus of proving the impossibility of the marriage is on the other side.

We now come to a very important case, that of *Ashrufood Dowlah Ahmed Hossein Khan Bahadur v. Hyder Hossein Khan* (4). This case was decided in 1866. The facts were as follows. Hyder Hossein Khan claimed to be the son of Wazir Ameenood Dowlah and a woman who had entered the service of the Wazir as a cook in the days when he held the comparatively unimportant post of *darogha*. A *nuta* marriage had

admittedly taken place between the Wazir and this woman at some period. The question for decision was whether Hyder Hossein Khan had been born before or after the date of that marriage. Their Lordships said at page 111: "It would be an easy matter to legitimize a child conceived before marriage by withholding proof of the time of marriage and resting on an inference from the marriage itself," and they found that although it was proved that Hyder Hossein Khan was the son of the Wazir and this woman, and although the Wazir and this woman had eventually become man and wife, it was not established that Hyder Hossein Khan was the legitimate son of the Wazir. The facts are similar to the facts in the present case, with one exception. Their Lordships found distinctly that there had been no acknowledgment by the Wazir of Hyder Hossein Khan as his son. There was proof of treatment and, to use their Lordships' own words (page 119), "there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the status of a son conceived before marriage." Thus the decision in that case would appear to tell against the claim of the appellants. But the learned Counsel for the appellants lays great stress upon certain words used by their Lordships at page 113, "The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions

(2) 8 M. L. A. 136; 3 W. R. (P. C.) 27; 1 Suth. P. C. J. 40; 1 Sar. P. C. J. 725; 19 E. R. 481.

(3) 3 W. R. 127.

(4) 11 M. L. A. 94; 7 W. R. 1 (P. C.); 1 Suth. P. C. J. 659; 2 Sar. P. C. J. 223; 20 E. R. 37.

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of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Bauker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum* (2) affirms this principle."

We shall discuss later the rule that their Lordships laid down here.

The next case brought to our notice is a decision of their Lordships of the Privy Council in 1867 in the case of *J. P. Wise v. Sunduloonissa Chowdranee* (5). This decision does not lay down any new principle. It lays down the principle already recognised in the previous decisions that, even in the absence of the proof of marriage, the evidence afforded by the conduct of the parties and by the treatment of the alleged wife and children is sufficient to establish the factum of a marriage by a presumption which becomes final being not rebutted.

The next decision is one of 1869 by a Bench of the Calcutta High Court in the case of *Bibee Nujeeboonissa v. Bibee Zumeerun* (6). In this decision Kemp, J., laid down: "According to the Muhammadan Law, a child born out of wedlock, if acknowledged, acquires the status of legitimacy." He gives no authority for this view but was probably following the decision in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4).

The next case is the decision of their Lordships of the Privy Council in 1881, the case of *Mahammad Azmat Ali Khan v. Lalli Begum* (7). In this it is laid down that the acknowledgment and recognition of children by a Muhammadan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negating this relationship are absent; and that the question whe-

ther such acknowledgment should be presumed or not, depends on the circumstances of each particular case. The decision in this case does not touch directly upon the points before us, but it is valuable as showing their Lordships' interpretation of the passages in the case reported as *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4). At page 433 their Lordships stated with reference to that decision: "The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judges below can only be understood by referring to the questions to which they were addressed."

The next case is one of 1883—*Sadakat Hossein v. Mahomed Yusuf* (8). The head-note of the report states as the decision of their Lordships of the Privy Council that the acknowledgment and recognition of a "natural" son by a Muhammadan as his son gives him the status of a son capable of inheriting as a legitimate son; unless certain conditions exist. We do not find that this head-note accurately summarizes their Lordships' conclusions. In that case a certain Selim, who was beyond question the actual son of Amir Hossein by a woman known as Domni, had been recognized by Amir Hossein, so as to give him the status of a son capable of inheriting. It was set up that at the time that Selim was born Domni was the married wife of a man called Jummun, and, if Domni were the married wife of Jummun, Amir Hossein could not possibly have been married to Domni. Their Lordships found that it was not established that Jummun had ever been married to Domni, and, therefore, there was no insuperable bar to the presumption of a marriage between Domni and Amir Hossein before the birth of Selim. They did not find that Selim was the natural son of Amir Hossein, using the word "natural" in the sense of illegitimate. Selim was the son of Amir Hossein and Domni. There was no evidence as to whether the parties had or had not been married. It was an open question. They might have

(5) 11 M. I. A. 177; 7 W. R. (P. C.) 13; 1 Suth. P. C. J. 667; 2 Sar. P. C. J. 249; 20 E. R. 68.

(6) 11 W. R. 426.

(7) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (N. S.) 260.

(8) 10 C. 663; 11 I. A. 31; 8 Ind. Jur. 212; 4 Sar. P. C. J. 519; 5 Ind. Dec. (N. S.) 446.

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been married or they might not have been married, and from the presumption that Selim had been treated by Amir Hossein as his son their Lordships drew the inference that a marriage had taken place between his parents. But they did not lay down the proposition that a person who is proved to be the illegitimate son of a Muhammadan can be legitimated by his father by a subsequent acknowledgment.

In 1888 the whole question was considered very carefully by a Bench of the Allahabad High Court in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (9). Straight, J., discussed in detail the proposition whether the acknowledgment of a son renders that person the legitimate son of the acknowledger under the Muhammadan Law, although the person acknowledged was born out of wedlock. With special reference to the passage in *Ashrufud Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4), which we have already quoted at length, at page 317 Straight, J., interpreted the law as follows:—

"Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth, and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category."

The point was discussed with greater elaboration by Mahmood, J., in a separate judgment. The same passage in *Ashrufud Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4), to which reference has already been made, was considered by that learned Judge, who held at page 333 that it must not be understood loosely in the sense of being an abstract enunciation of

the law applicable to all cases. He goes on to say:—"Illegitimacy under the Muhammadan Law, as indeed under other systems, arises from the absence of a lawful matrimonial relation between the parents of the child; and if illegitimacy which is proved and placed beyond doubt were no impediment to an acknowledgment, there would be no logical reason why the offspring of an adulterous or incestuous intercourse should not acquire the status of legitimate children when acknowledged by the father.

"After having carefully considered the various rulings of the Lords of the Privy Council in the cases to which I have referred, I am of opinion that their Lordships never intended to go the length of laying down the rule that a child who is proved to be illegitimate, either in consequence of marriage between his parents being disproved, or being unlawful, could be legitimated by an acknowledgment. All the cases which their Lordships had before them were cases in which the question of marriage itself was a matter in dispute and involved in obscurity with reference to the legitimacy of the child. In other words, those cases were such as left either the fact or the exact time of the alleged marriage a matter of uncertainty, that is, neither proved nor disproved; and their Lordships in dealing with those cases applied the principles of the Muhammadan Law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance."

The learned Judge enlarged further upon the point, and it is only necessary to quote one or two passages from the remainder of his judgment. He says later:—"Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a proved and established fact. The Muhammadan Law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either

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the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child."

The next case is that of *Abdul Razak v. Aga Mahomed Jaffer Bindanim* (10) decided in 1893. In that case a Muhammadan had lived with a Burmese woman and a son was born to them. This Muhammadan referred to the child as his son on more than one occasion. Now there was no insuperable obstacle to the marriage of this Muhammadan with the Burmese woman. Their Lordships of the Privy Council said at page 678: "The learned Counsel for the respondents did not deny that Abdul Hadi might have married Mah Thai, as no doubt he might have done if she had embraced Islam, nor did they contend that the intercourse between Abdul Hadi and Mah Thai was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word, although there may have been an admission of paternity."

"The learned Counsel for the appellant cited various texts, which, taken apart from the context, would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the status of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board which is clear upon the point. The question arose in the case of *Ashrufud Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4). There it was contended that the claimant, who was defendant in the suit and respondent

(10) 21 C. 666; 21 I. A. 56; 4 M. L. J. 131; 6 Sar. P. C. J. 389; 10 Ind. Dec. (N. S.) 1074.

ent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant, and a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms: 'Has the deed of repudiation the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?' In the course of their judgment (p. 104 of the report) their Lordships comment upon that issue. It was, they said, 'very correctly framed.' It substitutes, for the ambiguous word 'sonship' which might include an illegitimate son, the word 'legitimacy', and uses the word 'acknowledgment' in its legal sense under the Muhammadan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of 'legitimacy as a son.' It is clear that it is in that sense that the term 'acknowledgment' is used in a later passage of the judgment which has often been cited, where their Lordships say, 'a child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, express or implied, directly proved or presumed.'

"It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the appellant is accepted as true in every particular, comes to nothing more than an admission of paternity, which was not intended to have the serious effect of conferring the status of legitimacy. A witness is produced who says he accompanied Abdul Hadi on his second visit to Mangi, and that Abdul Hadi told him that he was going to see his son. And there is some other evidence to the like effect..... Assuming, however, every word that is said about it to be perfectly true, the evidence falls very far short of such an acknowledgment as would confer the status of legitimacy upon an illegitimate child."

This decision appears to determine finally the point raised by the Allahabad High Court in *Muhammad Allah-lad Khan v.*

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Muhammad Ismail Khan (9) and to lay down that even if a child of a Muhammadan father be proved to be illegitimate, he can be legitimated at the will of his father by a subsequent acknowledgment of the child as his legitimate child. But it is necessary that such an acknowledgment should be of a formal nature made by the person who makes it with a full appreciation of its consequences.

There is one more decision of their Lordships of the Privy Council in a case which was decided in 1910, that is, the case of *Qhazanfar Ali Khan v. Kaniz Fatima* (11). In that case a Muhammadan had cohabited for many years with a woman who had originally been a common prostitute and a son was born from this connection. On more than one occasion the father had stated that the woman was his wife. On one occasion he had in the course of a deposition in a suit stated that she was his wife, but it was found that he had done so because he was ashamed to say in open Court that he was keeping a prostitute as his mistress. Their Lordships in this case considered the acknowledgment of no effect, the evidence to be derived from prolonged cohabitation of no value, the fact that two of the daughters of this woman were married to respectable men insufficient to prove legitimacy, and found the son to be illegitimate.

This concludes the authorities, and after their consideration we find that their Lordships of the Privy Council have decided that it is open to a Muhammadan to legitimate an illegitimate child, but that to establish such legitimation it is necessary to prove an intention evidenced by a formal and deliberate act. The only evidence of acknowledgment in the present case is that Mir Muhammad referred to these women in his Will as his daughters. He did not refer to them as his legitimate daughters. He did not do anything more than provide for their maintenance, their marriages and their support. He would have been obliged as a man of honour to provide for their maintenance, marriages and support, even

if they were illegitimate, and there is nothing in the circumstances of the case from which it could be inferred that he intended to legitimate them.

It thus having been proved to our satisfaction that the appellants and their deceased sister were born out of wedlock, and that they had never been legitimated by any subsequent act on the part of their father, this appeal fails. It is dismissed accordingly. The appellants will pay their own costs and those of the contesting respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 672 of 1916.

November 27, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walmsley.

THE CORPORATION OF CALCUTTA—
RESPONDENT—PETITIONER

versus

Srimati NRITYA KALI DASSEY—

APPELLANT—OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), ss. 152, 158, 160—Notice for re-valuation—Fresh notice, necessity of, when altering valuation from one basis to another.

Section 158 of the Calcutta Municipal Act provides only for the issue of a notice for re-valuation and there is no provision in the Act for the issue of a fresh notice when, after hearing objections under section 160, the Chairman alters the valuation already made by him. [p. 934, col. 2.]

Where, therefore, the Chairman of the Calcutta Municipal Corporation, after issuing a notice under section 158 of the Calcutta Municipal Act for the re-valuation of a holding on the basis of the cost of construction and value of land instead of on the rental value, made a certain valuation, and then after hearing objections of the owner, taken under section 160 of the Act, altered the valuation on the rental basis:

Held, that the notice given under section 158 was sufficient and not defective. [p. 934, col. 2.]

Rule against the order of the Court of Small Causes at Sealdah in Municipal Appeal No. 1 of 1916.

FACTS material to the report will appear from the following judgment of the Small Cause Court at Sealdah, to which an appeal was preferred by the opposite party against the valuation made by the Deputy Chairman of the Calcutta Corporation:—

(11) 6 Ind. Cas. 674; 32 A. 345; 14 C. W. N. 690 (P. C.); 7 A. L. J. 579; 11 O. L. J. 649; 12 Bom. L. R. 417; 8 M. L. T. 59; 20 M. L. J. 579; 13 O. C. 170.

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"This appeal is in respect of premises No. 101, Monobur Pookur Road, Ward No. 21. The existing assessment was on an annual valuation of Rs. 245, and it was raised to Rs. 476 on the ground of rental value. The appellant objects to the same on two grounds, viz.—(1) that the notice under section 158 is bad in law, as the ground on which the increase was made had not been stated in the same as required under the section, and (2) that under section 152 there could be no fresh valuation and assessment in March 1916 after the valuation of 1910-11.

The first assessment was in September 1903, when the annual value was fixed Rs. 118. The annual value in 1909 was increased to Rs. 332, but there was an appeal to this Court, and it was found that the increased valuation could not stand. The amount was then reduced to Rs. 245. The time of expiry of the period of six years for that valuation was the 2nd quarter of 1915-16.

The next valuation was on 16th March 1916 and this objection is with regard to the same. On a careful consideration of the section, I am of opinion that the valuation made was in proper time and it is quite clear that the Act authorises the Chairman to revise the valuation and assessment at the end of six years, the time of expiry for the Ward No. 21 being 30th September every sixth year from the year 1903. Thus the Corporation was, in my opinion, quite justified in revising the valuation after September 1915, the time when the valuation of 1910-11 expired [*vide* section 152, clause 2 (c), of Act III of 1899].

The appellant, I think, should succeed on the other ground, and my finding on the point is that the notice under section 158 was not good. The increase was made on the ground of rental value, but the same was not stated in the notice as required. So the increased valuation must be cancelled, and cannot stand.

The appeal is allowed, but the parties shall bear their own costs."

Dr. Dwarkanath Mitter, for the Petitioner.—The Chairman of the Municipality gave notice under section 158 of the Calcutta Municipal Act, No second notice

is provided by the same Act. The first notice was issued under section 158 of the said Act, under which the Chairman wanted to raise the assessment on the residential basis. The Deputy Chairman heard objections and based the valuation on the rental basis. The opposite party ventures to contend that as no fresh notice was issued as to valuation on the rental basis, the suit cannot stand. But under the law no fresh notice is necessary. (Reads section 158.) The opposite party objected under section 160. (Reads sections 160, 161, 162 of the Calcutta Municipal Act.) The Judge says that fresh notice should be given as the Deputy Chairman did not issue fresh notice under section 158. The Judge is obviously wrong, as the Act does not contemplate doing that. Taking the commonsense view of things, a second notice after the alteration to rental basis would be quite useless.

Babu Gunada Charan Sen (for Babu Mohini Mohun Chatterji), for the Opposite Party.—The grounds for the increment of assessment are given in section 151 of the Calcutta Municipal Act. The assessment can be made only on one of these two grounds; Section 158 lays down that the Chairman shall give special notice to owners stating the ground or grounds on which he makes the increase. This notice mentions ground 'b' of section 151 and not ground 'a'. I was asked to meet the case against one under 'b' and not under 'a'. The Chairman does not go into the evidence to alter the valuation to the rental basis. The notice required me to offer evidence, oral or documentary. The Chairman determined the principle in my favour, and altered the residential basis to the rental basis, but did not enter into details.

Dr. Mitter.—He was asked to adduce evidence in favour of his objection.

[CHATTERJEE, J.—If evidence was not produced, then what?]

Dr. Mitter.—The Chairman did not believe the evidence and decided in his own way.

Babu G. U. Sen.—If a fresh notice is served upon me, I shall know the case of the Municipality. (Refers to section 156).

[CHATTERJEE, J.—Where is the provision for fresh notice?]

The ground of increase on the rental basis was not stated in the notice, so there was no

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"good" notice here, at least it was an irregular notice; so a fresh notice was necessary and the law clearly contemplates that.

Moreover, the present assessment has not been made within the time prescribed by the Act. The case did not fall within clause (c) of section 152 and the learned Judge of the Small Cause Court erred in holding that this was a case under section 152, clause (c). I can urge this ground in support of the decree made in my favour by the lower Court. The valuation made by the Calcutta Corporation cannot stand both because the notice was bad and because it was not made within the prescribed time.

JUDGMENT.

D. CHATTERJEE, J.—In this case a certain holding was to be re-valued on the expiry of 6 years from the last valuation. The Chairman of the Calcutta Municipality gave a notice under section 158 of the Calcutta Municipal Act, and the ground upon which the re-valuation was proposed to be made was that the valuation should be on the cost of construction and value of land instead of on the rental value, the premises being now occupied by the owner. The Chairman made a certain valuation, that is to say, fixed a certain value upon which the assessment was to be made. Then under section 160, a notice of objection was given by the opposite party and the opposite party was given a notice by the Chairman to be present with his evidence to be heard at a certain date before the Deputy Chairman. On the date so fixed, the Deputy Chairman made a valuation, accepting the principle for which the objector contended, that is, upon rental value.

Against this, there was an appeal to the Small Cause Court and the learned Judge has held that the notice under section 158 was not good and that, therefore, the increased valuation must be cancelled.

The Corporation has moved this Court for revising the said order of the Small Cause Court, and it is contended on behalf of the Corporation that the learned Judge's view of the law is wrong in that the Calcutta Municipal Act does not contain any provision for giving a further notice after an objection has been decided.

We find that section 158* provides for a notice. Upon that notice, a valuation is made and objections are then taken under section 160. After the decision of objections under section 160, any person dissatisfied with the order passed on his objection may appeal to the Court of Small Causes. The law does not contain any provision for a fresh notice, and this is as it should be; because the object of a notice is to make the party intended to be assessed acquainted with the action that the Municipality is going to take in respect of his holding; and when the Municipality has once given him notice and he has appeared and taken objections and the objections have been decided, no further notice is necessary. His only course is to appeal to the Small Cause Court as provided by section 162 of the Act. We think, therefore, that the notice under section 158 in this case was not defective and that the learned Judge of the Small Cause Court must try the case in due course of law.

Another objection was taken before us that the learned Judge of the Small Cause Court was wrong in holding that this case came within clause (c) of section 152, so that the present assessment was made within time. We think that the contention of the learned Vakil for the opposite party in this case is not sound. In this case the valuation was made in August 1909; and upon objection, and appeal to the Small Cause Court, it was ultimately reduced in 1910. Therefore, the valuation, as originally made, was cancelled and that is sufficient to let in the provisions of section 152 (c).

In this view of the case, we make the Rule absolute and direct that the learned Judge in the Small Cause Court should try the case on the merits in due course of law after considering such evidence as may be adduced by the parties.

We assess the hearing fee at two gold mohurs.

WALLSLEY, J.—I agree.

Rule made absolute; Case remanded.

SAMUNDAR SINGH v. MUKH LAL SINGH.

PATNA HIGH COURT.

SECOND APPEAL NO. 292 OF 1916.

November 30, 1916.

Present:—Mr. Justice Jwala Prasad.
 SAMUNDAR SINGH AND OTHERS—
 DEFENDANTS—APPELLANTS

versus

MUKH LAL SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 25—
 Transfer of Property Act (IV of 1882), s. 111 (g)—
 Landlord and tenant—Ejectment—Forfeiture—Denial
 of landlord's title, what amounts to.*

The denial of a landlord's title by a tenant, in order to involve forfeiture of the latter's interest, must be expressed and not implied and must precede the institution of the suit for ejectment on the ground of denial of title. [p. 937, col. 1.]

Harish Chandra Shaha v. Chandra Mohan Dass, 28 C. 113, relied upon.

Ektabar Sheikh v. Hara Bewah, 8 Ind. Cas. 680; 15 C. W. N. 335; 13 C. L. J. 1; *Sheikh Miadhar v. Rajani Kanta Ray*, 5 Ind. Cas. 708; 14 C. W. N. 339, distinguished.

Appeal against the decree of the District Judge, Patna, dated the 9th December 1915, confirming that of the Munsif, 2nd Court, Patna, dated the 18th January 1915.

Mr. Ganesh Dutt Singh, for the Appellants.

Mr. Baidya Nath Narain Sinha, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the respondents in the Court of the Munsif of Patna for a declaration of their title to the lands in suit and for possession thereof. The lands in dispute consist of survey plots Nos. 951 and 952. They have been recorded in the names of the defendants as their *mukadammi* lands and are admittedly in their possession.

The plaintiffs' case is that the said lands in dispute form part of a 7 *bighas* *mukadammi* land purchased by them under a sale certificate dated the 7th of August 1872, and that the said plots Nos. 951 and 952 along with two other plots bearing Nos. 788 and 950 are held by the defendants as tenants of the plaintiffs at an annual rent of Rs. 9.

The defendants, on the other hand, contend that the lands in suit form part of their own *mukadammi* land of 5 *bighas* and they dispute the title of the plaintiffs to the said lands. The Survey Record of Rights have recorded the names of the defendants as the *mukadammidars* of the lands in suit.

The plaintiffs, therefore, brought this suit for the following reliefs:

(1) That it be declared that the lands in plots Nos. 951 and 952 belong to the plaintiffs as *mukadammidars* of the said lands;

(2) That it be declared that the said lands do not form part of the *mukadammi* lands of the defendants and that the survey entry in respect of the same in favour of the defendants is wrong; and

(3) On a declaration of the title of the plaintiffs over the land in suit as *mukadammidars* thereof, the plaintiffs be awarded *khas* possession of the said lands.

The defendants by their written statement deny the title of the plaintiffs as *mukadammidars* of the land and assert that they do not hold the lands at a rental of Rs. 9, but that they hold only .54 (*decimal*) at a rental of Rs. 4 under the plaintiffs.

Both the Courts below have held that the lands in suit form part of the 7 *bighas* purchased by the plaintiffs at a Civil Court sale in 1872, in respect of which the sale certificate has been produced by the plaintiffs-respondents. The Courts below have also held that the plaintiffs succeeded in this case in proving their title and in rebutting the presumption raised by the Record of Rights in favour of the defendants. On the basis of these findings the Courts below have given a decree in favour of the plaintiffs in respect of the lands in suit and have further directed that the possession over the lands be given to them by ejecting the defendants therefrom. The defendants have appealed to this Court. It is contended on their behalf that the findings of the Courts below are not sufficient in law to rebut the presumption afforded by the Record of Rights and that the sale certificate in itself is no evidence of title of the plaintiffs. No doubt the Courts below have not referred to the evidence in this case but they have sufficiently indicated in their judgments, particularly the Appellate Court, that there was sufficient material on the record to justify them to come to the conclusion that the plaintiffs proved their case satisfactorily and discharged the onus that was upon them of rebutting the presumption of the Record of Rights.

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With a view to satisfy myself as to the correctness of the finding, I have looked into the evidence on the record and find that there is abundant evidence of witnesses of the neighbouring lands as well as of the co-sharers in the village to prove the title of the plaintiffs in these lands. They prove that these lands are part of the lands purchased by the plaintiffs at the auction-sale in 1872 and that the plaintiffs had been in possession thereof as *mukadammidars* and the defendants were mere tenants on the said lands and were paying a rent of Rs. 9 to the plaintiffs. I have no doubt that the Courts below had sufficient material before them to come to the finding of fact that the plaintiffs' title over these lands has been proved and that the entry in the Record of Rights was wrong. The Courts below were, therefore, right in giving a declaration to the plaintiffs of their title over these lands and for possession as *mukadammidars* over these lands. The Courts below have, however, given a decree for ejectment of the defendants and for *khas* possession to the plaintiffs in this case. The order for ejectment is contained in the concluding portion of the judgment of the District Judge, which runs as follows:—

"I thus agree with the Munsif's finding of fact in issue No. 1 and in giving the plaintiffs a decree for ejectment, he was only giving them what they are legally entitled to, *seeing that the defendants denied their title.*"

The order for ejectment has, therefore, been obviously based upon the denial by the defendants of the plaintiffs' title. I have very great doubts as to the correctness of this portion of the order of the Court below. Under section 25 of the Bengal Tenancy Act a tenant cannot be ejected from his holding except in execution of a decree for ejectment passed on the grounds specified in that section. These grounds are:—

(a) That the tenant has used the land comprising the holding in a manner which renders it unfit for purposes of the tenancy.

(b) That he has broken the condition consistent with the provisions of this Act and on breach of which he is under the terms of the contract between himself and his landlord liable to be ejected.

It is thus clear that the denial by a tenant of his landlord's title is no ground for forfeiture of his tenancy under the Bengal Tenancy Act. No doubt under section 111 (g) of the Transfer of Property Act based upon the English Law, a denial of the landlord's title is a ground for forfeiture of the tenant's interest. The introduction of section 136A by Act of 1907 B. C. into the Bengal Tenancy Act will also show that the landlord is entitled only to damages for the denial of his title by his tenant but is not entitled to eject the tenant on account of such a denial.

The learned Vakil for the respondents has referred to a series of rulings on this point, particularly the rulings reported as *Ekabar Sheikh v. Hara Bewah* (1) and *Sheikh Miadhar v. Rajani Kanta Ray* (2). A reference to these authorities will show that they do not bear out the contention of the learned Vakil for the respondents. In *Ekabar Sheikh v. Hara Bewah* (1) in a previous suit on the plea of the tenant-defendant it had already been held that there was no relationship of landlord and tenant between the plaintiff and the defendant, and hence in the subsequent suit for ejectment by the landlord it was held that the plaintiff had forfeited his rights in the tenancy by reason, not of the denial of the landlord's title, but by an adjudication by a Court of Justice in a previous suit which operated as *res judicata*. The same appears to be the principle of the decision in *Sheikh Miadhar v. Rajani Kanta Ray* (2). The tenant had succeeded in a previous suit in resisting the claim of the landlord for rent by setting up a title in himself and denying the title of the landlord. It was rightly held that in a subsequent suit for ejectment the decision in the former suit precluded him from again asserting his right as tenant of the plaintiff. It is thus clear that a mere denial of the landlord's title in the suit itself will not entail a forfeiture of the tenancy.

In this case the plaintiff has admitted throughout in the plaint and in the evidence that the defendants hold these

(1) 8 Ind. Cas. 660; 15 C. W. N. 335; 13 C. L. J. 1.

(2) 5 Ind. Cas. 708; 14 C. W. N. 339.

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lands as tenants up to the present moment on payment of certain rent. The defendants have set up a title in themselves of *mukadammidars*. There is nothing on the record to show beyond the entry in the Survey Record of Rights that the defendants had denied expressly the title of the plaintiffs as landlords previous to the institution of this suit and following the decision in *Harish Chandra Shaha v. Chandra Mohan Dass* (3), I hold that the denial of the landlord's title must be expressed and not implied and that such a denial must precede the institution of the suit for ejectment on the ground of denial of the landlord's title. Several other authorities have been cited in this case, but they are all authorities of a time prior to 1907 when the Bengal Tenancy Act was amended and section 136A was added to it, and I do not think that they apply to this case nor do I think that they go far enough to hold that the denial in the same suit either in the written statement or in the evidence is a denial that will cause forfeiture of the tenant's interest. I, therefore, hold that the plaintiffs in this case are not entitled to get *khas* possession over the lands in suit by ejecting the defendants from the same and I modify the order and decree of the Court below to that extent.

The plaintiffs will, therefore, be entitled to a declaration of their title over the lands as *mukadammidars* and will get possession over these lands of their proprietary interest, but shall not be entitled to eject the defendants who are tenants of the land. The plaintiffs are entitled to get rent only from them. With the above modifications I affirm the decree of the Court below.

The appeal is, therefore, partly decreed with proportionate costs.

(3) 28 C. 113.

Decree modified.

PATNA HIGH COURT.

SECOND APPEAL NO. 1821 OF 1915.

December 5, 1916.

Present.—Mr. Justice Jwala Prasad.

Syed MUHAMMAD ABU ZAFAR—

PLAINTIFF—APPELLANT

versus

RAM PERSHAD KUMAR—DEFENDANT—

RESPONDENT.

Bengal Village Choukidari Act (VI B. C. of 1870), s. 48.—Choukidari chakran land—Settlement with one of several zemindars, validity of.—Jurisdiction.

The Collector has no jurisdiction to settle village *choukidari chakran* land with only one of several *zemindars* under section 48 of Act VI of 1870. [p. 938, col. 2.]

Bejoy Chand Mahatab Bahadur v. Kristo Mohini Dasi, 21 C. 626; 10 Ind. Dec. (N. S.) 1048, followed.

Appeal against the decree of the Additional Sub-Judge, Monghyr, dated the 25th April 1915, modifying that of the Munsif, 2nd Court, Beguserai, dated the 28th May 1914.

Syed Muhammad Tahir, for the Appellant.

Messrs. Baidya Nath Narain Sinha and Sivmandan Rai, for the Respondent.

JUDGMENT.—The dispute in this case is in respect of a *choukidari chakran* land, consisting of 1 *bigha*, 2 *cottas* and 16 *dhurs*. The appellant is one of the *zemindars* of the estate in which the land in dispute is situate. He owns 14 *gandas* share in the said estate. The respondent owns 3 *gandas* share in the estate. The land was transferred to the appellant by the Collector under section 48 of the Village Choukidari Act VI of 1870. The defendant-respondent had taken a settlement of the land in suit from the Collector subsequent to the settlement of it with the plaintiff. The defendant's settlement, however, was cancelled by the Collector at the instance of the plaintiff-appellant. The land is in possession of the defendant by virtue of his purchase against the previous *choukidar* who was in possession of the *chakran* land. The plaintiff has brought this suit for recovery of possession of the land on the basis of the settlement made with him by the Collector under sections 48 to 51 of the said Act. The lower Appellate Court has held that the defendant's possession as an auction-purchaser of the land is invalid as against the plaintiff inasmuch as the previous *choukidar* had no transferable interest in the land in suit.

MUHAMMAD ABU ZAFAR v. RAM PERSHAD KUMAR.

This view is correct. The learned Subordinate Judge has held that the defendant is entitled to remain in possession of the land to the extent of his share in the *zemindari*. This is also correct. He has, however, given a decree to the plaintiff to the extent of 14 *gandas* share in the land in dispute, representing his share in the *zemindari*. The defendant has been allowed to remain in possession of the rest of the land.

The plaintiff has appealed to this Court contending that the lower Appellate Court should have given him a decree for the entire land in suit on the basis of the settlement made with him by the Collector. The respondent has filed a cross-appeal contending that the entire suit should have been dismissed on the ground that the settlement by the Collector was invalid and also because the defendant's purchase in the mortgage decree was good and valid.

I agree with the finding of the lower Appellate Court that the previous *choukidar* had no transferable right in the land and hence the respondent cannot have any right in the land on the basis of his purchase at the auction-sale as against the plaintiff *zemindar* who took settlement of it from the Collector.

As to the validity and the effect of the settlement made by the Collector, I would refer to section 48 of the said Act. This section enacts that all *choukidari chakran* lands shall be transferred to the *zemindur* of the estate or tenure in which such lands may be situate. The Collector is bound to transfer the lands to the *zemindar* of the estate and to no one else. *Vide Bejoy Chand Mahatab Bahadur v. Kristo Mohini Das* (1). The word "*zemindar*" has been defined in section 1 of the Act to mean "the person whose name is registered in general register of estates paying revenue directly to Government as the proprietor of an estate" &c., &c. Both the appellant and the respondent are *zemindars* within the meaning of the term. Under section 14, Act I of 1899 as also under section 13, Act X of 1897, B. C. (General Clauses Act) words in the singular shall include the plural, and *vice versa*. The word "*zemindar*", therefore, under section 48 of the said Act means all the *zemindars* of the estate where there are several. The Collector, therefore, should have

transferred the land to all the *zemindars* of the estate and not to one only in preference to the others. He was bound, therefore, to settle the lands with the defendant to the extent of his share in the estate. As a matter of fact the defendant did take settlement of the land from the Collector, but the Collector cancelled the settlement with him at the instance of the plaintiff. He was willing to take the settlement and the Collector had no right to refuse it. The settlement of the land with the plaintiff of the share of the defendant in the land is without any jurisdiction. The plaintiff has no right to take possession of the land to the extent of the share of the defendant. But the defendant's possession under his purchase at the auction-sale having been held invalid, he is not entitled to remain in possession of the land in excess of his 3 *gandas* share. Other *zemindars* of the estate have not come forward and it is not known whether they were willing or not to take the settlement. They are not even parties to this suit. The plaintiff is entitled to the possession of the land excluding only 3 *gandas* of it which represents the defendant's share in the estate. The settlement of the land with the plaintiff is not invalid in respect of the other shares of the other *zemindars* as the Collector could make settlement of that share with the plaintiff or any body else if the other *zemindars* did not take the settlement, *vide Choukidari Manual* of 1908 by Wheeler, page 46. The decree of the lower Court is upheld to the extent of 3 *gandas* share in the land belonging to the defendants, subject to the proportionate assessment of revenue over the share. The decree of the Court is modified to this extent that the plaintiff shall recover possession of the rest of the disputed land, deducting 3 *gandas* share of the defendants. The appeal is decreed in part with proportionate costs. The cross-appeal is dismissed with costs.

*Appeal decreed:
Cross-appeal dismissed.*

RAMADA SUNDARI MANDAL v. SHYAMA KANTA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1357
OF 1915.

December 5, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Newbould.

Srimati RAMADA SUNDARI MANDAL

AND OTHERS—DEFENDANTS—

APPELLANTS

versus

SHYAMA KANTA CHAKRABARTTY

AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Co-sharer landlords—Partition, suit for, of fraction of joint estate, maintainability of—Transfer of Property Act (IV of 1882)—Homestead lands, tenancy of, whether transferable before passing of Act.*A suit for the partition of a very small portion of a joint estate, in which alone the parties are jointly interested as *putnidars* is maintainable.*Parbati Churn Debi v. Ain-ud-deen*, 7 C. 577; 4 Shome L. R. 46; 9 C. L. 170; 3 Ind. Dec. (N. S.) 920, referred to.

Tenancies from year to year of homestead lands were not transferable except by custom previous to the passing of the Transfer of Property Act.

(10) 21 C. 666; 21 I. A. 56; 4 M. L. J. 131; 6 Sar. P. C. J. 389; 10 Ind. Dec. (N. S.) 1014.

Madhu Sudan Sen v. Kamini Kanta Sen, 32 C. 1023; 9 C. W. N. 895; *Ambica Prasad Singh v. Baldeo Lal*, 36 Ind. Cas. 126; 20 C. W. N. 1113; 1 P. L. J. 253; *Ananda Mohan Saha v. Gobinda Chandra Roy Choudhury*, 33 Ind. Cas. 565; 20 C. W. N. 382, followed.

Appeal against the decree of the Additional Judge, Dacca, dated the 11th March 1915, affirming that of the Subordinate Judge, 5th Court, at that place, dated the 29th of July 1914.

Babus Sarat Chandra Basak and Heramba Chandra Shaha, for the Appellants.

Babu Akhoy Kumar Banerjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition and the appeal is against a preliminary decree passed in the suit. The subject-matter of partition is a small piece of land comprised in a revenue-paying estate. Plaintiff obtained a *putni* in respect of this land from the proprietors owning a 13-annas, 15-gandas share. Defendant No. 1 also was a *putnidar* under the 1-anna, 5-ganda proprietors. The remaining 1 anna belonged to the other defendants. Defendants Nos. 2, 3 and 4 claim a right to the land as usufructuary mortgagees from the old tenant and they further claim that they have been recognized by the proprietors other than those who are the lessors of the plaintiff and the de-

fendant No. 1. The Courts below have given a decree for partition overruling the objections raised by the defendants. Defendants Nos. 1 to 4 have appealed to this Court.

It is contended that the subject-matter of the partition being a very small portion of an estate there ought not to have been a decree for partition. But this is the only property which is jointly owned by the plaintiff and the defendants, and they have no other property in common between them. Defendants are not interested in any other portion of the estate and there is, therefore, no risk of their being subjected to other partition suits as was suggested in the case of *Parbati Churn Debi v. Ain-ud-deen* (1). Defendants obtained a *putni* lease only in respect of their lessors' interest in the land and, that being so, we do not see any reason why the land should not be partitioned.

It is contended on behalf of defendants Nos. 2 to 4 that they are usufructuary mortgagees from the tenants but the finding is that the old tenant abandoned the land.

The last contention is that the land was transferable according to law. But the tenancy was created before the passing of the Transfer of Property Act; and upon the authorities, tenancies from year to year of homestead lands were not transferable except by custom previous to the passing of the Transfer of Property Act. See *Madhu Sudan Sen v. Kamini Kanta Sen* (2), *Ambica Prasad Singh v. Baldeo Lal* (3), *Ananda Mohan Saha v. Gobinda Chandra Roy Choudhury* (4), and the cases referred to therein.

The appeal, therefore, fails and is accordingly dismissed with costs. We assess the hearing fee at Rs. 48.

Let the record be sent down without delay.

Appeal dismissed.

(1) 7 C. 577; 4 Shome L. R. 46; 9 C. L. R. 170; 3 Ind. Dec. (N. S.) 920.

(2) 32 C. 1023; 9 C. W. N. 895.

(3) 36 Ind. Cas. 126; 20 C. W. N. 1113; 1 P. L. J. 253.

(4) 33 Ind. Cas. 565; 20 C. W. N. 322.

BHARAT SINGH v. JAWALI.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 27 OF 1916.

November 23, 1916.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

BHARAT SINGH—DEFENDANT—

APPELLANT

versus

JAWALI AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Appeal, second—Decree dismissing suit but granting permission to bring fresh suit, construction of—Appeal against granting permission to bring fresh suit, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1.

A suit for redemption was deliberately dismissed by the first Court. Plaintiffs appealed and the lower Appellate Court upheld the decree by the following order: "However, in upholding the order of the lower Court, I order that the appellant hereby has permission to sue again when he has collected his evidence provided that this cause of action is still continuing." Defendants appealed against so much of the decree, as purported to permit the plaintiff to bring a fresh suit. A single Judge of the High Court held that no appeal lay treating the appeal as one against an order under Order XXIII, rule 1 of the Civil Procedure Code of 1908. On an appeal under the Letters Patent:

Held, that the decree of the lower Appellate Court could not be treated as an order granting the plaintiff permission to withdraw the suit with liberty to bring a fresh suit, and that, therefore, the appeal to the High Court was not an appeal from an order but an appeal against that portion of the decree of the lower Appellate Court which was in favour of the plaintiffs. [p. 941, col. 2.]

Genda Mal v. Pirbhu Lal, 17 A. 97; A. W. N. (1895) 17; 8 Ind. Dec. (N. s.) 387, distinguished.

Appeal under section 10 of the Letters Patent, against the decree of Mr. Justice Knox, dated the 1st February 1916.

FACTS.—The plaintiffs brought a suit for redemption. The Munsif dismissed the suit on the ground that there was no evidence of the existence of any mortgage. The plaintiffs appealed to the District Judge, who confirmed the decree of the Munsif, but gave them permission to bring a fresh suit. The plaintiffs acquiesced in this order which was incorporated in the decree; but the defendants appealed to the High Court on the ground that permission to institute a fresh suit could not be given as there was no formal defect in the frame of the suit. The learned Judge before whom the appeal came on for hearing remitted certain issues for trial to the lower Court. On receipt of the findings,

the respondent for the first time raised a preliminary objection to the effect that the District Judge's order being one under Order XXIII, rule 1, no appeal lay to the High Court. The learned Judge acceded to this contention and dismissed the appeal. The defendants then preferred an appeal under section 10 of the Letters Patent.

Mr. S. K. Dar (for the Hon'ble Mr. Narain Prasad Asthana), for the Appellant.—The suit is on foot of an old mortgage. It has been instituted by certain speculators. The Munsif dismissed the suit as the mortgage was not proved. The lower Appellate Court had no justification to make an order allowing permission to the respondents to institute a fresh suit. The provisions of Order XXIII, rule 1, Civil Procedure Code, do not apply to the facts of the present case. There was no application, written or oral, for permission to withdraw from the suit. Moreover, the Judge expressed an opinion on the merits and the order was incorporated in the decree itself. It follows, therefore, that the defendant had a right of appeal.

Mr. N. Upadhyaya, for the Respondents.—The sole question is whether the defendants could appeal against an order passed under Order XXIII, rule 1, Civil Procedure Code. The order was not happily worded, but all the same it is an order giving permission to the plaintiffs to institute a fresh suit. The propriety of that order cannot be questioned by way of appeal.

[RICHARDS, C. J.—Plaintiffs cannot withdraw the suit because it has been actually dismissed. The Code gives no such power.]

We must take it that the Judge meant to set aside the order of dismissal when he gave permission.

[RICHARDS, C. J.—You did not appeal against this decree.]

I rely on *Genda Lal v. Pirbhu Mal* (1) and *Jogadindro Nath v. Sarut Sunduri Debi* (2).

[RICHARDS, C. J.—How can you bring a fresh suit, when this suit stands dismissed?]

Mr. S. K. Dar was not heard in reply.

JUDGMENT.—The facts connected with this appeal are shortly as follows:—The

(1) 17 A. 97; A. W. N. (1895) 17; 8 Ind. Dec. (N. s.) 387.

(2) 18 C. 322; 9 Ind. Dec (N s) 215.

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plaintiffs claimed to be the purchasers of the equity of redemption under an alleged mortgage, dated about the year 1877. When they brought their suit they altogether failed to prove their mortgage. The Court of first instance dismissed the suit on this ground. No application was made by the plaintiffs for permission to withdraw their suit with liberty to bring a fresh suit. On the other hand they appealed alleging that there was sufficient evidence to prove the mortgage; *secondly*, that the Court ought to have allowed them time to produce evidence. *Thirdly*, that the Court had taken a wrong view as to the burden of proof. *Fourthly*, (the same as the second,) that they should have been allowed further time. The Court of first appeal after considering these grounds gave judgment stating that the plaintiffs had been guilty of great *laches* and that he saw no reason for allowing the appeal. The judgment goes on: "However, in upholding the order of the lower Court, I order that the appellant hereby has permission to sue again when he has collected his evidence provided that this cause of action is still continuing." The judgment was followed by a regular decree which provides that the decree of the Court of first instance was upheld, but that the plaintiff had permission to sue again when he had collected his evidence. The plaintiffs did not appeal against this decree but the defendants appealed against so much of it as purported to permit the plaintiff to bring a fresh suit. When the appeal came before a learned Judge of this Court he referred certain issues, the finding on which was that the plaintiffs had come into Court without proper proof and they had disclosed no sufficient reason for not having their proof ready. The learned Judge of this Court, however, has held that no appeal lay, treating the appeal as one against an order under Order XXIII, rule 1. The defendant has preferred this appeal under the Letters Patent and contends that there has been a decree dismissing the plaintiff's suit, that there has been no order allowing the plaintiffs permission to withdraw the suit with liberty to bring a fresh suit, and that, as a matter of fact, the plaintiffs neither applied to withdraw their suit nor were granted permission to withdraw. It

seems to us that this contention has force. The Court of first instance deliberately dismissed the plaintiffs' suit. The lower Appellate Court upheld that decree. The result is that the plaintiffs' suit has been finally dismissed by both the Courts and the plaintiffs have preferred no appeal against the dismissal in the lower Appellate Court. The appeal to this Court was not an appeal from an order granting the plaintiff liberty to withdraw—it was an appeal against that portion of the decree which was in the plaintiffs' favour. Reliance is placed on the case of *Genda Mal v. Pirbhay Lal* (1). In that case the facts were quite different. The suit came before a Munsif and the plaintiff applied for permission to withdraw his suit with liberty to bring a fresh suit. The Munsif declined to give the permission and made a decree dismissing the suit. The plaintiff appealed and urged in the lower Appellate Court that there was sufficient ground for granting him permission to withdraw his suit and that the Munsif ought to have granted him that permission. The Court of first appeal thought that the contention of the plaintiff was right and that the Munsif ought to have allowed him to withdraw from the suit. He, therefore, set aside the Munsif's decree dismissing the suit and granted the plaintiff permission to withdraw with liberty to bring a fresh suit. It was against that order that an appeal was preferred to the High Court which held that no appeal lay under the circumstances. This was the only point that was decided in that case. In our opinion, it is quite impossible to treat the decree of the lower Appellate Court in the present case as an order granting the plaintiff permission to withdraw his suit with liberty to bring a fresh suit. If we are right in considering it a decree, an appeal clearly lay. We allow the appeal, set aside the decree of this Court and also of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

PRIYANATH MITTER v. ANATH NATH DEV.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2763
AND 2927 OF 1913.

December 12, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walmsley.PRIYANATH MITTER AND ANOTHER—
DEFENDANTS NOS. 1 AND 3—APPELLANTS
*versus*ANATH NATH DEV.—PLAINTIFF,
ANNADA PROSAD BOSE—DEFENDANT
No. 2—RESPONDENTS.*Bengal Tenancy Act (VIII B. C. of 1885), s. 87—
Landlord and tenant—Abandonment of holding—
Waiver of abandonment, suit for rent, whether amounts
to—Appeal, second—Adverse possession, plea of,
whether open in second appeal.*

Abandonment can be found without any reference to section 87 of the Bengal Tenancy Act, as the Act does neither lay down that an abandonment by a tenant can only be made according to the procedure prescribed by section 87 nor does it confine the tenant to that procedure [p. 944, col. 1.]

A suit for rent against a tenant, after he has abandoned the lease, without any knowledge of the abandonment on the part of the landlord, cannot operate as a waiver of the abandonment. [p. 944, col. 2.]

The question of adverse possession is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. [p. 944, col. 2.]

Appeals against the decree of the District Judge, 24-Parganas, dated the 28th July 1913, reversing a decision of the Subordinate Judge, 24-Parganas, dated the 29th June 1912.

FACTS material to this report are as follows:—

The land in suit is a garden situated in the suburbs of Calcutta of which Anath Nath Dev is the landlord. In January 1885 Anath granted a lease for eleven years to Priyanath. Fani is a brother-in-law of Priyanath and his case is that he took the lease jointly with Priyanath—although his name was not mentioned in the lease. In 1890 Priyanath and Fani let out the land to Annada. In 1908, Anath sued Priyanath for rent, as he had not realized any rent from him since 1898, and then found on enquiry that Priyanath was not in possession. He, thereafter, tried to take *khas* possession, and he sent his *Darwan* and servants for that purpose—who plucked some flowers from the garden. Annada who was then in actual possession settled the matter with Priyanath, and attorned to him directly for

the land taken from him. Thereafter Anath brought this suit to eject Priyanath on the ground of abandonment and Fani as trespasser—while Priyanath and Fani brought a suit after notice to eject Annada on the ground that he was only an under-*rai*yat. In the pleadings Priyanath and Fani claimed to have acquired a right of occupancy to the lands in suit. The first Court dismissed the suit of Anath against Priyanath and Fani and decreed that of Priyanath and Fani against Annada. On appeal to the District Judge, the decision of the first Court was reversed. Hence this second appeal by Priyanath and Fani.

Sir Rash Behari Ghose (with him Babus Sarat Chandra Roy Chowdhury, Biraj Mohan Mazumdar, Tarakeshwar Pal Chowdhury, Dwijendranath Monkerjee and Satya Charan Singha), for the Appellants.—Upon the learned Judge's own finding, Priyanath, the defendant No. 1, never abandoned the holding so as to entitle the plaintiff to re-enter on the land. It is clear from the evidence on the record that lease was granted by the defendant No. 1, Priyanath, to the defendant No. 2, Annada, and the latter has been in possession of the holding under the settlement taken from the former. This means that the defendant No. 1 is in occupation of the holding by letting it out. That defendant No. 1 failed to pay rent to the plaintiff for several years is not by itself sufficient to hold that there has been an abandonment. This is clear from the wording of section 87 of the Bengal Tenancy Act. The question whether or not there had been an abandonment by the defendant No. 1, must be decided in the light of the law laid down in the Bengal Tenancy Act. [Refers to *Ram Pershad Koeri v. Jawahir Roy* (1).]

The second point is that even assuming that the defendant No. 1 did abandon the holding, the plaintiff has by his conduct waived his right to re-enter on that ground. By suing the defendant No. 1 for rent in 1908 the plaintiff acknowledged the existence of a subsisting lease. After that he should not be allowed to turn round and to re-enter upon the land on the ground of his tenant's abandonment. After he had obtained a decree for rent against the defendant No. 1, the

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decretal amount was deposited in Court by Fani on behalf of the defendant No. 1, Priyanath, and the money deposited was withdrawn by the plaintiff. After having so acted, the plaintiff cannot claim re-entry on the ground of the tenant's abandonment. The plaintiff has by his own conduct waived his right to re-entry on that ground.

The third and the last point is that the present suit is barred by limitation.

Babu Surendra Chandra Sen, (with him Sir S. P. Sinha, Babus Amarendra Nath Bose, Provosh Chandra Mitter, Narendra Kumar Bose), for the Respondents.—The question of limitation was not taken in any of the lower Courts.

Sir Rash Behari Ghose.—But the question may be taken at this stage if it can be decided on the face of the pleadings.

Assuming for the sake of argument that there was abandonment, the abandonment having taken place twelve years prior to the institution of the present suit, the suit is obviously time-barred. Plaintiff's right to recover possession has been completely extinguished by the operation of the Statute of Limitation. [Refers to the observation of Jenkins, C. J., in *Prohabati Dasi v. Taibaturinessa Chaudhuri* (2).]

Then again, the lease was expressly granted for agricultural and horticultural purposes, and it is an undeniable fact that it is being used for horticultural purposes. So the learned District Judge is obviously wrong in holding that the Transfer of Property Act is applicable to this case, and Bengal Tenancy Act has no application. The learned Judge in the Court of Appeal below ought to have found that Priyanath and Fani acquired a right of occupancy to the holding in question.

Sir S. P. Sinha.—Apart from the question of limitation raised for the first time here, the appeal is obviously concluded by findings of fact arrived at by the lower Appellate Court. It finds that no relationship of landlord and tenant exists between the plaintiff and the defendant No. 1. This is a finding of fact which is conclusive in second appeal. [Refers to *Sarat Chandra Roy Chowdhury v. Ratubuddin Mandal* (3).]

(2) 20 Ind. Cas. 664; 17 C. W. N. 1088 at p. 1092; 19 C. L. J. 62.

(3) 17 Ind. Cas. 227; 16 C. L. J. 271.

As regards *abandonment*, the lower Appellate Court has found that there has been an abandonment of the holding. Abandonment is a question of fact and not of law. In England it is a question for the Jury. So the finding of the Court of appeal below on this point is conclusive.

[CHATTERJEE, J.—Why did the plaintiff sue Priyanath for rent up to 1908? What is the effect of the decree against Priyanath?]

Because prior to that we were not aware of the fact of abandonment. That is very clear from the finding of the lower Appellate Court. The learned Judge finds that Fani was in possession not as a tenant but as a trespasser. My suing Priyanath for rent does not get rid of the fact of abandonment. Abandonment is a finding of fact on the evidence and not a point of law. It cannot be questioned in second appeal.

Then it has been argued on behalf of the appellant that the plaintiff has waived his right to re-enter. But the question arises when did I come to know of my right to re-enter. No question of waiver can be raised unless it is found that the plaintiff did know of the fact of abandonment at the time of the institution of the rent suit against Priyanath in 1908. In the absence of any such finding the question cannot be raised for the first time in second appeal.

Then it has been argued (though for the first time in second appeal) that the plaintiff's suit is barred by limitation. Considering the nature and scope of the suit and the facts found the question of limitation cannot arise. Up to 1908 the plaintiff had no knowledge that Priyanath had abandoned the holding. He came to know of that fact in the course of the rent suit in 1908. So his cause of action arose then and then only. Hence the suit cannot be time-barred. [*Prohabati Dasi v. Taibaturinessa Chaudhuri* (2) distinguished]. The plea of limitation is not on the pleadings. It is not possible to decide this question upon the evidence on record. No such question can arise with reference to the scope and nature of the present suit. [Refers to *Jadu Nath Belet v. Raj Narain Mukherjee* (4).]

Babu Sarat Chandra Roy Chowdhury, in reply.—Abandonment is not a question of fact

(4) 19 Ind. Cas. 884; 17 C. W. N. 459.

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in India although it may be otherwise in England. The question is whether there has been an abandonment in law, and this question must be decided according to the provisions of the Bengal Tenancy Act.

JUDGMENT.

S. A. No. 2763 of 1913.

Three points were argued in this appeal; *first*, that the case was governed by the Bengal Tenancy Act and, therefore, Priyanath had occupancy rights and the plaintiff cannot ignore him and ask for *khas* possession; *secondly*, that, on the findings, no abandonment is made out and that even if it can be said that there was an abandonment, the abandonment had been waived by the suit for rent brought by the plaintiff in 1908; and *thirdly*, that upon the findings, the suit for recovery of possession against Fani is barred by limitation.

The learned Judge has found that Priyanath abandoned the lands immediately after the lease, that is about 1885.

It is contended, *first*, that no abandonment under section 87 of the Bengal Tenancy Act is made out; and, *secondly*, that if there was an abandonment, it had been waived.

The learned Judge has found abandonment without any reference to section 87 of the Bengal Tenancy Act and we think that he had every right to do so. There is nothing in the Bengal Tenancy Act which lays down that an abandonment by a tenant can only be made in accordance with the procedure prescribed by section 87. That section lays down a certain procedure to be adopted by the landlord under certain circumstances; it does not confine the tenant to that procedure. The tenant can give up the land; he can cut off all connection with the land; there is nothing to prevent him from doing it. Upon the facts and in the circumstances of the case, the learned Judge has found that Priyanath took no interest in the lease and abandoned the lands. Thus we have a sufficient finding so far as this case is concerned. If he abandoned the lands, then no question under the Bengal Tenancy Act arises; for then he cannot have acquired any right of occupancy, nor can he depend upon the same.

As regards the suit of 1908, the plaintiff's plea is that he was ignorant of what had taken place with regard to this land, and

that in order to make out a waiver, it must be found that the plaintiff brought the suit of 1908 with full knowledge of the abandonment that had been made by Priyanath before that time. There is no finding in this case that the plaintiff had knowledge of the abandonment. That being so, there cannot be said to have been a waiver by the plaintiff of the abandonment that is found to have taken place immediately after the lease.

This disposes of the first and second grounds.

The third ground is that if Priyanath abandoned in 1885 or thereabouts, and if Fani has been in possession ever since, then Fani's possession is adverse and he has acquired a statutory title by that possession. This plea, however, was not raised in any of the Courts below. In this Court it was not taken in the grounds of appeal but was taken with notice to the respondent. If it had been a pure question of law independent of any finding of fact, it would have been open to us to consider it and to give it effect. The question of adverse possession, however, is a mixed question of law and fact. We do not know what evidence would have been produced by the parties if the plea had been taken in the Courts below. It may be that the possession was not adverse, because Fani did never deny any body's title. This being so, we do not think that it would be proper to give effect to this plea without further evidence on the point; and since the plea has been taken at a very late stage of the case, we do not think that an opportunity should be given to re-open the whole case and let in fresh evidence. This disposes of the third ground.

In this view of the case, we dismiss the appeal with costs.

S. A. No. 2927 of 1913.

This appeal is governed by the same reasons as in Second Appeal No. 2763 of 1913. The title of Priyanath failing, his right of eviction also fails. This appeal also is dismissed with costs.

Appeal dismissed.

MOTI RAIJI v. LALDAS JIBHAI.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 49 OF 1915.

September 28, 1916.

Present:—Mr. Justice Beaman and
Mr. Justice Heaton.MOTI RAIJI—DEFENDANT NO. 2—APPELLANT
versus

LALDAS JIBHAI AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Surrender of estate to reversioners—Acceleration, when valid—Alienation and acceleration, distinction between—Legal necessity—Adoption—Adopted son, rights of, to question alienations before adoption—Maxim 'a man cannot take advantage of his own fraud,' applicability of.

There are only two ways in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has, the one is by acceleration, the other by alienation for legal necessity. [p. 946, col. 1.]

The notions conveyed by the said two terms are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration. [p. 947, col. 2; p. 954, col. 2.]

The true doctrine of acceleration, which has been incorporated with the general body of Hindu Law by the decision of the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal*, 19 I. A. 30; 19 C. 236; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603, is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this, that a Hindu widow enjoying the normal Hindu widow's life-estate may, if she please, surrender it in favour of the next reversioner, and, if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life-estate should be entirely withdrawn and not merely a fractional part of it. [p. 947, col. 2; p. 948, col. 1.]

Behari Lal v. Madho Lal Ahir Gayawal, 19 I. A. 30; 19 C. 236; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603, dissented from.

For the purposes of an alienation, if the widow is to convey more than her life-interest, it must be for purposes of legal necessity. [p. 948, cols. 1 & 2.]

The consent of the reversioners to a Hindu widow's alienation is no more than a factor in the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but *per se* it will not be sufficient to do away with all other proof. [p. 948, col. 2.]

Nobokishore Surma Roy v. Hari Nath Sarma Roy, 10 C. 1102; 5 Ind. Dec. (N. S.) 737, disapproved.

The maxim that 'a man shall not take advantage of his own fraud' is quite distinct from the doctrine of estoppel. Two things have to be looked at in applying the maxim, (1) whether the person against whom this maxim is sought to be used has ever committed any fraud at all; (2) whether assuming that he has committed constructive fraud, that has given him any advantage in the particular issue he is contesting. The maxim applies to a great number of

cases in which there need be no estoppel at all. [p. 951, cols. 1 & 2.]

An adoption will not divest estates vested before it was made. The adopted son can, however, question an alienation as void and not binding on him as and from the date of his adoption, as an alienation requires for its validation legal necessity. [p. 953, col. 2; p. 954, col. 1.]

One B, a Hindu widow, having mortgaged her husband's estate in 1893 to 1st defendant, the plaintiffs as next reversioners sued in 1893 for cancellation of the mortgage. The matter was referred to arbitrators, who in December 1894 drew up an award whereby (1) plaintiffs were to redeem the mortgage on payment of Rs. 1,700 to 1st defendant and the latter was to reconvey the properties to them; (2) out of the properties so reconveyed the plaintiffs were to give to the widow a house and 18 *bighas* of land for her maintenance. Nothing, however, was done upon the award for many years, nor did the parties get it made a rule of Court. The 1st defendant, mortgagee, sub-mortgaged the property for Rs. 1,000 to one D and under that mortgage he attorned to the latter. In 1906 the widow sued to redeem the mortgage, ignoring the award. That suit was dismissed on the ground that by the award there was no right of redemption in the widow. About this time, plaintiffs obtained a conveyance of the properties from 1st defendant which they got compulsorily registered. Under its terms they redeemed the sub-mortgage to D, but the 1st defendant refused to deliver the properties to the plaintiffs. In 1909, the widow adopted the 2nd defendant, the son of 1st defendant, and the properties were delivered to him by the latter. Plaintiffs instituted the present suit for possession, alleging that the effect of the award was an acceleration of their rights and that the subsequent adoption of 2nd defendant could not defeat the estate already vested in them. They also alleged that the adoption was a fraudulent act of defendants acting in concert to defeat plaintiffs and that 2nd defendant could not be permitted to take advantage of his own fraud:

Held, (1) that the award of 1893 was in no sense an acceleration as the entire interest of the widow did not pass to the plaintiffs, but there was provision for the immediate restitution to her of a substantial portion of the property, which violated the fundamental basis of the theoretical doctrine of acceleration; [p. 950, cols. 1 & 2.]

(2) that the transaction could only be regarded as an alienation by the widow, to validate which the plaintiffs were bound to show legal necessity; [p. 948, col. 2; p. 950, col. 2.]

(3) that the 2nd defendant, as adopted son of the last male owner, was entitled to question the alienation as being void against him as from the date of his adoption; [p. 954, col. 1.]

(4) that as the adoption was legal *per se*, the resort to it as a means of asserting one's rights did not amount to fraud and the Court could not consider the meanness about the line of conduct pursued by the 1st defendant to get his son adopted by the widow. [p. 953, col. 1; p. 954, col. 2.]

Anant Sitrambava Pujari v. Ramchandra Atmaram, (1897) P. J. 273; *Hillaya Subbaya Hegde v. Narayanappa Timmaya*, 12 Ind. Cas. 913; 36 B. 189; 13 Bom. L. R. 1200, referred to.

MOTI RAJJI v. LALDAS JIBHAI.

Appeal under the Letters Patent from the decision of Mr. Justice Batchelor in Second Appeal No. 473 of 1914, confirming the decree passed by the District Judge, Broach, in Appeal No. 13 of 1912, reversing the decree passed by the first class Subordinate Judge, Broach, in Civil Suit No. 253 of 1910.

Mr. G. K. Parekh, for the Appellants.

Mr. G. S. Rao, for the Respondents.

JUDGMENT.

BEAMAN, J.—There are only two ways, we think, in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has, the one is by acceleration, the other by alienation for legal necessity. In the present case, limiting the contest to the appellant, defendant No. 2, and the plaintiffs, there can be no question of legal necessity. Both have pleaded at various stages that the original alienation by the widow, Bai Lala, of the year 1893 was without consideration. It does not lie, therefore, in the mouth of the plaintiffs now to contend that that alienation was for legal necessity.

The only question remaining to be answered is whether as a result of the alienation of 1893, the widow accelerated her estate in favour of the plaintiff. In order to make what follows clearer, we shall briefly state the material facts upon which this question arises.

Bai Lala, the widow of one Rajji, was left in possession of a widow's estate in all his property. He died leaving no issue. In 1893, Bai Lala mortgaged the whole estate to one Bechar for a sum of about Rs. 3,500. Almost immediately the plaintiffs, who claimed to be the next reversioners, and in the course of all subsequent proceedings appear to have been admitted to be so, brought a suit to set aside this alienation on the ground that it was a hollow transaction, and that the widow had received no consideration. The suit was, on the face of it, premature, since at that time it may be doubted whether the plaintiffs had any *locus standi*. But with that we are not now concerned. What actually happened was that the matters in dispute were referred to arbitration, and an award was given by the arbitrators out of which all the subsequent rights of the parties *inter se*

are held to have flowed. That award was not brought into Court or converted into a decree, but it has been confirmed, to some extent at any rate, by a decree of this High Court in the year 1911. In effect the award ordered that the plaintiffs should be allowed to redeem the estate mortgaged to the defendant No. 1 Bechar for a sum of Rs. 1,700, and that on this being done Bechar was to convey the mortgaged estate, not to the original mortgagor Bai Lala, but to the plaintiffs, and that Bai Lala was to surrender all her right, title and interest in it, and that thereupon the plaintiffs in turn were to give to Bai Lala a house and 18 *bighas* of land, out of the estate so re-conveyed to them by Bechar, for her life as maintenance. The award fixed the term within which the plaintiffs were to pay Rs. 1,700 to the original mortgagee Bechar, and that term ended with *Magsar* 1894. Such were the terms of the award. Nothing was done upon it for many years, and it appears that the mortgagee Bechar sub-mortgaged the property to one Desai for a sum which we will state roughly at Rs. 1,000. Under that mortgage Bechar attorned to his mortgagee Desai, and at a very much later period Desai actually brought a suit to recover one year's rent from Bechar and got a decree. That was somewhere in the year 1907, long before which the other transactions had occurred which we will now mention.

Between 1894 when the time limited by the award had expired, and the year 1906, all parties interested in the award appear to have rested on their rights, and taken no steps to enforce them. About that period the widow Bai Lala brought a suit to redeem the mortgage, ignoring the award and the suit in which it had been given. That was the case which came up ultimately on second appeal to this High Court in the year 1911, and was decided by a Bench consisting of Chandavarkar and Heaton, JJ. Those learned Judges limited their conclusion most strictly to this, that the effect of the award had been to transfer the equity of redemption from Bai Lala to the plaintiffs; and, therefore, that her suit to redeem must fail. I neglect any *obiter dicta* in the judgment of Chandavarkar, J.,

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which go beyond this conclusion. At or about the same time the plaintiffs bestirred themselves and attempted to obtain a conveyance from Bechar of the whole mortgaged property. This was about the month of April 1906. Bechar refused to consent to the registration of this conveyance, although he admitted that he had executed it. The plaintiffs got it registered. In this conveyance we find a term authorising the plaintiffs to redeem out of the sum of Rs. 1,700, which they had under the award to pay to Bechar, the sub-mortgagee Desai, and this they appear to have done early in the year 1907, and obtained for themselves a reconveyance from the sub-mortgagee, including of course such landlord's rights as had come into being between the sub-mortgagee Desai and the original mortgagee, Bechar under the latter's mortgage to the former. In 1909 or thereabouts, the widow Bai Lala appears to have adopted the present defendant No. 2, who was the natural son of the original mortgagee. The plaintiffs appear to have taken no steps under their conveyance to regain possession of the property, nor did they then or at any time before the institution of this suit pay to the original mortgagee Bechar Rs. 700 which were still due to him under the award, in which this payment had been made a condition precedent to calling upon him for a reconveyance, and so obtaining possession of the mortgaged property. Before this suit was instituted, it would appear that defendant No. 1 Bechar made common cause with his natural son, defendant No. 2, appellant here, and his guardian the widow Bai Lala, and let defendant No. 2 into nominal possession at least of the mortgaged property by the widow his guardian. Thereupon the plaintiff brought this suit to recover possession of the mortgaged property under the award of 1893, and was resisted by the defendant No. 2 who is the appellant here. The appellant, defendant No. 2, has set up a title paramount both to that of the mortgagor and the mortgagee, treating the plaintiff under the award of 1893 as mortgagor. His contention is that the whole transaction of 1893 was a hollow sham, and that he as the adopted son of Bai Lala was entitled from the moment of his adoption to challenge, and

making his challenge good, to set it aside. That was the position when the parties went to trial.

We now revert to the first question we have to answer. Was the transaction which resulted from the suit of 1893 an acceleration of Bai Lala's estate in favour of the plaintiffs, the next reversioners? We have been referred to several cases in the Calcutta and Madras High Courts in which the topic of acceleration has been, if not exhaustively considered, glanced at, in connection with another feature of the Hindu Law, which, in the gradual progress of judicial decisions, seems to have got inextricably confounded with it. We are unable to agree with the decisions either of the Calcutta High Court, which appear to us to overlook almost entirely the essential conditions of a true acceleration, or the decision of Sir Sankaran Nair, J., in the Madras Full Bench case of *Rangappa Naik v. Kamti Naik* (1), in which he treats the facts before him as indubitably constituting a true acceleration. In our opinion that was not a case of acceleration at all, as we shall presently show, and neither of the two other learned Judges who made up the Full Bench placed their decision upon that ground.

In order to understand the great confusion of thought that appears to have gathered about the subject, extremely simple in itself, it is necessary to remember that the conflict of judicial authority which has been supposed to exist between the Calcutta and the Bombay High Courts for many years is upon a point which has really nothing to do with acceleration at all. We began by saying that there are only two ways in which a widow in possession of a life-estate can convey a greater interest than that which she herself has, the one being acceleration, the other alienation for legal necessity. A moment's analysis of these legal notions will show that they are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration. The true doctrine of acceleration which has been incorporated,

(1) 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355.

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and speaking for myself, I think very unfortunately incorporated, with the general body of Hindu Law by the decision of the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal* (2) is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this, that a Hindu widow enjoying the normal Hindu widow's life-estate may, if she please, surrender it in favour of the next reversioner and if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life-estate, which prevents the family property taking its normal course and going into the hands of the next reversioners, members of the same family, should be entirely withdrawn. Both theoretically and for obvious reasons of practical policy it is indispensable that this condition should be found to exist. It will not do for a widow, as appears to have been supposed in one judgment at least of the Calcutta High Court, to accelerate a fraction of her life-estate. That is utterly opposed in theory to the English doctrine, which is thus being transferred bodily and made an integral part of the Hindu Law of the joint family. It is also open to the most obvious practical objections, and that is why the Privy Council laying down the limitations of the rule of acceleration in the case of *Behari Lal v. Madho Lal Ahir Gayawal* (2) insist in language, which we do not think could have been made clearer, that for a good acceleration in law it is absolutely necessary that the entire interposed life-estate should have been withdrawn. But what has happened throughout the course of decisions both in Calcutta and Madras has been a blending of a totally different set of considerations with those plain and easily intelligible limitations placed upon the doctrine of acceleration.

For the purposes of an alienation, if the widow is to convey more than the estate which she herself has, that is, an estate co-extensive only with her own life, the rule of Hindu Law from the very first, a rule we believe universal over the whole country,

(2) 19 I. A. 50; 19 C. 236; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603.

has been that such alienation must be for purposes of legal necessity. Now it will be observed that considerations applying to alienations of that kind would necessarily be totally different from considerations applying to a case of true acceleration. For in a case of acceleration the property remains in the family where it was originally acquired, whereas in a case of alienation, if that alienation be shown to have been for legal necessity, the property is finally gone out of the family. That is why rigorous insistence has always been placed by the Courts upon the proof of legal necessity. But in Calcutta from a very early period all the Judges appear to have leaned strongly to the view that any alienation made by a widow, tenant for life, with the consent of the next reversioners would on account of that consent *per se* be a good absolute alienation so far as the reversioners, the original members of the family, were concerned. The reasoning was this, that since the reversioners themselves who were expectant upon the widow's life-estate had consented to her transferring the whole or any part of the property, in which she had that life-estate, to a stranger from whom neither they nor any other member of the family could ever afterwards recover it, the inference must be irresistible that they agreed with the widow that there was legal necessity. The Bombay High Court on the other hand never went that length, and has never fallen into the same confusion which characterises the *dicta* of many eminent Judges both in Calcutta and Madras upon questions which may belong really to the doctrine of acceleration rather than that of alienation for legal necessity. The Bombay view has always been, and speaking for myself, I again say that, in my opinion, it has been logically correct throughout, that the consent of the reversioners to the Hindu widow's alienation is no more, and never ought to be anything more, than a factor in the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but *per se* it will not be sufficient to do away with all other proof. The substitution of the mere consent of the next reversioners for the proof of legal necessity is the main point of difference between the current of decisions

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in Calcutta and in Bombay, and the confusion which has resulted both in the application of the law appropriate to cases of true alienation and in cases which are supposed to be cases of acceleration is easily discernible as soon as the leading cases in Calcutta and Madras are subjected to critical consideration. Thus we find Garth, C. J., and Mitter, J., in one Calcutta case, *viz.*, *Nobokiskore Sarma Roy v. Hari Nath Sarma Roy* (3), stating that inasmuch as it is now an admitted feature of Hindu Law that the widow may accelerate her life-estate in favour of the next reversioner, it is impossible to assert that the consent of the next reversioner to the alienation by the widow, of a part of the whole estate in which she has a life-interest will not validate and make such alienation absolute. So far from that being, in my opinion, a correct statement either of the law or its reason, it is quite easy to show where the fallacy lies. It is one thing for the next reversioners to receive the property into their own hands through any act which is tantamount to the civil death of the tenant for life, but it is a very different thing to say that because this may occur, it necessarily follows that the consent of the next reversioners will validate the absolute alienation to an outsider of the entire estate in which the widow has a life-interest, and that is a point which deserves the more weight if we allow that acceleration may be for valuable consideration. In strictness, speaking for myself again, I doubt whether acceleration proper ought to have any connection with valuable consideration, but in actual practice it would be impossible, I suppose, to draw a line of that kind. Admitting that a widow may accelerate for valuable consideration, it is obvious that if we by a loose analogy extend the doctrine so far as to say that by purchasing for like consideration the consent of the next reversioner she may dispose of the whole estate so as to take it out of the family and hand it over to an outsider, the door is at once thrown wide open to many transactions of extremely doubtful morality. To give an instance which may illustrate my meaning, there might be a young widow left with a life-estate in a great property, and the next

reversioner might be an old man of seventy years of age with no reasonable expectation of surviving her. She might very easily purchase his consent at a nominal figure and sell the entire estate of her deceased husband for a great cash consideration to be spent by her upon her own pleasures and indulgences. Now such a case brings out clearly the radical distinction between true acceleration and alienation. In all accelerations to talk of, the consent of the person in whose favour the acceleration is made is to use words without meaning. Commonly he who is put in possession of an estate immediately for which he might otherwise have had to wait many years will consent, and that consent can have no legal significance whatever; nor is there any distinction to be drawn in cases of alienations for legal necessity, between the alienation of a whole or part of the estate in which the widow has a life-interest. If the necessity goes the length of compelling her to alienate the whole estate, that alienation will be as valid in law as the alienation of a part. But as we began by saying, it is different in a true case of acceleration. For there the indispensable condition is the withdrawal of the entire life-estate, an obstruction which prevents the property taking its normal course, and there can be, in our opinion, no such thing as an acceleration of a part of the life-estate or of a part of the property over which the life-estate extends, although that view has led to very confusing dicta to be found in the judgments both of the Calcutta and Madras High Courts. There is of course no analogy between the case of acceleration which requires the surrender of the entire life-estate and the case of alienation for legal necessity which might cover the smallest fraction or the whole, and yet it appears to have been seriously argued in one judgment, at any rate, to be found in the Calcutta Law Reports that because in case of acceleration the whole life-estate has been withdrawn, therefore, a widow may not alienate for legal necessity anything less than the whole estate in which she has her life-interest. Such a contention, we do not think, was ever made before. It certainly never has been made in this High Court and never seriously been considered here.

(3) 10 C. 1102; 5 Ind. Dec. (N. S.) 737.

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Having thus endeavoured to make as clear as possible the fundamental distinctions between a true acceleration and an alienation for legal necessity, having endeavoured to show that neither in principle nor in practice have they any logical connection with each other, we will return to the facts of the present case, in order to decide whether those facts do reveal and constitute a good case of true acceleration. The learned Judge below has laid down the conditions of acceleration with perfect correctness. So far we are in entire agreement with him. But we do not think that the facts fulfil those conditions. If we look at the award itself out of which this acceleration is said to have arisen, we feel quite incapable of separating its parts and giving it a different construction as a result of this separation from that which read as a whole it seems naturally to bear. What the widow had to do was to surrender her life-interest in the whole of her husband's mortgaged estate to the plaintiff, the next reversioner, upon the plaintiff having redeemed that estate, at about half the figure at which it was mortgaged, from the mortgagee, and thereupon the plaintiff in turn had to restore to the widow what amounts roughly to about one-third of the entire estate, and we cannot allow ourselves to be blinded by mere formulary expressions to the true nature of the entire arrangement contemplated by the parties. That appears to us to be so plain upon the face of the document that it can admit of no serious doubt. The learned Judge below supposed that if consideration were needed for acceleration at all, the consideration to be found here was the redemption of the property by the plaintiffs for a sum of Rs. 1,700. Without going too closely into that, and allowing that it might in one view be regarded as consideration, it is strange that the learned Judge should apparently have overlooked what is so obviously the substantial, natural and true consideration flowing from the plaintiffs to the widow. That, beyond all question or doubt, was the immediate restitution to her for her life of one-third of the entire estate, and we can see no difference in principle between such an arrangement and a reservation at the time

of an intended acceleration by the life-tenant of a substantial interest in the estate so accelerated. Stripping off all verbiage, it comes to this and no more. The widow might have said: "I will surrender two-thirds of my husband's estate to the next reversioner retaining one-third for the remainder of my life." The addition of the word "maintenance" in the award really makes, we think, no difference whatever. The two acts are reciprocal, and the test is simple. If the widow had refused to carry out her part of the agreement, would any Court have compelled her to do so without at the same time compelling the plaintiff to perform his? The result thus arrived at is precisely that which, upon a true application of the principle of acceleration, makes a nominal acceleration of this kind bad and void in the eye of the law. For for reasons of policy, as indicated by their Lordships of the Privy Council, it is absolutely necessary that the widow should withdraw her entire life-estate, this being the only guarantee that the acceleration is genuine, and not made from corrupt motives in order to favour a special reversioner. Entertaining doubt, as I do, of the desirability of ever introducing this doctrine of the English Law into the Hindu Law of this country (I do not think that it ever really was a part of the Hindu Law), I feel no doubt whatever that its application must be confined within the narrowest limits. Any undue loose extension of it might give rise to dishonest transactions and complicated litigation. Whether or not consideration ought to be regarded at all as part of a good acceleration, this much is certain that consideration of the kind we find expressed in this award is really no consideration, but a reservation in the widow's interest of a very substantial part of her original life-estate, and that violates the fundamental basis of the theoretical doctrine of acceleration. In our opinion that alone is sufficient to show that this was in no sense a case of acceleration, and we are not disposed to stretch the law so as to include a single doubtful case, nor do we consider that there are any merits or equities in the plaintiffs' favour which require us to do so.

There remains one other point, and that a point of considerable nicety, to be dealt with before we come to our final conclusion. In the Court of First Appeal, as well as in the

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lower Court, the learned Judges appear to have thought that upon the general ground that no man shall take advantage of his own fraud, the defendant No. 2 cannot in this suit at any rate contest the plaintiffs' claim to possession, and the learned Judge of second appeal relies upon two cases, one of *Anant Sitarambawa Pujari v. Ramchandra Atmaram* (4), decided by Farran, C. J., and Candy, J., and another much more recent case, *Hillaya Subbaya Hedge v. Narayanappa Timmaya* (5), decided by Russell, J., and Chandavarkar, J. In the first of these cases the learned Judges held that the defendant being a tenant of the plaintiff, and having let in fraudulently and collusively the 2nd defendant who denied the landlord's title, the latter could not be allowed to resist the landlord's suit to recover possession, but must first surrender, and then set up any title he had in a separate suit. This proceeds merely upon the ground of constructive estoppel as between landlord and tenant, although their Lordships appear to have put it upon the much wider ground of the maxim that no man shall take advantage of his own fraud.

The second was a case of a mortgagor retaining possession of his land, against whom the mortgagee brought a suit upon the mortgage for possession. The mortgagor was found to have let in another person who claimed by title paramount, and the Courts held that that person could not resist the mortgagee's suit. He was first to give over possession and then sue on his own title. The latter case goes very far and the learned Judges expressly put it upon the ground of estoppel. It is a somewhat confusing case, because there is much in the judgment of the learned Judge who delivered judgment which is difficult to reconcile with the statement of facts upon which the judgment is based. However that may be, assuming that any given case is not one of estoppel, but referable to the general maxim that a man shall not take advantage of his own fraud, there are obviously two points first to be looked at, one is whether the person against whom this maxim is

used has really committed a fraud at all; and the next is whether, assuming that he has committed a constructive fraud, that has given him any advantage in the particular issue he is contesting. Now it is perfectly obvious upon examination not only of the case-law on the subject, but of the theoretical test of the notion embodied in the maxim, compared with that of estoppel, that the two are quite distinct. The maxim applies to a great number of cases in which there need be no estoppel at all. It being remembered that estoppel is always and in strictness no more than a rule of evidence, it is clear that its operation would hardly extend to cases which yet might well fall under the broad equitable maxim. It is easy to put cases of that kind in which there could have been no misrepresentation by the alleged fraud-feasor, in which his conduct may have been throughout wholly unknown to the plaintiff who seeks to shut him out of Court on the ground of his fraud. But there are cases, such as those which I have already mentioned, relied upon by the Courts below in which the two grounds of exclusion may appear to overlap, and certainly are not easy to keep definitely and distinctly apart. That is because of the ease with which a constructive estoppel is raised and entertained by the Courts. Allowing the fullest weight both to the legal maxim and to cases of constructive estoppel, we still have to deal with the facts before us, and we shall deal with them particularly with reference to the two points we have noted, *first*, whether the defendant No. 2 has really been guilty of any fraud at all; *secondly*, whether, if so, that fraud has given him any advantage in the special issue to be determined between him and the plaintiff. This is clearly not a case now of constructive estoppel, such as might be extracted from the mortgagee in possession fraudulently and collusively handing over the security to a third party, knowing that party is not claiming through him and intending to resist the mortgagor, should he seek to redeem, by paramount title. For, as far as we can see, whatever relation between the mortgagor and mortgagee might have been brought into existence by the award of 1893, that must clearly have come to an end, when the

(4) (1897) P. J. 273.

(5) 12 Ind. Cas. 913; 56 B. 185; 13 Bom. L. R. 1200.

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defendant No. 1 Bechar reconveyed the property to the plaintiff by a registered instrument in 1906. The matter has been complicated by the introduction of the sub-mortgagee, and it is only by reason of that introduction that the Courts below appear to have found their way without much difficulty to the conclusion that the original mortgagee Bechar being the plaintiff's tenant, since the sub-mortgagee assigned to the plaintiff, there arises a constructive estoppel against defendant No. 2 who has thus been let into the tenant's possession. That might be so, if we assume that the assignment of the sub-mortgage by Desai to the plaintiffs really conveyed to the plaintiffs any subsisting rights against his own mortgagee, the defendant No. 1. But if we look to the terms of the conveyance itself, and if we look further back to the origin of the rights of the parties in the award of 1893, we find some difficulty in coming to this conclusion. Although in this suit the plaintiff is not ostensibly suing as a mortgagor to redeem, that is the only true legal ground upon which his right in this suit can be placed. Under the award he had the right, we will say, to redeem Bechar on payment of Rs. 1,700, and he had no other right whatever. Accordingly, in 1906, although by that time any right which he may have had on the award of 1893 had long been time-barred, he actually does obtain a conveyance from the mortgagee on consideration of his paying off the sub-mortgagee and at the same time handing over the balance to the original mortgagee. Looked at as a whole then, the result of this transaction appears to be that the payment by the plaintiff to the sub-mortgagee Desai was no more than a payment by the mortgagee's agent to his sub-mortgagee, and any benefit arising from such payment ought certainly to have gone to the mortgagee and not to the plaintiffs, mortgagors. Look at the transaction a little more closely, and it comes to this. The plaintiffs had to pay Bechar Rs. 1,700. Bechar, in anticipation of receiving that sum, reconveys the whole property to the plaintiffs, which we may observe he was not bound to do. Suppose the plaintiffs, Bechar and Desai had all three met together at this time, and pursuant to the true and

honest intent of the parties, the plaintiffs had handed Rs. 1,700 to Bechar, and Bechar thereout had immediately given Rs. 1,000 to Desai, can it be said that the plaintiffs by such a payment would have acquired any of the rights of Desai against Bechar? We think there can be but one answer. We think that that is in effect what happened, though it has been obscured by the forms through which the parties have gone. The money paid to Desai was not in any real sense the plaintiffs' money. It was Bechar's money paid in advance for Bechar, not money paid by the plaintiffs independently on their account to Desai. Therefore, we think that the plaintiffs cannot take advantage of the assignment which Desai then gave them, if they seek to use it adversely to Bechar. We think that the moment Bechar reconveyed the mortgaged estate to the plaintiffs, he ceased to fill the character of a mortgagee at all and in any view can be on no higher footing than that of a lienor for the unpaid balance of the purchase-money. And, speaking for myself, I am not aware that the person so situated would be under any fiduciary obligation to the owner of the property. So far from that being the case, by surrendering the property to another person claiming by title paramount he would only jeopardise his own lien. By this analysis, we have surmounted most of the difficulties arising out of the case-law which doubtless appeared so insurmountable to the two lower Courts of Appeal, and led them to the conclusion that Bechar stood in a fiduciary relation to the plaintiffs, that he betrayed that relation in making over possession to defendant No. 2, and that as a result of that breach of trust defendant No. 2 has gained a substantial advantage by being on the record of this suit at all, and, therefore, must not be allowed to contest the plaintiffs' claim. We think that the whole of that reasoning is erroneous, as we have shown. But even assuming for a moment that there may have been some fiduciary relation, constructive probably, if at all, between Bechar and the plaintiffs, and supposing that that has been used so as to bring the defendant No. 2 upon the record, we should still have to ask ourselves whether in the very definite issue between himself and the plaintiffs, he has gained any advantage what-

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ever. Speaking for myself again, I should doubt it. It is quite true that had this been a mortgage suit, and nothing more (whereas in form it is a suit in ejectment and nothing more), a person claiming by title paramount both to mortgagor and mortgagee finds no place in such a suit. But in a suit in ejectment it may be doubted whether the plaintiff could fairly say that the defendant's position is not stronger here than it would have been had the defendant No. 1 been no more than a transferee since 1906, and gone out of possession and let the defendant No. 2 in. There is a very definite issue to be tried between defendant No. 2 and the plaintiffs, and whether it were tried in this or another suit, I cannot see that the *de facto* possession of the one or the other party would be of the least advantage in obtaining a determination of that issue. The defendant No. 2 comes in as an adopted son claiming to divest from the moment of his adoption the widow's estate, and, therefore, to challenge all alienations made by her. Now the plaintiffs admittedly were not in possession of the property which they sue to recover as mortgagors. They are met by the adopted son claiming to be in possession, and the most that the plaintiffs could say, as far as I can see, would be that but for the defendant No. 2 having been let into possession by defendant No. 1, he could not have appeared in this suit at all. Then at any rate he would have appeared very shortly in another suit, and there could be no question of limitation in the matter, so the issue raised would again have been raised there, and as I said just now the *de facto* possession of one or the other party would have been entirely irrelevant, and certainly could not have given a party so placed any advantage over the other.

Divesting, by an after-made adoption, estate which had in the meantime vested, is a question we should have had to consider had we found that the award of 1893 was a true acceleration. It came in for a good deal of discussion in the course of the argument, and I should like to make one or two observations upon it.

Courts usually answer it uniformly and with much confidence, it may, indeed, be

regarded as settled law, that a subsequent adoption will not divest estates vested before it was made. And the question often takes the awkward and inexact form of whether a given adoption is a valid adoption to the property of the deceased adoptive father.

Such a case as that of an acceleration first taking place, and then the widow adopting, has, we believe, never formed the subject of judicial decision. The point of difficulty is to find any single, clear and uniform principle upon which (a) to rest the law commonly favoured in the Courts where it is a case of after adoption, and (b) to distinguish such a case from that of a posthumous natural son. In the latter case, it could only be on the assumption that his rights arise upon his conception, that he could be put upon a different footing from an after-adopted son. But I doubt whether that ground can be justified in the Hindu Law proper.

Suppose a Hindu begets a son and dies next day. What difference in principle can there be between his case, and that of a son adopted exactly nine months after the death of the adopted father? The rule in the *Tagore case* [*Jotindra Mohan Tagore v. Ganendra Mohan Tagore* (6)] puts after-adopted and posthumous natural sons on the same footing as donees, and exactly the same principle would, it is submitted, have to be applied to cases of the kind we have in view. Reasoning to be found in some of the reported cases against allowing an after-adopted son to divest estates vested in the meantime, will not do. There we find it said that the true reason is that until a widow does adopt no one can say whether she will or not. But it is as true to say that a widow left pregnant cannot say, nor can any one say, whether she will give birth to a child at all, or if she does whether that child will be a son. A son adopted fifteen years after his adoptive father's death would certainly not be allowed to divest estates which during that period might have vested more than once in others. But a posthumous son born a week after his father's death, almost certainly would.

(6) 18 W. R. 359; 9 B. L. R. 377; Sup. Vol. I. A. 47; 2 Suth P. C. J. 692; 3 Sar. P. C. J. 82.

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Yet a very little reflection will show that the element of time has really nothing to do with the operation of any uniform principle rightly applicable to all cases of the kind. Nor upon a rigorous analysis is it easy to discover any ground upon which to distinguish the case of an after-adopted from that of an after-born son.

Holding as we do that there has been no acceleration here, it amounts to this and no more than that there has been an alienation of two-thirds of the property to reversioners, and we are unable to draw any distinction between an alienation to a reversioner and an alienation to a third person. If the alienation be in any true sense an alienation, then it must be governed by the general law which requires for the validation of all such alienations legal necessity, and we have already, we think, given sufficient reasons for holding that in this case legal necessity cannot be said even to be alleged, much less proved, while the doctrine of acceleration will not assist the plaintiffs. The conclusion we have come to upon the whole case is that the defendant No. 2, appellant here, is entitled to resist the plaintiffs' claim as the adopted son, that he is entitled to allege that the widow's alienation of 1893 under the award was not for legal necessity, and as such became void against him at the moment of his adoption. He is, therefore, now, in our opinion, entitled to have that alienation set aside in his favour. We must, therefore, allow the appeal and dismiss the plaintiffs' claim with all costs.

HEATON, J.—I agree in the conclusions arrived at. I feel no doubt whatever in my own mind that this is not a case of acceleration. In the case referred to, *viz.*, *Behari Lal v. Madho Lal Ahir Gayawal* (2), in the judgment of the Privy Council, it is said: "It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances." That clearly brings out the idea that for an acceleration there must be an absolute

annihilation of the widow's interest, as complete as if she were dead. In this case it seems to me from the terms of the award that there was no annihilation of the widow's interest. Far from that there was a securing to her of a life-interest of about a third of the entire estate, and to regard that as an acceleration seems to me the same as allowing to be done by means of a trick or device that which is forbidden by law. Having once arrived at the conclusion that there is no acceleration, we simply have to deal with an alienation. That, I entirely agree, is something different from, and antagonistic to, an acceleration. Having only an alienation to deal with, we have the very common case of an adopted son seeking to set aside an alienation made by his adoptive mother before the adoption and when it is admitted, as it is in this case, that there was no necessity for the alienation, that alienation can be set aside. I also think that the circumstances of the case show that there is nothing in equity which should prevent us from dealing with the defence set up by the defendant No. 2 and deciding the case on that defence if it is made good, as in this case it has been made good. It seems to me quite wrong to describe what has happened as a fraud which has been participated in not by defendant No. 2 himself, for he is a minor, but by his guardian. It is perfectly true that from a certain point of view there might appear some degree of meanness about the line of conduct which defendant No. 1 Bechar, the natural father of the adopted boy, has pursued. Failing to get what he considered his rights by any other means, he adopted the expedient of giving his son in adoption to Raiji's widow Lala. But, however mean a transaction this may appear to be, it is perfectly legal. The adoption is a perfectly good adoption, and converts the defendant N. 2 into the son of Raiji with the rights of a son. So long as the thing is legal, I cannot see that to resort to it as a means of asserting one's rights can be termed a fraud. There is also another point of view. If one were to analyse the conduct of the different parties who have taken

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part in this long series of transactions, the litigation, the devices, the delays, the refusal for years to give effect to the award which had been assented to by all, it seems to me that it is drawing very fine distinctions to single out any one particular party and describe his conduct as fraudulent in comparison with that of the others. For these reasons, and others which my learned colleague has stated much more fully and analytically, I agree in the decree which has been ordered.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 552 OF 1916.

December 8, 1916.

Present:—Mr. Justice Jwala Prasad.

MOHAMMAD LATIF KHAN—

PLAINTIFF—APPELLANT

versus

BAJO KOIRI—DEFENDANT—

RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 208—Bengal Rent Recovery Act (VIII of 1865), ss. 11, 4, 16—Limitation Act (IX of 1908), Sch. I, Art. 138—Auction-purchaser, rights of—Suit for possession—Limitation.

A purchaser under a sale held under the Chota Nagpur Tenancy Act is entitled to be put in possession of the property purchased by him under section 11 of the Bengal Rent Recovery Act. If he fails to obtain possession under that Act, his remedy to obtain possession by a civil suit is not barred, if the suit is brought within twelve years of the sale as required by Article 138 of the Limitation Act.

Appeal against the decree of the Judicial Commissioner, Chota Nagpur, dated the 28th February 1916, confirming that of the Munsif, Chapra, dated the 26th March 1915.

Mr. Mustafa Khan, for the Appellant.

JUDGMENT.—The appellant is the landlord of the respondent. He purchased the holding of the respondent in execution of his rent decree. The sale was held in February 1910. He did not apply for delivery of possession and the holding is still in possession of the respondent. In May 1914 he instituted the present suit in the Court of the Munsif of Chapra for recovery of possession of the land purchased by him at the auction-sale. The lower Appellate Court has dismissed the suit, holding that the plaintiff has no remedy in the Civil

Court as he failed to seek his relief in the Revenue Court that held the sale. I think that this view is incorrect. It is open to the purchaser at an auction-sale to apply to the Court that held the sale for delivery of possession, or to bring a regular suit. The two remedies are concurrent: *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* (1), *Bhagwati v. Banwari Lal* (2). In *Sasibhusan Mookerjee v. Razhanath Bose* (3) it was laid down that if the auction-purchaser were to sue the judgment-debtor for declaration of title and for recovery of possession at any time within twelve years from the confirmation of sale, there would be no answer to the claim of the auction-purchaser. The above authorities have been followed recently by the Full Bench of this Court in *Abdul Gani v. Raja Ram* (4), where the question was whether an appeal lies from an order under rule 95 of Order XXI of the Code of Civil Procedure. I do not find any difference in sales held under the Chota Nagpur Tenancy Act, VI of 1908, section 208, read with the Bengal Rent Recovery Act, VIII of 1865, sections 4 to 16, and those held under the Code of Civil Procedure. The title vests in the purchaser under the sale held under the Chota Nagpur Tenancy Act, and the purchaser is entitled to be put in possession under section 11 of the Rent Recovery Act. If he fails to obtain possession under that Act, his remedy to obtain possession by a civil suit is not barred. The purchaser's remedy is alternative and if the suit is brought within twelve years from the date of the confirmation of the sale, it will not be barred under Article 138 of the Limitation Act. I, therefore, hold that the present suit is not barred. The appeal is decreed with costs throughout.

Appeal allowed.

(1) 14 C. 644; 7 Ind. Dec. (N. S.) 427.

(2) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

(3) 25 Ind. Cas. 267; 19 C. W. N. 835 at p. 840; 20 C. L. J. 433.

(4) 85 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829.

SARAT CHUNDRA DUTTA v. JADAB CHUNDRA GOSWAMI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 27 OF 1915.

May 23, 1916.

Present:—Sir Lancelot Sanderson, Kt,
Chief Justice, and

Justice Sir Asutosh Mookerjee, Kt.

SARAT CHUNDRA DUTTA—DEFENDANT

—APPELLANT

versus

JADAB CHUNDRA GOSWAMI—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 107, scope of—Tenancy-at-will—Writing and registration, whether necessary—Agreement to pay specified annual rent, whether tenancy from year to year.

The first paragraph of section 107 of the Transfer of Property Act is restricted in its terms only to the three specified classes of leases enumerated therein, viz., (1) a tenancy from year to year, (2) a lease for any term exceeding one year and (3), a lease reserving an annual rent. In these three cases registration is necessary. [p. 957, col. 1.]

An agreement to pay a specified rent every year is not conclusive proof that the tenancy is from year to year. [p. 957, col. 2.]

Durgi Nikarini v. Goberdhan Bose, 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 525 and *Gobinda Chandra Saha v. Dwarka Nath Patita*, 26 Ind. Cas. 962; 20 C. L. J. 455; 19 C. W. N. 439, followed.

A tenancy-at-will can be created verbally and leases which do not come within the first paragraph of section 107 can be proved by oral evidence. [p. 957, col. 2.]

Surabh Narain Lal v. Catherine Sophia, 1 C. W. N. 248; *Fazel Sheikh v. Karamuddi Sheikh*, 6 C. W. N. 916; *Sita Nath Pal v. Kartick Gharmi*, 8 C. W. N. 434; and *Venkatagiri Zamindar v. Raghava*, 9 M. 142; 3 Ind. Dec. (N. S.) 496, referred to.

Appeal against the following decree of Mr. Justice Mullick, dated the 1st of February 1915, in Appeal from Appellate Decree No. 2885 of 1912.

"The plaintiff sues the defendant for the rents of the years 1314 to 1317. The defendant denies the relationship of landlord and tenant. The land is situated in the Pabna Municipality and the case is, therefore, governed by the Transfer of Property Act. The plaintiff bases his claim on an oral agreement of tenancy. It is admitted that under section 107 of the Transfer of Property Act, the tenancy could not have been created without a lease, but the learned Munsif, finding that the tenancy is established by an *ex parte* rent decree and by the admission of the defendant himself in a previous suit, has decreed the claim. On appeal the learned Subordinate Judge was of opinion that

the tenancy could not be proved except by an instrument and that a suit for rent was not maintainable, and further that no damages for use and occupation could be decreed as they were not specifically claimed. The suit having been dismissed the plaintiff prefers this second appeal.

It is quite clear that although there is no registered instrument, it is open to the plaintiff to prove by other evidence the fact of the tenancy. The learned Subordinate Judge finds that the evidence adduced would prove a tenancy if it were admissible. In these circumstances it is unnecessary to remand the case. The tenancy being established, the question is what rent should be paid. The previous rent decree does not work an estoppel, but it is evidence of the amount payable.

On the other hand the defendant has given no evidence to show that he is not liable to pay this amount. I think the learned Munsif's decree is correct.

With regard to the claim for 1314 which has been held to be barred by limitation, there is no cross-appeal. The result is that the decree of the learned Subordinate Judge is set aside and that of the learned Munsif restored. The appeal is decreed with costs."

Babus Mohini Mohan Chukravartty and Abinas Chandra Chakravartty, for the Appellant.

Dr. D. N. Mitter and Babu Baikuntha Nath Mitter, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case I think this appeal should be dismissed. It is clear that on the merits the defendant has no case whatever. The learned Munsif in the Court below found that the story which the defendant set up was a shamelessly false one. Now the defendant tries to defend this action on a technicality based upon section 107 of the Transfer of Property Act. In my judgment his defence is without foundation. That section deals with certain classes of tenancy which are therein mentioned, namely, a tenancy from year to year, or for any term exceeding one year or reserving a yearly rent, and which can be made only by a registered instrument,

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It has not been shown in this case that the tenancy in question which must now admittedly be taken to exist was one of those mentioned in the section. On the other hand, the facts are as set out by the learned Munsif in his judgment. He said: "The defendant entered into the land as a tenant of the plaintiff, paid rent for it for a number of years, allowed a decree to be passed against him without any contest and admitted the tenancy in the defence he raised in Mahananda's suit. The parties have so long conducted themselves as landlord and tenant, I think, that the defendant is estopped from questioning the validity of the settlement which has been acquiesced in and acted upon." These being the facts of the case, I think the judgment of Mr. Justice Mullick was right, and there is no reason for disturbing the judgment and this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree that the judgment of Mr. Justice Mullick must be affirmed.

The contention of the appellant is based upon a misapprehension of the provisions of section 107 of the Transfer of Property Act. That section does not lay down that a lease of immoveable property can be made only by a registered instrument, but the Legislature has provided that a lease of immoveable property in three specified cases can be made only by a registered instrument. These cases are, *first*, a lease from year to year, *secondly*, a lease for any term exceeding one year, and *thirdly*, a lease reserving a yearly rent. In the case before us, the plaintiff alleged that the defendant was a tenant-at-will, that his holding was of a temporary character, was non-transferable and was liable to be terminated by notice to quit. The plaintiff also stated that the defendant had entered upon the land on these conditions and had agreed to pay rent at the rate of Rs. 6 a year.

It is now contended that because there was an agreement to pay rent at the rate of Rs. 6 a year the tenancy must be regarded as a tenancy from year to year. In my opinion, there is no foundation for this contention. As explained in *Durgi Nikarini v. Gobarthan Bose* (1) and *Gobinda Chandra*

Saha v. Dwarka Nath Patita (2), the fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year. It is not the case of the plaintiff that the defendant holds under a tenancy from year to year; his case is that the defendant is a tenant-at-will, and a tenancy-at-will undoubtedly can be created verbally, notwithstanding the provisions of section 107 of the Transfer of Property Act.

It was finally suggested that even if the defendant be a tenant-at-will, the terms of the tenancy can be established only by means of a written lease and the amount of rent payable in respect of it cannot be proved by oral evidence. There is no foundation for this argument. Numerous cases may be found in the books, where it has been held that the terms of a tenancy which does not come within section 107 of the Transfer of Property Act can be proved by oral evidence: *Surabh Narain Lal v. Catherine Sophia* (3), *Fazel Sheikh v. Keramvddi Sheikh* (4), *Sita Nath Pal v. Kartick Gharmi* (5) and *Venka'agiri Zamindar v. Raghava* (6).

Appeal dismissed.

(2) 26 Ind. Cas. 962; 20 C. L. J. 455; 19 C. W. N. 489.

(3) 1 C. W. N. 248.

(4) 6 C. W. N. 916.

(5) 8 C. W. N. 434.

(6) 9 M. 142; 3 Ind. Dec. (N. S.) 496.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 204 of 1916.

October 24, 1916.

Present:—Mr. Justice Srinivasa Aiyangar.

O. WUTHRIK, E. Q.—PLAINTIFF—

PETITIONER

versus

DAVID—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 83—Alien enemy, suit by—Lease granted by alien enemy as agent of non-enemy subject, enforceability of—Contracts with alien enemies, principles affecting, validity of.

The prohibition as regards intercourse between hostile aliens is confined only to commercial dealings and does not render illegal all contracts whatever be their nature. It extends to contracts which tend to increase the enemy's resources and

(1) 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 525.

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every kind of trading or commercial dealing, but does not prevent an agreement made in enemy territory to pay money there out of funds accruing there. [p. 959, cols. 1 & 2.]

A lease granted, after the commencement of hostilities, by an alien enemy in British India on behalf of one who is not shown to be an enemy subject, the rent whereof is intended to be used in this country and by persons who are not enemies, is enforceable. [p. 958, col. 2; p. 959, col. 2.]

Kershaw v. Kelsey, 100 Mass. 561, referred to.

In any event, there is no objection to an action being laid on the lease when it is brought by an agent, who is not an enemy subject. [p. 958, col. 2; p. 959, col. 2.]

Enemy subjects resident in British Territory who are permitted to remain are not alien enemies and can contract like subjects, whether such permission is express or implied. The permission should be presumed in the case of aliens who were residing in British Territory before the outbreak of war and who continue to remain after such outbreak, unless they are ordered to remove themselves within a certain time and they do not. [p. 959, col. 1.]

Wells v. Williams, 1 Salk. 46; 91 E. R. 45; 1 Ld. Raym. 282; *Daubigny v. Davallon*, (1794) 2 Anst. 462; 145 E. R. 936; 3 R. R. 613; *Janson v. Driefontein Consolidated Mines, Ltd.*, (1902) A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 7 Com. Cas. 268; 18 T. L. R. 796; *Schaffinius v. Goldberg*, (1916) 1 K. B. 284 at p. 292; 85 L. J. K. B. 374, referred to.

Principles relative to intercourse between the subjects of belligerents after commencement of hostilities discussed. [p. 958, col. 2; p. 959, cols. 1 & 2.]

Petition, under section 25 of Act IX of 1837, praying the High Court to revise the decree of the Court of the District Munsiff at Karkul, in Small Cause Suit No. 412 of 1915.

Dr. S. Swaminathan, for the Appellant,
Mr. B. Seetharama Rao, for the Respondent.

JUDGMENT.—This a suit to recover rent. The plea is that the lease was granted by, and the covenant to pay rent entered into with, an alien enemy and the covenant was, therefore, void and unenforceable. The Trial Judge accepted the plea and dismissed the suit and this application is to revise the decree. To make the plea intelligible it is only necessary to state the following facts. The land leased is in South Canara in British Territory and belongs to the Basel Evangelical Mission. The lease was granted by Mr. Buhus, a German, the then Secular Agent of the Mission, on October 2, 1914, after war was declared, to the defendant, a British subject. The suit to recover rent was instituted by the present Secular Agent of the Mission, one Mr. Wuthrik. Enemy character was

not attributed to the Basel Mission; at any rate, no point was raised about it in the lower Court and there are no materials on record to determine the nationality of the Mission. We know nothing about its constitution; whether it is a trading corporation, or a corporation at all, how and under what authority was it constituted, who are its members, or what is its principal place of residence or business, if any, we do not know.

Again, there was no contention that the plaintiff Mr. Wuthrik is an alien enemy and was not entitled to sue in British Indian Courts by reason of the prohibition contained in section 83 of the Code.

There was, further, no contention that Herr Buhus could not, after, the declaration of war, act or continue to act as the Agent of the Mission, i. e., that the Basel Mission could not, after war was declared, appoint a German as Agent or if there was a previous contract of agency, that agency was abrogated by the war.

The only question then is whether the covenant to pay rent is void as Herr Buhus was a German. I am not familiar with this branch of law, but on the best investigation that I could make of this matter, for the present purpose, I have arrived at the following conclusions as best supported by authority:

(1) On a declaration of war the citizens or subjects of the belligerents become enemies of each other and political status determines the question of enemy ownership. Vattel *Droit des Gens*, liv. 3, c. 5, section 70 (cited at page 494 of 1902 Appeal Cases). [*Janson v. Driefontein Consolidated Mines Ltd.* (1)]. The *Beneto Estenger* (2) at page 571 per Fuller, Chief Justice.

(2) On a declaration of war it appears the sovereign has in theory full right to take the persons and confiscate the tangible property of the enemy found within his territory; this right, however, is said to be a naked and impolitic right condemned by the enlightened conscience and judgment of modern times, *Hang'v. Abbott* (3), and in practice is not likely to be resorted to except in case of public necessity or by way of reprisal; but a

(1) (1902) A. C. 484 at p. 499; 71 L. J. K. B. 857; 87 L. T. 372; 7 Com. Cas. 268; 18 T. L. R. 796.

(2) 176 U. S. 568; 44 Law. Ed. 592.

(3) 6 Wall. 532 at p. 536; 18 Law. Ed. 939.

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declaration of war *per se* does not import a confiscation of enemy property found on land or on the high seas. *Brown v. United States* (4).

(3) During war all commercial intercourse and trading between enemies is illegal unless sanctioned by the authority of the Government. Persons resident in enemy country, whatever their nationality, are treated as enemies as far as relates to their trade. Their commercial domicile during war or their war domicile determines their enemy character. *Janson v. Driefontein Consolidated Mines Ltd.* (1); at page 499 per Lord Davey, at pages 505 and 506 per Lord Lindley. From this it follows that enemy subjects resident in British Territory who are permitted to remain are not alien enemies, and can contract like subjects. Whether such permission should be express or may be implied by a person being allowed to remain is a point on which there appears to be some diversity of opinion; but the weight of authority appears to favour the view, at any rate in the case of aliens who were residing in British Territory before the outbreak of war and who continue to remain after such outbreak, that permission should be presumed, unless they are ordered to remove themselves within a certain time and they do not. This, I think, is the effect of the decisions in *Wells v. Williams* (5), *Daubigny v. Davallon* (6), *Janson v. Driefontein Consolidated Mines Ltd.* (1), bottom of page 505 and top of page 503, per Lord Lindley, *Kershaw v. Kelsey* (7), *Schoffenius v. Goldberg* (8).

4. The prohibition as regards intercourse between hostile aliens is on the best authority confined only to commercial intercourse and does not render illegal all contracts whatever be their nature. The question was elaborately discussed in the leading case of *Kershaw v. Kelsey* (7) by Gray, J., and the conclusion reached that the prohibition extended only to intercourse between citizens of the two belligerents which was inconsistent with the state of war between them, including any

act or contract which tends to increase his resources and every kind of trading or commercial dealing, but it did not prevent an agreement made in enemy territory to pay money there out of funds accruing there. It was also said that when a creditor, although a subject of the enemy, remains in the country of the debtor or has a known agent there, authorised to receive the amount of the debt during war, payment there to such creditor or his agent can, in no respect, be construed as a violation of the duties imposed by the war. This appears to be the opinion of Lord Davey and Lord Lindley in *Janson v. Driefontein Consolidated Mines, Ltd.* (1) and of Lord Stowell in '*The Hoop*' (9). In *Willison v. Patteson* (10) it is said in general terms that all contracts with an alien enemy are void, but the drawing of the bill in that case appears to be a commercial transaction and involved in the withdrawing of money from England to France. In *The Julia* (11) Story, J., took a different view, but the observations appear to be *obiter*. In *United States v. Lane* (12) Davis, J., said: "By a universally recognized principle of public law commercial intercourse between states at war with each other is interdicted."

If either of the last two conclusions is correct, there can be no doubt that the defendant's plea is not an answer to the suit. It is not said that Mr. Buhus came into British India after the declaration of war. Again the lease cannot be said to be a commercial transaction; the rent payable was intended apparently to be used in this country for the purpose of the Mission. The case of *Kershaw v. Kelsey* (7) appears to be on all fours with the present case and is precisely in point.

I, therefore, reverse the decree of the lower Court and remand the suit for trial according to law. Costs will abide.

Petition allowed; Suit remanded.

(9) (1799) 1 Ch. Rob. 196 at p. 199; 1 Engl. Pri. Cas. 104.

(10) (1817) 7 Taunt. 439; 1 Moore 133; 129 E. R. 176; 18 E. R. 525.

(11) 8 Cranch 181 at p. 193; 3 Law. Ed. 528.

(12) 8 Wall. 185 at p. 195; 19 Law. Ed. 445.

(4) 8 Cranch 110; 3 Law. Ed. 504.

(5) 1 Salk. 46; 91 E. R. 45; 1 Ld. Raym. 282.

(6) (1794) 2 Anst. 462; 145 E. R. 936; 3 R. R. 613.

(7) 100 Mass. 561.

(8) (1916) 1 K. B. 284 at p. 292; 85 L. J. K. B. 374.

PUNCHA V. BINDESWARI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 3828 OF 1912.

December 21, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.PUNCHA THAKUR AND ANOTHER—
PLAINTIFFS—APPELLANTS*versus*

BINDESWARI THAKUR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Custom, essentials of—Temple, ancient—Intention of founder—Presumption—Transfer of right to receive offerings made to temple, validity of—Public policy—Estoppel, whether can validate invalid transfer.

Custom, in order to prevail against the general law, must be proved to be immemorial, reasonable, certain and continued without interruption since its immemorial origin. [p. 962, col. 1.]

Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty, 1 M. 235 (P. C.); 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156, and *Mahamaya Debi v. Haridas Haldar*, 27 Ind. Cas. 400; 19 C. W. N. 208; 20 C. L. J. 183; 42 C. 455, referred to.

Where the origin of a foundation is lost in antiquity, then unless a custom to the contrary is established, it must be presumed that the original founder intended, in making his delegation of the powers of worship to certain persons, that those powers should remain in their hands for the good of the temple and the convenience of the public, and that it is against public policy that persons to whom those powers of worship have been delegated should of their own free will make a delegation of those powers to a third party. [p. 962, col. 1.]

In the case of such a foundation a custom permitting alienation is not established by six undisputed transfers. [p. 962, col. 1.]

A transfer of the right to receive offerings made to a temple is, therefore, void as against public policy. [p. 962, col. 1.]

Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty, 1 M. 235 (P. C.); 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156, *Ramasawmy Aiyar v. Venkata Achari*, 9 M. I. A. 344; 2 W. R. 21 (P. C.); 1 Suth. P. C. J. 492; 2 Sar. P. C. J. 1; 19 E. R. 771, *Srimati Mallika Dasi v. Ratanmani Chakervarti*, 1 C. W. N. 493 and *Mahamaya Debi v. Haridas Haldar*, 27 Ind. Cas. 400; 19 C. W. N. 208; 20 C. L. J. 183; 42 C. 455, referred to.

Where a transfer is contrary to public policy, neither party can make it legal by creating estoppel. [p. 962, col. 1.]

Appeal against the decree of the Officiating Additional Sub-Judge, Mozaffarpore, dated the 7th October 1912, confirming that of the Munsif, Mozaffarpore, dated the 29th June 1912.

Messrs. Lachmi Narain Sinha and Baidya Nath Narain Sinha, for the Appellants.

Mr. Gour Uhandra Pal, for the Respondents.

JUDGMENT.

ROE, J.—The property in dispute in this case is a 3-annas share in the offerings made to the temple of Sri Bhaironathji in the District of Mozaffarpore. This three annas belonged to the plaintiffs' family and was mortgaged by the plaintiff's father, who is still alive, to the defendants second party. A suit was instituted upon the basis of this mortgage and the 3-annas share was put up for sale and purchased by the defendants second party, who took out delivery of possession on the 18th January 1901 and a few days after transferred the property purchased to the defendant 1st party. On the 11th April 1911, the plaintiff instituted the present suit for a declaration that the sale (transfer?) made by the father was void as against him and that, therefore, the whole share transferred from his father's hands into the hands of the first defendant through the second defendant should be restored to the plaintiff. The ground taken for this suit was that the plaintiff's father had no right to mortgage the plaintiff's interest in this share of the offerings and that the mortgage itself and the mortgage decree were illegal and void, for the reason that the offerings were not transferable and the second party who was not either a *panda* or *pujari* could not acquire any right in it. The lower Courts concurred in holding that the property transferred by the plaintiffs' father was inalienable and that, therefore, the transfer was void. A plea of estoppel had been set up by the defendants, on the ground that the plaintiff's father having led the mortgagee to believe that the property was alienable his son cannot be heard to say that it was inalienable. On appeal to the High Court at Calcutta it was held by my learned brother sitting with Mr. Justice Coxe that the property transferred was without doubt inalienable and that statutory provisions being against the transfer, no question of estoppel would arise. An application for review was made against this judgment and admitted to hearing, on the ground that there was no statutory bar to the transfer of such a right as was transferred in this case and that there had not been by the lower Courts a suffi-

PUNCHA T. BINDESWARI.

ciently full enquiry into the origin of rights transferred by the plaintiff's father.

The case again comes before this Court, the whole question having been laid open by the order admitting the petition for review. I have no hesitation in concurring in the conclusions arrived at in the previous judgment. I venture only, with respect, to suggest that in the last lines of that judgment for the words "statutory provisions" the words 'public policy' should be read.

My reasons for this opinion are based largely upon the decision in the Privy Council case of *Rajah Vurmah Valia v. Ravi Vurma Kunhi Kutty* (1). The actual facts surrounding the present endowment are lost in antiquity. No man can say who built the temple in which these offerings are made and no man can say who were the original priests to whom the right to conduct worship and receive offerings was delegated. All that we do know is that in the memory of man there have been six operative transfers of shares in the right to receive offerings and this is the seventh, and is the first in which the right of the *pujari*s to transfer their interest in future offerings has been contested. We are asked to remand the case that all these points might be gone into. But a remand for taking of fresh evidence should only be made in very special circumstances, and it is clear that no further light can be thrown upon the origin of the temple and appointment of *pujari*s and it must be presumed that out of the seven instances of transfer only one, the one before us, has been disputed before the Court. The case is in many respects similar to the Madras case upon which my opinion is based. There the original endowment had been lost in antiquity, the original founder was unknown, his original intentions in appointing a person to hold the office of the priest could not be ascertained. Their Lordships of the Judicial Committee made the following observations upon a position of this nature:—

"The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due

administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would ensure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken."

Further they went on to say at page 250:

"Custom must prevail against the general law. That such would be the consequence of a well-proved and established custom their Lordships do not deny. In the present case, however, the Civil Judge has distinctly found against the existence of the custom."

That case and the case of *Ramasawmy Aiyar v. Venkata Achari* (2) are good authority for the proposition that where it is shown that a particular office has been by custom alienable, it is not against public policy that such transfers should take place, and as I read the decision in the latter case the alienation of the right of the *pujari* in that particular case was confined to persons of the same class as the transferor and equally capable with them of performing a due turn of worship. In the case of *Srimati Mallika Dasi v. Ratanmani Chakravarti* (3) it was distinctly laid down that the right to perform a turn of worship and receive offerings during that turn was alienable. And in *Mahamaya Debi v. Haridas Haldar* (4) that pro-

(1) 1 M. 235 (P. C.); 4 I. A. 76; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156.

(2) 9 M. I. A. 344; 2 W. R. 21 (P. C.); 1 Suth. P. C. J. 492; 2 Sar. P. C. J. 1; 19 E. R. 771.

(3) 1 C. W. N. 493.

(4) 27 Ind. Cas. 400; 20 C. L. J. 183; 19 C. W. N. 208; 42 C. 455.

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position was not denied. What was asserted in that case was that *prima facie* the transfer of such an office was opposed to public policy but yet upon proof of a custom extending beyond the memory of man and not in itself unreasonable, it might be said that considerations of public policy no longer oppose the transfer. In the particular case then considered that custom was proved to be immemorial, reasonable, certain and continued without interruption since its immemorial origin. The principle, therefore, upon which the present case should be decided is this, that the origin of the foundation being lost in antiquity it must be presumed that the original founder intended, in making his delegation of the powers of worship to the ancestors of the plaintiffs, that those powers of worship should remain in their hands for the good of the temple and for the convenience of the public, and that it is against public policy that persons to whom these powers of worship have been delegated, should of their own free will make a delegation of those powers to a third party. Before that principle can be overridden it must be shown that there is a custom, immemorial, unbroken, reasonable, and certain. It is impossible for us to hold that by six undisputed transfers a custom, immemorial, unbroken, reasonable, and certain, has been proved. I would, therefore, hold that the mortgage made by the father of the present plaintiff in favour of the second defendant was void as against public policy and that the sale in execution of that mortgage was equally void. Where a transfer is contrary to public policy neither party can make it legal by creating estoppel.

In my view the appeal should be again dismissed with costs throughout.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1948
OF 1913.

December 6, 1916.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Newbould.

CHINTA HARARAN DAS AND OTHERS—
DEFENDANTS—APPELLANTS

versus

RADHA CHARAN PODDAR—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1903), O. XX—Decree—Court, cognizance by, of events happening after institution of suit or appeal—Jurisdiction.

In exceptional cases Courts can take cognizance of events since the institution of a suit or appeal where the adoption of such a course tends to shorten litigation and best subserve the ends of justice. [p. 963, col. 2.]

A plaintiff, therefore, is entitled to a decree for *khas* possession of a land on declaration of title in a suit brought for the purpose, where it is found that the defendant was holding the land under an *ijara* lease subsisting at the time of the institution of the suit but which expired before the date of the decree. [p. 963, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 9th October 1912, reversing that of the Registrar Munsif, Munshigunj, dated the 19th of July 1910.

FACTS of the case appear from the judgment.

Babu Gunada Charan Sen (with him Babu Dwarkanath Chakravarty), for the Appellants.—The plaint itself says that there was an *ijara* lease of the land subsisting in favour of defendant No. 41 up to the year 1316. This *ijara* lease in favour of defendant No. 41 was still subsisting at the time of the institution of the suit. Plaintiff's suit ought to be dismissed under the above circumstances. Refers to *Ram Ratan Sahu v. Mohant Sahu* (1) and *Ramanadan Ochetti v. Pulikutti Servai* (2).

Plaintiffs ought to have brought a fresh suit when the lease had expired. *Ramanadan Ochetti v. Pulikutti Servai* (2) is quite on all fours with the present case. In *Ramanadan Ochetti v. Pulikutti Servai* (2) reliance has been placed upon *Davis v. Kaze Abdool Hamed* (3). In *Davis v. Kaze Abdool Hamed* (3)

(1) 6 C. L. J. 74 at p. 78; 11 C. W. N. 732.

(2) 21 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559.

(3) 8 W. R. 55 at p. 58.

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also there was that sort of lease and the landlord sued for *khas* possession before the termination of the lease. *Vide* also *Molmal Illoth Krishnan Nambudri v. Secretary of State* (4), which is like the present one. This class of cases has never been held to be covered by the exception to the general rule. *Rai Charan Mandal v. Biswanath Mandal* (5) is distinguishable. The point is whether upon the plaint as framed, the plaintiffs would be entitled to any relief. The general principle stated is in *Ram Ratan Sahu v. Mohant Sahu* (1). The exception has no application in this case. Your Lordships cannot allow a plaintiff change front as often as he likes. There will be no cause of action until the lease has terminated. In *Davis v. Kaze Abdul Hamed* (3), as above cited, the lease had been subsisting and it expired during the pendency of the suit. There was failure of cause of action of the plaintiff, still he is going to succeed.

Babu Akhoy Kumar Banerji, for the Respondents, referred to *Rai Charan Mandal v. Biswanath Mandal* (5) and *Nuri Miah v. Ambica Singh* (6), as showing that the Courts can take notice of events since the institution of a suit.

Babu Gunoda Charan Sen, in reply.—In *Rai Charan Mandal v. Biswanath Mandal* (5) and *Nuri Miah v. Ambica Singh* (6), relief could be given upon the plaint as framed and the facts in these two cases were quite different. Here the plaintiff could not get the relief asked for on the plaint as framed and his cause of action for *khas* possession had not arisen when the suit was instituted.

JUDGMENT.—The plaintiff-respondent brought the suit out of which this appeal arises, for a declaration of his title to and recovery of *khas* possession of the land in suit. Defendants Nos. 1 and 41 contested the suit. The former claimed the land as appertaining to his estate. The latter supported the former and pleaded that he had taken settlement from him (the defendant No. 1) and had been holding under such

settlement for over 12 years. The Court of first instance found the question of title in favour of the plaintiff. There was an allegation in the plaint that there was an *ijara* lease of the land in favour of defendant No. 41 up to 1316, but that it was surrendered by him (the defendant No. 41) after service of notice, before the institution of the suit. The Court of first instance held that the relinquishment had not been proved, and passed a decree declaring the plaintiff's title to the land and for possession through defendant No. 41 till 1316. That decree was set aside on appeal and the case was remanded. When the case was decided after remand, the Court of first instance gave a decree to the plaintiff for *khas* possession as the lease had admittedly expired at the date of such decree, and that decree has been affirmed on appeal by the lower Appellate Court with some variations.

The main question argued before us is whether, having regard to the allegation in the plaint that the term of the *ijara* was up to 1316, the case should not be remanded to the lower Appellate Court for a finding upon the point whether the *ijara* lease determined before the institution of the suit. We do not think, however, that we ought to remand the case. The term of the *ijara* expired in 1316, *i.e.*, before the final decree of the Court of first instance. It, no doubt, expired after the institution of the suit, but in exceptional cases Courts have taken cognizance of events since the institution of a suit on appeal, where the adoption of such a course tends to "shorten litigation and best subserve the ends of justice." The decree, therefore, which was passed by the Court of first instance originally (before remand) namely, that the plaintiff do recover possession through the defendant No. 41 up to 1316 should not be passed now, when more than seven years have elapsed from the date of the expiry of the *ijara*.

Then again, the defendant No. 41 from before the institution of the suit repudiated the tenancy of the disputed land as being included within the *ijara* under the plaintiff, and set up the title of the defendant No. 1 and possession under him. He sided with the defendant No. 1 throughout in this litigation and even in this Court filed the appeal jointly with him.

(4) 4 Ind. Cas. 30; 19 M. L. J. 347; 5 M. L. T. 213.

(5) 26 Ind. Cas. 410; 20 C. L. J. 107.

(6) 34 Ind. Cas. 869; 20 C. W. N. 1099 at p. 1110; 44 C. 47.

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Lastly, it has been urged before us that the defendant No. 41 paid the *ijara* rent up to 1316 although he held the disputed land under defendant No. 1, and that under these circumstances, there ought not to be any decree for mesne profits in favour of the plaintiff either against defendant No. 41 or against defendant No. 1. The question of mesne profits has been left for determination at a subsequent stage of the suit, and the question whether defendant No. 41 really paid the *ijara* rent up to 1316 will, therefore, be determined in a subsequent proceeding; and, if that question is found in favour of the defendant, the plaintiff will not be entitled to any mesne profits for the period for which the *ijara* rent might have been paid by the defendant No. 41. With these observations the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 113 OF 1915.
October 2, 1916.

Present:—Mr. Justice Oldfield and
Mr. Justice Krishnan.

SIVAKOLUNDU PILLAI—RESPONDENT
No. 1—APPELLANT

versus

GANAPATHY IYER AND OTHERS—
PETITIONER AND RESPONDENTS NOS. 2 & 3—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XXI, rr. 54 (g), 89, 90, 91, 92—Execution of decree—Sale, order for, without prior attachment—Irregularity—Appeal, sale held during pendency of—Loss or prejudice to party, absence of—Appellate Court, duty of.

Attachment is only a step to be taken by the executing Court in bringing to sale the property of a judgment-debtor. If such a step is omitted and sale of the property is ordered, the sale can be set aside only if it has resulted in substantial loss to the party and once the sale is confirmed, the objection as to invalidity of attachment can no longer be urged. The absence of attachment is a mere irregularity, which does not affect the jurisdiction of the executing Court to sell immoveable property. [p. 965, col. 1.]

Sheodhyan v. Bholanath, 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. s.) 907, followed.

Section 99, Civil Procedure Code, shows the principle to be adopted in appeals. An Appellate Court should not reverse the order of the first Court

on a point which is of no importance and which does not affect the merits of the case. [p. 965, col. 1.]

Where a sale has actually taken place and been confirmed during the pendency of an appeal against an order for sale without a subsisting attachment, the Appellate Court should not set aside the sale where no loss or prejudice is shown to have resulted thereby to a party. [p. 965, col. 2.]

Nomuna Bibi v. Roshun Miah, 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621, dissented from.

Zain-ul-abidin Khan v. Muhammad Asghar Ali Khan, 10 A. 166; 15 I. A. 12; 5 Sar. P. O. J. 129; 6 Ind. Dec. (N. s.) 112, distinguished.

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Sadasiva Aiyar, in Appeal against Order No. 155 of 1915, preferred against the order of the Court of the Subordinate Judge, Kumbakonam, in Execution Petition Register No. 26 of 1915, in Original Suit No. 23 of 1901.

Mr. C. V. Ananthakrishna Aiyar (with him Mr. K. R. Rangaswami Aiyangar), for the Appellant.

Mr. T. Narasimha Aiyangar (with him Messrs. T. S. Krishna Aiyar and K. S. Jayarama Aiyar), for the Respondents.

JUDGMENT.

KRISHNAN, J.—This appeal arises from an application for execution of the decree in Original Suit No. 23 of 1901 in plaintiff's favour, by sale of defendants' immoveable properties. Among other objections which are not now material, defendants contended that the properties could be not sold without a fresh attachment as the attachment made in the previous execution application was no longer subsisting. Plaintiffs contended that it was, and the Subordinate Judge agreeing with that contention directed the sale of the properties without a fresh attachment. The defendants appealed to this Court against that order; the learned Judge who heard the appeal dismissed it, on the ground that the existence of a subsisting attachment was *res judicata* between the parties by reason of a previous order by the Subordinate Judge. The Letters Patent Appeal before us is against that judgment.

The appellants contend that there was no subsisting attachment in fact and that the question is not *res judicata* as the previous order relied on by the learned Judge did not decide anything about it. Respondents have tried to support the view taken

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on both these points and have urged in addition that even if we thought that these two points were wrongly decided and that there was no proper attachment, we should not interfere on that ground as the sale ordered has been carried out, and the Subordinate Court, rejecting the application by the first defendant to set it aside for irregularity, has confirmed it under Order XXI, rule 92, and it has now become absolute. These facts have been proved before us by affidavit and the defendants do not deny them but merely state that the decree-holders themselves are the purchasers.

It is not denied that the sale can no longer be set aside for any irregularity in its conduct, however material it may be, but it is urged that the absence of attachment is not a mere irregularity but one that affects the jurisdiction of the executing Court to sell immovable property. It has been held in *Sheodhyan v. Bholanath* (1) that it is only an irregularity; I entirely agree with the view expressed there and with the observations of the learned Judges as to the object of attachment. Attachment is only a step to be taken by the executing Court in bringing to sale the properties of a judgment-debtor. If such a step is omitted the sale can be set aside only if it has resulted in substantial loss, and once the sale is confirmed the objection can no longer be urged.

It was next argued that we should take no notice of what happened after the date of the Subordinate Judge's order appealed against, but set it aside if we think it erroneous and leave the parties to take such further steps as they liked. I do not think it right to do so when we know that the proceedings in execution have reached a stage where the objection regarding want of attachment is no longer material and will not affect the concluded sale. It seems to me that section 99, Civil Procedure Code, shows the principle to be adopted in appeals; and we should not reverse the order of the first Court on a point which is of no importance now and which does not affect the merits of the case. The learned Vakil for the appellants

(1) 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. S.) 907.

has cited the observations at the end of the judgment of Chitty, J., in *Nomuna Bibi v. Roshun Meah* (2) as in his favour. The question, however, does not seem to have been fully argued before the learned Judges as there is no reference to it in the judgment of Coxe, J., at all. With all respect to the learned Judge, I am unable to follow his view. The decision of the Privy Council in *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (3), also cited for the appellants, has no application, as that was a case where the decree itself in execution of which the sale took place had been subsequently modified; the sale there was thus an incompetent sale and could be upheld only in favour of strangers purchasers not parties to the decree. In the case before us, the absence of attachment did not invalidate the sale without loss being proved; and that question has now been settled against the defendants by the rejection of their application under Order XXI, rule 90. The fact, therefore, that the plaintiffs-decree-holders were themselves the purchasers here, is of no importance; the sale in their favour has been confirmed and is valid.

I am, therefore, of opinion that the defendants' appeal fails on the last ground urged by the respondents' Vakil and it is not necessary for us to consider the correctness of the first two points argued. I will dismiss the appeal with costs of first respondent.

OLDFIELD, J.—I agree.

Appeal dismissed.

V. R. P.

(2) 9 Ind. Cas. 558; 35 C. 482; 15 C. W. N. 42; 13 C. L. J. 621.

(3) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3653
OF 1914.

November 22, 1916.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

NAGENDRA LAL CHOWDHURY—
PLAINTIFF—APPELLANT

versus

HAMDOO MIA—DEFENDANT—
RESPONDENT.

Abwabs—Rent, consolidated, several items one of which is given as jama, totalled as,

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Where, at the head of a *kabuliyat*, an amount of rent was written down as the consolidated rent or the total rent which the tenant undertook to pay for the land and in arriving at the total several items were taken into consideration, one of which was given as the *jama* (rent):

Held, that the items, other than the one given as the *jama*, were not *abwabs*, as what was agreed to be paid by the tenant was the consolidated rent which included those items. [p. 966, col. 2.]

Radha Charan Ray Chowdhry v. Golak Chandra Ghose, 31 O. 834; 8 C. W. N. 529, followed.

Appeal against the decree of the District Judge, Chittagong, dated the 28th April 1914, affirming that of the Munsif, Hathazari, dated the 7th April 1913.

FACTS material to this report are as follows. In a suit brought by the landlord against the tenants for recovery of arrears of rent, cesses, etc., the tenants pleaded *inter alia* that certain items claimed by the landlord were *abwabs*. The *kabuliyat* on which the tenants relied for showing that those items were *abwabs* was to the following effect:—
“*Kabuliyat* creating permanent tenure (*Bando-busthi kaimi taluka kabuliyat*) under *Taraf* (Estate) *Karfal Charia*, owner thereof *Abhaya Charan Choudhuri* * * *
Taluk Ali Muhammad son of * * *.

Total land, 3 *kanals*, 16 *gandas*, 1 *kara*; *Jama*, Rs. 10-8; Cess, Re. 1-6; *Dak* cess, 2 annas; Price of *Bhet*, Re. 1; Consolidated rent, Rs. 13

Instalments.			Rs.
<i>Aswin</i>	...	...	5
<i>Pous</i>	...	...	4
<i>Falgun</i>	...	...	4]
Total			13

I of my own accord having fixed the aforesaid rent for the above land execute this *taluka kabuliyat*. I to my sons, grandsons and so on downwards shall pay in your office the aforesaid rent according to the instalments mentioned above. If I do not pay the rent according to the instalments then I shall pay the same along with interest at the rate of 1 anna per rupee for the default of the instalment. If I do not so pay, then you shall be competent to realise the same with the help of laws that are or will be

in force and to sell the said *taluka* twice in the year in accordance with Regulation VIII of 1819 and realise the dues thereby * * *. Whenever you demand any *bhet* and *begar* on the occasion of any festival or ceremony at your house I shall pay the same at the rate of annas 4 per rupee on the rent fixed. At the time of the annual Autumnal *Puja* I shall deliver one *ari* of fine *Madhumalati* rice for the price mentioned above * * *. To the above effect I execute this permanent *taluka kabuliyat*. *Finis*. 25th *Magh* 1251 *aghi*.”

The Munsif held that those items were not recoverable as they were *abwabs*. In appeal the decision of the Munsif was upheld by the District Judge. The plaintiffs thereupon preferred this second appeal to the High Court.

Babu Khitish Chunder Sen, for the Appellant.

Babu Tarkeswar Nath Mitter, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned District Judge of Chittagong, dated the 28th April 1914, affirming the decision of the Munsif of Hathazari. The suit was brought to recover arrears of rent due under a contract of tenancy. The exact nature of the tenancy it is not necessary for us to consider. But the defendant had executed in favour of the plaintiff a *kabuliyat*. Under that *kabuliyat*, the defendant undertook to pay for the land certain rent which is mentioned in the body of the document as the aforesaid rent. The amount of the rent is written down at the head of the *kabuliyat* as the consolidated rent or the total rent. The question is, “is the item before the total is arrived at given as the *jama*, the rent, and the other items in arriving at the total are *abwabs* or illegal exactions by the landlord?” I am of opinion that the view taken by the lower Courts in this case cannot be supported. The rent is arrived at, it is true, by taking into consideration certain items. But what was agreed to be paid was the consolidated rent of Rs. 13, by three instalments—one of Rs. 5, and two

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of Rs. 4, on the particular dates mentioned in the document and the tenant in consideration of having the grant of the land to him undertook to pay that Rs. 13 by those particular instalments. The case is clearly covered by the decision of this Court in *Radha Oharan Ray Ohowdhry v. Golak Chandra Ghose* (1). There being no other dispute between the parties except as to what amount should be recovered, we set aside the orders of the two lower Courts and decree the plaintiff's suit for the amount claimed by him in his plaint. The amount claimed will bear interest at the rate of six per cent. per annum from to-day until realization. The plaintiff must have his costs both in this appeal and in the two lower Courts.

RICHARDSON, J.—I agree.

Appeal allowed.

(1) 31 C. 834; 8 C. W. N. 523.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 412
OF 1913.

December 11, 1916.

Present:—Mr. Justice Mullick and

Mr. Justice Atkinson.

Babu BALDHARI SINGH—PLAINTIFF—

APPELLANT

versus

Babu BASAR ALI KALAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Contract, verbal—Burden of proof—Evidence Act (I of 1872), s. 114, ill. (g)—Defendant, failure of, to produce account-books, effect of.

A plaintiff suing upon a contract must establish it conclusively to the satisfaction of the Court. [p. 968, col. 1.]

Where the plaintiff has failed to prove his case, the omission by the defendant to produce his account-books does not give rise to a presumption that, if produced, they would have lent support to the plaintiff's case. [p. 970, col. 2.]

Bilas Kunwar v. Desraj Ronjit Singh, 30 Ind. Cas. 299; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.), referred to.

First appeal from a decision of the 1st Subordinate Judge, Patna, dated the 15th August 1913.

Messrs. P. R. Dass and Ganesh Dut Singh,
for the Appellant.

Messrs. Kulwant Sahai and Fakhurud Din,
for the Respondents.

JUDGMENT.

ATKINSON, J.—The plaintiff sues in this action to recover Rs. 11,927-9 from the defendants. This sum represents principal and interest calculated up to the 6th September 1912. The original contractual relationship arose between the parties on the 12th August 1903. Let us see for a moment what is the contract which the plaintiff relies upon to sue in this action.

The contract alleged is that he, the plaintiff, was induced by the defendants, who are related one to the other and carry on a joint distillery business, to lend them from time to time money for the purpose of their business, and that at the time the contract was made it was agreed that one open banking account should be kept between the plaintiff and the several defendants jointly, on the ground that it was money being raised or borrowed in the form of a banking transaction for the benefit of the joint business. That is the form in which the plaintiff sets forth his cause of action in his plaint. Let us see if he has established that contract by the evidence adduced on his behalf.

In my opinion it is clear that the plaintiff has not established the contract which he pleads. No evidence is given to show that these defendants were joint; no evidence is given that they represented themselves as carrying on a joint business in a distillery concern. The only evidence that is given by the plaintiff is, that upon the 12th August 1906 at about 8 o'clock in the morning at the plaintiff's house the several defendants were there with others; and that one Bakar Kalal, one of the defendants, opened negotiations with the plaintiff as to the borrowing of money for the benefit of the business. Nothing is shown as to how the defendants, or each of them, were jointly concerned so as to be liable for the joint debt. The plaintiff himself was the only witness who could have given evidence to prove the contract set forth in his plaint, but he has not been called and has given no evidence at all to establish what

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was the true contract which he alleged existed between himself and the defendants.

One thing that is decidedly noticeable in this case is, that the inception of the business relationship alleged to have been established between the plaintiff and the defendants is of a most unusual and peculiar character, having regard to the ordinary custom prevailing in such matters in this country as well as the plaintiff's own usual course of dealing. There is no document signed, there is no agreement made in writing, there is no evidence of any kind produced, to show the terms on which this contract was made. It is pleaded only as a verbal contract and no more. And although the banking relationship went on between the plaintiff and the defendants for over six years, and continued in all up to 1912, yet there is not one shred of writing of any kind or description by the defendants in support of the plaintiff's case. We have only to see if the contract has been made; and if it has been made, whether the evidence is so coercive and strong as to induce us to hold that we should be bound to give the plaintiff judgment for the sum which he claims.

Not a shred of writing or any documentary evidence, save the *bahi*, is produced, covering the whole period from the 12th August 1906 to the 15th April 1912. It is alleged that this business which was conducted by the plaintiff with the defendants was something outside an ordinary money-lending transaction, and was in the nature of a banking business. If it was a banking business, it appears to me that the whole course of dealing between the parties, as proved by the plaintiff, is utterly inconsistent with banking business in its ordinary sense. Withdrawals were made from time to time, without cheque, without draft—merely upon verbal demand; lodgments were made from time to time by the defendants, and no receipts were given; and note the peculiar method of lodging on the last day of each month a small sum, and on the succeeding day—the beginning of the next month—the withdrawal of a much larger sum. The fact that this was the course of dealing consecutively for years, six years in all, seems

to me a very peculiar and illogical and improbable transaction. No demand was made by the plaintiff upon the defendants prior to the action brought on foot of the alleged debt. The last loan obtained was on the 15th February 1910; no withdrawals were made after that date; interest has been calculated up to the 15th April 1912; and during these two years no demand of any kind or description was made by the plaintiff upon the defendants to discharge and satisfy the debt which he alleged they owed him. That, to my mind, is most significant. The first demand for payment that was made by the plaintiff upon the defendants was the issue and service of the plaint. All these matters have to be taken into consideration in testing the *bona fides* of this claim. The entire absence of independent evidence to corroborate the plaintiff's case as proved by his three witnesses—whose evidence must, I think, be viewed with some suspicion—cannot be lost sight of. The corroboration alleged to exist is alleged to exist because other persons were present besides the contracting parties at the time the contract was made and they have not been called. Interest is alleged to have been reduced in May 1907 at the request of all the defendants, and a man called Golaman was present, and yet he is not called; his presence is admitted by witness No. 2 for the plaintiff, he would have been a very material witness in support of the plaintiff's case if in May 1907 the defendants had come to the plaintiff and said: "Will you now please agree to relax the rate of interest which you are charging us on foot of the several drafts with you in accordance with our original contract of 1906." Here is an independent person who might have clinched the case for the plaintiff and yet he was not called. There were six or seven persons present at the making of the original contract, and they have not been called. In no one particular has the plaintiff produced any corroborative evidence of his claim, save and except the pass-book. I may say this pass-book has a very suspicious appearance. It is noticeable in its regular uniformity of all entries; it is written up in copy-book style, and these entries in their uniformity seem to me to negative the idea of entries made from time to time as the transactions took place. Mr.

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Das on Friday called this pass-book a ledger; to-day he has receded from that position and says it contains the original entries made from time to time as each transaction took place over the whole period of six years. Well, whether it be a ledger or be the book of original entries, it appears to me to bear upon its face suspicion and doubt; and this is so all the more because you find intermingled with the account of the defendants at the end of the year 1909 the account of another person not a party to this suit, covering the period of one year if not more, and then we find the defendants' account following on in the succeeding years 1910, 1911 and 1912. The account book is inaccurate and it is also false in some of its calculations. I do think importance is to be attached to the two points made by Mr. Kulwant Sahai as to the interest charged for the month of February in the leap years 1908 and 1912, as well as the point he makes that interest is calculated on the money for the entire month, when admittedly it was only outstanding for a part. It is all very fine for the plaintiff to throw this book on the table and say: "there it is: It is *prima facie* evidence of my claim; it must be accepted." But where the plea of forgery is alleged, it is necessary to scrutinise this account book with the greatest possible care; and viewing that book in its entirety and appealing to myself as a Judge of fact, I cannot bring myself to arrive at the conclusion that this book is a book honestly made and kept honestly day by day as a record of the entries of the transactions it purports to deal with. Suspicion, in my opinion, is written broadcast upon its face. It is a book I think unreliable; and its value is not enhanced by the witnesses called to support it, *videlicet*, witnesses Nos. 1, 2 and 3 for the plaintiff. They are the plaintiff's servants, who have been in the plaintiff's employment for many years, and who no doubt are anxious to serve their master. The plaintiff fails to appear as a witness on his own behalf. His non-appearance is striking. With him the alleged contract was supposed to have been made. Suddenly when the case has been pending a year, and is on the point of being heard, a petition is filed claiming an adjournment on the ground that the plaintiff is ill; the petition is unverified by affidavit and no doctor's

evidence or certificate is forthcoming in corroboration to support it. It states that the plaintiff is unwell, that he is in ill health, and has been obstructed in attending Court by the floods. There is not a tittle of evidence to support this, beyond the blank statement in the petition itself. The plaintiff was a vital witness on his own behalf to prove the making of the contract and its terms. He alone made the contract; he alone could prove it. Witnesses Nos. 1 and 2 who are called to prove the contract were only bystanders, and in my judgment these witnesses do not prove the contract pleaded. In no part of their evidence can you show that the contract was made with the defendants jointly and for the purpose of carrying on a joint business. I think that this is the foundation of the plaintiff's claim. The onus is on the plaintiff to establish conclusively the contract he alleges. The factum of the contract has to be established to the satisfaction of the Court. If the plaintiff fails to discharge this onus he cannot succeed; and due weight must always be given to the finding of the Primary Court who saw and heard the witnesses adduced for the plaintiff and who could more fully and conclusively arrive at a clear conclusion as to the value of their testimony and the degree of credit to be attached to it. I hesitate to dissent from the opinion expressed by the Subordinate Judge as to the value to be attached to the evidence given by the plaintiff's witnesses, more especially as I find the case in its inherent features and probabilities gravely suspicious and doubtful. The disappearance of the account-book alleged to have been given to the defendants is remarkable, if it ever existed. But even the history of this book is peculiar. The object of this book, if any, was to keep a check on the entries in the plaintiff's ledger, and yet we find this book kept and entered up by the plaintiff's *dewan*, witness No. 2. The alleged physical custody of the book was with the defendants, yet the entries were made by the plaintiff's clerk, when and where is not proved. And there seems an utter lack of genuine and convincing proof as to the reality and existence of this second account-book. Why, if the book was for the protection of the defendants, should it be kept and entered

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up by the plaintiff's clerk? It is not a usual way certainly of doing business. And what is significant is that throughout the many years pending before the hearing of this suit no application was made by the plaintiff calling upon the defendants to produce the alleged account-book, which he says he gave them and which forms the basis of the contract referred to in paragraph No. 4 of the plaint. Never a petition, never a summons, never a demand is made to produce the book, which he (the plaintiff) says he gave the defendants for the purpose of keeping a counter-record, and which was to be entered up by the plaintiff's servant. If his case was true he must have known that the book was in existence at the time and could have been preserved as a record, in the action instituted by him. However, he did not trouble to do anything of the kind, nor did he attempt to prove the contract to the conviction of the Court's mind. The evidence given by the defendants may be weak and false; this will not lessen the legal obligation the plaintiff is required to discharge. The defence is a categorical denial of the contract and of the fact of borrowing money from the plaintiff for a joint business or any business. The defendants, when the claim was put forward, asked for inspection of the plaintiff's account book, and they allege in paragraph No. 7 of the written statement that that application was refused. Why, if this was an honest transaction, was inspection refused? It appears now from the record that persistently from September 1912 to April 1913 every available excuse was put forward by the plaintiff to conceal this book. Why, if he was an honest man, preparing an honest ledger and an honest account-book, did he refrain from producing it? I think the non-production of this document when it was demanded throws a grave suspicion upon its genuineness.

Then it is alleged that the defendants should have produced their account-books, which would have shown whether they were joint or not; whether they got revenue licenses in their own names or jointly, and would otherwise have raised some degree of proof in support of the plaintiff's case. I cannot see why the defendants should be called upon to produce their books when

no application was made upon them to do so. Their case is a denial, a traverse, of the entire case for the plaintiff; and that plea did not throw upon them, in my opinion, the responsibility of producing their books. They say:—"Your case is false from beginning to end. Your book is a forgery; your claim is false." They were never served with notice to produce, never called upon to show their books; and now it is contended that because they did not produce their books, there is a presumption that, if produced, the books would have been against them. I cannot hold with that contention at all; it would be not only absurd but unjust, and in this case inequitable, to infer from the non-production by the defendants of their books, which were never called for, that the plaintiff's case was just and affirmatively proved.

The sole question, therefore, is whether we believe that the contract sued on was made. We are of opinion that this contract, as pleaded, has not been proved. The only person who could prove it has not been called. We think that the books and the other evidence in the case adduced on behalf of the plaintiff are so untrustworthy and so unreliable that we would not be warranted, as Judges of fact, in reversing the decision of the Subordinate Judge and in giving a decree in favour of the plaintiff for the amount of his claim. Accordingly we shall dismiss this appeal with costs, and the action with costs in all Courts.

MULLICK, J.—I agree. I only desire to add a few remarks with reference to the argument addressed to us by Mr. Das to the effect that the omission by the defendants to produce their account-books leads to the inference that the plaintiff's case was true. In this connection I desire merely to reproduce the words of their Lordships of the Privy Council in the case of *Bilas Kunwar v. Desraj Ranjit Singh* (1). The words are as follows:—

"These books do not necessarily form any part of the plaintiff's case; it is of course possible that some entries might have ap-

(1) 30 Ind. Cas. 299; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).

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peared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference, such as is made in the High Court, that the books if produced would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow being therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents thereof."

In my opinion no adverse inference could have been drawn in this case by reason of the non-production of their account-books by the defendants.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 58
OF 1914.

January 17, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

NAKIMO DEWANI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

JERANG DEWAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Civil Procedure Code (Act XIV of 1862), s. 462—Compromise for minor by Court of Wards—Leave of Court, whether necessary—Court of Wards Act (IX B. O. of 1879), ss. 18, 57.

Order XXXII, rule 7, Civil Procedure Code, 1908, or section 462, Civil Procedure Code, 1862, does not apply when a suit is compromised by the Court of Wards on behalf of a minor ward. Such compromise is binding without leave of the Civil Court. [p. 974, col. 2.]

Appeal against the decree of the District Judge, Darjeeling, dated the 14th November 1913.

FACTS of the case are briefly as follows.—In 1862 the Government of Bengal in return for political services received during the Sikkim Campaign, made a grant of an extensive tract of forest lands, covering all the hills, spurs and valleys below Phallut and right up to the Sikkim frontiers, to one Cheboo Lama, a member of the Court of the Maharaja of Independent Sikkim. On Cheboo's death there was a partition (subsequently recognised by Government) among his son Rechuck, who became a British subject and got 19,000 acres in British territory, his nephew Parbhu, who got the Sikkim estate, and his adopted son Raja Tenduk Pulger of Darjeeling.

On Rechuck's death disputes arose between his widows Nakymo and Gadenputty Dewan (since deceased) on the one hand, and Parbhu on the other, but on a reference by the Collector of Darjeeling to Mr. Pope, the then District Judge of Darjeeling, under the Bengal Land Registration Act, the latter, on March 31st, 1900, decided in favour of the widows, holding that they had a preferential right to succession and possession according to the custom prevailing among the Buddhist Lepchas and Bhutias of Sikkim and Darjeeling.

The estate was already encumbered to the extent of Rs. 65,000 and Nakymo applied to the Court of Wards to take over charge from her as a disqualified proprietress. After some correspondence they did so, but subsequently informed her that they were holding on behalf of her minor daughters whom they considered to be the preferential heirs. Meanwhile on Parbhu's death his son Jerang Dewan—one time a Prime Minister of Sikkim—who claimed to be the preferential heir, was willing to settle his claim on certain terms undertaking to pay off the debts and pay Nakymo an annuity of Rs. 100 and also make some other provision for her minor daughters. But the Bengal Government and the Board of Revenue refused to sanction this compromise, which fell through as the conveyance in pursuance of it could not be registered. In 1907 Jerang Dewan filed a suit for recovery of possession on declaration of his

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preferential title as nearest agnate, and made Nakymo and her two minor daughters defendants through Chubbilal, a Sub-Deputy Collector who was the manager of the Reilling Estate under the Court of Wards. Without taking any step to file a written statement, the latter, with the approval of the Legal Remembrancer obtained through the Court of Wards, compromised the suit on terms much less favourable to Nakymo and the minors than the earlier infructuous compromise, with the result that Nakymo who had walked into the Court of Wards with 19,000 acres walked out with only two thousand acres and an allowance of Rs. 25 per month so long as she did not re-marry. But the sanction of the Civil Court was not obtained as required by section 462 of the Code of Civil Procedure, 1882, and thereafter the Reilling Estate was released by the Court of Wards to Jerang Dewan, who paid off the debt of Rs. 65,000. In 1916 Nakymo filed the present suit against Jerang and her minor daughters to set aside this compromise as invalid and as vitiated by fraud on the part of Chubbilal. The minors were subsequently made plaintiffs, and when the suit came up for trial before Mr. Nicholl, the District Judge of Darjeeling, Mr. G. Sircar, Vakil, on behalf of the plaintiffs, confined his arguments to the vulnerability of the compromise decree, relying on the latest Privy Council decision reported as *Partab Singh v. Bhabuti Singh* (1), as the District Judge would not allow him to go into the question of fraud, there being no specific allegation to that effect in the plaint. Mr. Sircar had also urged in the Court below that if the compromise were set aside the parties would be relegated to their original position and the suit that had been compromised would then have to go on. The defendants thereupon agreed to compromise, offering to give the plaintiff unconditionally almost three-fifths of the lands in suit, but Nakymo refused to sign this new compromise petition and the suit was dismissed, the District Judge holding that the Court of

Wards had power to sanction the compromise of the original suit without obtaining the leave of the Civil Court.

Nakymo and the minors then preferred an appeal to the Calcutta High Court, which came up for hearing in July 1916 before Justices N. R. Chatterjea and Sheepshanks, who in August desired to have the appeal re argued as to the demand asked for by appellants, but as their Lordships appeared to differ in opinion at this re-hearing, in order to prevent the further costs of a Letters Patent Appeal, they ordered the whole appeal to be sent down for re-argument on the appellants paying the respondents Rs. 300 as costs. After the long vacation an application was unsuccessfully made to the Chief Justice to transfer the appeal from the Bench presided over by Justices Fletcher and Richardson to that presided over by Mr. Justice N. R. Chatterjea, as it was really a partly heard matter and Mr. Justice Sheepshanks had left the High Court.

Babu Provas Chunder Mitter (with him Babu Tarakeswar Paul Chowdhury), for the Appellants.—Section 462 of the Civil Procedure Code, 1882, does apply to this case. An examination of the old Code will show that section 462 has application in a case compromised by a Court of Wards on behalf of minor wards.

Sections 4—18 of the Court of Wards Act refer to compromise out of Court. Section 51 of the Court of Wards Act refers to suit when started, as the following sections show.

Again this compromise was obtained by fraud practised on the Court of Wards. Therefore it cannot stand. The compromise failing, the parties must be relegated to their original position.

Referred to Trevelyan on Minority and *Partab Singh v. Bhabuti Singh* (1).

Mr. B. C. Mitter (with him Mr. S. N. Banerjee, Babus Sarat Kumar Mitter and Ram Charan Mitter), for the Respondents.—In construing a section of an Act you cannot go behind it and examine the history of the previous state of the law. This principle has been laid down by very eminent Judges. A comparison of the several sections of the Code of 1852 with certain sections of the

(1) 21 Ind. Cas. 288; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 35 A. 487; 11 A. L. J. 901; 40 I. A. 182 (P. C.).

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Court of Wards Act will show conclusively that section 462, Civil Procedure Code, has no application to a suit compromised by the Court of Wards. *Of* Section 440, Civil Procedure Code, with section 51 of the Court of Wards Act. See sections 51 and 18 of the Court of Wards Act. See sections 441, 461, Civil Procedure Code. None of them could apply to a compromise of a suit effected by the Court of Wards.

The Court of Wards Act sets up a concurrent jurisdiction for the benefit of the minor. Its scheme is altogether different and the Civil Court has nothing to do with it. When a Court of Wards takes charge of an estate, there is almost a devolution of interest. *Vide Sourindra Mohan Togore v. Siromoni Debi* (2). The Civil Court under the Civil Procedure Code has no control over the person who represents the minor under the Court of Wards. Section 18 of the Court of Wards Act refers to compromise both in and out of Court. If section 462, Civil Procedure Code, applied, then the Civil Court would seriously affect or derogate from the provisions of the Court of Wards Act.

Babu Provas Chunder Mitter replied.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiffs against the decision of the learned District Judge of Darjeeling and Dinajpore, dated the 1st December 1913, dismissing the suit. The suit was brought for the purpose of setting aside a compromise that had been entered into in a former suit, which is said to have been in contravention of section 462 of the Code of Civil Procedure which was then in force. The facts out of which the case arises are as follows:—One Lochho Tunqui had two sons Chuboo and Dudock. The parties came from the State of Bhutan and the law applicable to the parties is the Buddhist or the Customary Law as is recognized and which is in force in the State of Bhutan. Chuboo, who seems to have rendered important political services to the British Government, was awarded for such services a grant of 74,016 acres of land in the District of Darjeeling. Chuboo died in 1866

having been predeceased by his brother Dudock. Chuboo left one son named Rechak Dewan and a daughter named Euden. Rechak died on the 26th August 1899 having been married twice, his first wife being Nakymo Dewani, who is the first plaintiff in the present suit, and the other wife being one Gudenputty who died in 1903 without issue. Nakimo has had two children both of whom are daughters, namely, Ishay Chhodon and Tashi Lhamoo, who are the other plaintiffs. Chuboo's brother Dudock left an only son Phurboo. Phurboo had two sons, the eldest being Jerang Dewan. There seems to have been some controversy at the earlier stage of these proceedings and in the former suit as to whether Jerang was, in fact, a son of Phurboo, but the fact is that he claimed to be so and, so far as the evidence goes, he was recognized as being the son of Phurboo. There was another younger son of Phurboo and that younger son was named Gulchhan. He died in May 1903. The dispute arose as follows:—On the 10th August 1877, after Chuboo's death, the Government made a lease of this property to Rechak, one Tendok Palgar who was then the manager of the property and Phurboo in three equal shares. The Forest Department acquired 44,000 acres out of this property in 1881 and, on the 17th July 1899, there was a partition between Rechak and Phurboo, Phurboo getting all the properties in the State of Sikkim and Rechak getting the properties in the District of Darjeeling. On the 10th March 1893, the Government granted a lease of 19,000 odd acres of land to Rechak. Then after the death of Rechak, there having been certain disputes in the Civil Court which arose out of certain Land Registration proceedings, Nakymo applied to the Court of Wards to take charge of the estate. The Court of Wards at first intimated that Jerang Dewan must also be a party to the petition. However, in the result on the 7th November 1905 the Court of Wards declared Nakimo to be a disqualified proprietor and took over charge of the property. On the 17th February 1903, the Court of Wards declared the two daughters of Nakimo, namely, Ishay Chhodon and Tashi Lahmoo to be minors

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and, on the 7th March of that year, the Court declared them also to be the heirs of Rechak Dewan. From the 17th February 1906, the two minors Ishay Chhodon and Tashi Lahmoo were disqualified proprietors and wards under the Court of Wards. Next, on the 5th February 1907, Jerang Dewan instituted a suit against Nakymo and the two minors Ishay Chhodon and Tashi Lahmoo. In the course of that proceeding, a compromise was arrived at. That compromise was, as it appears from the petition of compromise and the letter of the Board of Revenue annexed to that petition, approved of by the Court of Wards.

The first point that has been argued both here and in the Court below and which apparently is the only point argued in the case is this. That the approval of the Civil Court not having been taken to that compromise under the provisions of section 462 of the Code of Civil Procedure then in force, the compromise is voidable as against the two minors. That depends purely on an examination of the sections in the Civil Procedure Code and in the Court of Wards Act. The Court of Wards Act contains two sections that are material to the matter. The first is the 18th section. That provides that "the Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward." The section by itself clearly authorises the Court of Wards to compromise a claim on behalf of the ward, whether a minor or an adult ward, if the Court judges it to be most for the benefit of the property or the advantage of the ward. The other section is the 51st section. That provides that, in all suits instituted by or against a minor ward, the Collector of the District or the manager shall, as the case may be, be the next friend or the guardian of the minor for the suit. That is how the matter stands under the Court of Wards Act. It is said that the Code of Civil Procedure has placed an additional restriction on the Court of Wards by further enacting under the terms of section 462 that any compromise entered

into by the Court of Wards on behalf of a minor litigant requires also the approval of the Civil Court. That turns purely on a consideration of the various sections that are in the Civil Procedure Code. It is, however, a matter to be noticed that section 464 of the Code as originally passed by the Legislature clearly did not require the sanction of the Civil Court to a compromise entered into by the Court of Wards. It is said, however, that the alteration in the wording of section 464 which was effected in the year 1888, altered that provision. Section 464, as it ran after the amendment of 1888, was in these terms:—"Nothing in this Chapter shall be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors." The view that the learned Judge took in the Court below was that to give the effect that was suggested by the plaintiffs to the provisions of section 462 would, in fact, derogate from the provisions of the Court of Wards Act so far as suits relating to minors under their charge were concerned. The argument is as follows:—Section 51 of the Court of Wards Act takes away from the Civil Court the duty of appointing a next friend or guardian *ad litem* of a minor and appoints the manager under the Court of Wards as the statutory next friend or guardian. Clearly, therefore, the Civil Court has nothing to do with the appointment of a next friend or guardian. Then section 18 of the same Act gives power to the Court of Wards to compromise generally, which includes both suits in and claims out of Court, and to cut down the provisions of section 18 by stating that when the ward is a minor, no compromise in a suit should be binding on the minor ward unless the approval of the Civil Court has been obtained as mentioned in the Civil Procedure Code, would derogate from the provisions contained in section 18 of the Court of Wards Act. I am of opinion that that argument is well-founded to hold that the sanction of the Civil Court to every compromise that is entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge would seriously affect, or derogate from, the provisions contained in the Court

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of Wards Act. This point, as appears from the judgment of the Court below, was the only point argued before the learned Judge, because the learned gentleman who conducted the case in that Court on behalf of the plaintiffs stated that he rested his case solely on the issue concerning vulnerability of the decree of the 12th March 1908 and did not invite the Court to decide the issue of title by succession.

The case has also been attempted to be argued before us on the question of fraud, the fraud alleged being that the Court of Wards were deceived in giving their consent to the compromise by having been given false information relating to the course of succession under the Bhutan Law. It is almost sufficient to deal with that case by stating that no evidence was given in the case as to what the fraud practised on the Court of Wards was. The Court of Wards had before them, as appears from the record, a full statement from the Deputy Commissioner as to what was proposed to be done and, before acting on the information and authorizing the compromise, they took the precaution of sending all the papers that they had before them to the Legal Remembrancer, asking him as to what ought to be done with regard to the matter and it was only when the Legal Remembrancer had dealt with the matter fully that the Court authorized the compromise. An allegation like this seems to be wholly insufficient to disturb the act of the Court regularly and properly entered into. Moreover, the evidence that we have in this case raises a serious doubt as to whether the plaintiffs under the Bhutan Law had the right of succession to Rechak's properties. There is a considerable body of evidence, notwithstanding some statement more or less loose of His Highness the Maharaja of Sikkim, as to the course of descent, which would go to show that the course of succession was not through females but was confined to agnatic relationship. In that view, it is not denied that Jerang Dewan would be wholly entitled to succeed to Rechak's properties after his death. The statement of the Maharaja of Sikkim that has been read to us seems to be vague, and nothing definite can be drawn from that. I think that the evidence does show that

there was clearly a case in which the Court could enter into the compromise so as to secure the best terms possible for the two minors and there is nothing to suggest that better terms could have been obtained. The alleged fraud is wholly unproved and the gentleman conducting the case in the Court below stated that he did not intend to ask the Court for a decision upon the issue of title by succession. If the Court of Wards acted to the best of their judgment to secure for the two minors, out of the property to which they had no right at all, 2,000 acres of land and a property of some value in Darjeeling *plus* the payment of their father's debts, which amounted to Rs. 64,000, I think the compromise was highly advantageous to the wards that the Court had under their charge. There is no evidence to support the case of fraud as set up in the 23rd paragraph of the plaint, namely, that a fraud of some sort was practised on the Court of Wards to get them to approve of that compromise. No evidence was given in support of such a case, nor do I think that there is any truth in the story. The Court recognized that these minors had, in fact, under the terms of the law by which they were governed, no right to their father's property and they entered into the compromise to secure the best terms they could, so that something might be got for these female wards. Whatever might be the state of affairs, I am quite clear that the evidence adduced is wholly insufficient to establish a case of fraud practised on the Court of Wards in the manner suggested. I think the result arrived at by the learned District Judge is correct. The present appeal, therefore, fails and must be dismissed with costs. There will be two sets of costs to the two sets of respondents.

RICHARDSON, J.—I agree.

Appeal dismissed.

GOVIND KANDU v. WAJID ALI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2254 of 1915.

December 5, 1916.

Present:—Mr. Justice Jwala Prasad.

GOVIND KANDU AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

Sheikh WAJID ALI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Variance between pleading and proof—Mortgage—Redemption—Suit based on specific mortgage—Mortgage specified not proved—Plaintiff, whether can get decree on prior mortgages—Cause of action—Multifariousness—Civil Procedure Code (Act V of 1908), O. I, r. 3—Misjoinder.

The plaintiff brought a suit for redemption against two persons on the basis of a particular mortgage. The specific mortgage set up in the plaint was not proved:

Held, that the plaintiff was not entitled to a decree for redemption in that suit on the basis of prior mortgages in favour of the two defendants separately. [p. 977, col. 2.]

Appeal from the decision of the Sub-Judge, Chapra, dated the 9th July 1915.

Mr. Rajendra Prasad, for the Appellants.

Mr. Parmeshwar Dayal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption. The suit is based on a *zarpeshgi*-deed, dated the 16th May 1910, executed by plaintiff for Rs. 275 in respect of 2 *bighas* 4 *cottahs* 19 *dhurs* of land for the years 1319 and 1320 *Faslīs*. The deed stands in the name of defendant No. 2, Sheikh Walayat Hussain, but it is alleged in the plaint that defendant No. 2 was only a *farzidar* and *benamidar* of defendant No. 1 Sheikh Wajid Ali, who is alleged to be the real mortgagee. The defendants filed separate written statements. The defendant No. 1 disclaimed all connection with the bond in suit and denied that he had any interest in the bond in suit. He further stated that he was in possession of only 1 *bigha* 5 *cottahs* out of the disputed land under *zarpeshgi*-bonds (1) dated 27th May 1895 and (2) dated 7th June 1909. He also alleged that he holds a simple mortgage-bond dated 26th July 1903 from the plaintiff and that certain other sums are due to him on account of *mahajini* dealings with the plaintiff. The defendant No. 2, Sheikh Walayat Hussain, alleged that the *zarpeshgi*-deed of 1910, on the basis of which the suit for redemption has been brought, was executed on account of fraud practised on him by

the plaintiff, that it was never acted upon and was inoperative. He further said that he was in possession of one *bigha* out of the disputed land under a *zarpeshgi*-bond of 13th July 1899 for Rs. 100 and was not in possession of 2 *bighas* 4 *cottahs* 19 *dhurs* as alleged by the plaintiff and that he was not a *farzidar* of defendant No. 1. The first Court declined to give a decree for redemption on the basis of the bond in suit, but held that the plaintiffs were entitled to a decree for redemption on the basis of prior mortgage-bonds executed in favour of either defendants as their due dates had expired. The Subordinate Judge in appeal held that the bond in suit was never given effect to and was inoperative and that the plaintiffs could not claim any benefit under it. He further held that the plaintiffs were not entitled to redeem the prior mortgages executed in favour of the defendants separately. He accordingly dismissed the suit of the plaintiff. The plaintiffs have, therefore, appealed to this Court and contend that the lower Appellate Court should have allowed them to redeem the prior mortgages held by the defendants.

The only question for determination is, whether or not the plaintiffs are entitled to redeem the property in this suit on the basis of the prior mortgages in favour of the defendants.

It has been distinctly held in this case by the lower Appellate Court that defendant No. 2 is not a *farzidar* of the defendant No. 1. The suit for redemption is in respect of 2 *bighas* 4 *cottahs* 19 *dhurs* of land. The defendant No. 1 holds only 1 *bigha* 5 *cottahs* out of this under separate *zarpeshgi*-bonds of 1895 and 1903 and has a simple mortgage-bond of 1903. The defendant No. 2 holds 1 *bigha* only under another *zarpeshgi*-bond of 1899. The bonds stand separately in name of the defendants and they have nothing to do with each other in respect of the bonds held by them. The plaintiffs have not got the same cause of action against these defendants, nor are they jointly liable in respect of each and all of such causes of action. The causes of action in respect of the several mortgage-bonds held by the defendants are distinct and independent of each other and

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do not arise out of the same transaction and cannot be joined in one suit against the two defendants in this case, who are not jointly liable in respect of each and all such causes of action—Order I, rule 3, and Order II, rule 3 (1), of the Code of Civil Procedure. *Umabai v. Bharu Balvant* (1) and *Mullick Kefait Hossein v. Sheo Pershad Singh* (2). The suit for redemption is based entirely upon the distinct cause of action, expressly stated to have arisen on the 30th of Jeth 1321 Fasli in respect of the *zarpeshgi*-deed of 16th May 1910. The plaintiff, having failed to establish his right to redeem the bond on the basis of which the suit was brought, should not be allowed to fall back on some other mortgage-bonds held by the defendants on which the suit has not been based. *Vide Krishna Pillai v. Rangasami Pillai* (3), *Sheo Prasad v. Lalit Kuar* (4), *Mullick Kefait Hossein v. Sheo Pershad* (2), *Govindrav Deshmukh v. Ragho Deshmukh* (5). The earlier rulings of Madras High Court relied upon by the appellant. *Unnian v. Rama* (6) and *Hinde & Co. v. Ponnath Brayan* (7), are distinguishable and have not been acted upon by the same Court in *Krishna Pillai v. Rangasami Pillai* (3), already referred to. I, therefore, think that the learned Subordinate Judge is right in not allowing the plaintiff to redeem the prior mortgages held by the defendants in the suit. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

- (1) 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499.
 (2) 23 C. 821; 12 Ind. Dec. (N. S.) 545.
 (3) 18 M. 462; 5 M. L. J. 187; 6 Ind. Dec. (N. S.) 672.
 (4) 18 A. 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975.
 (5) 8 B. 543; 4 Ind. Dec. (N. S.) 738.
 (6) 8 M. 415; 3 Ind. Dec. (N. S.) 284.
 (7) 4 M. 359; 1 Ind. Dec. (N. S.) 1085.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2315 OF 1914.

October 3, 1916.

Present:—Justice Sir William Ayling, Kt.,
 and Mr. Justice Napier.

SUBBAYA NADAN—PLAINTIFF—

APPELLANT

versus

AIYAVOO REDDI alias SANGA REDDI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Highways, public—Dedication to class, legality
 of—Right of user by any member of public—Pro-

cession, obstruction to—Cause of action—Burden of proof
 —Pleadings—Civil Procedure Code (Act V of 1908), O.
 I, r. 8 Specific Relief Act (I of 1877), s. 42.

Public highways cannot be dedicated to a class or to a limited section of the public and such dedication is no dedication at all. [p. 978, col. 2.]

Farquhar v. Newburg Rural District Council, (1909) 1 Ch. D. 12; 78 L. J. Ch. 170; 100 L. T. 17; 73 J. P. 1; 7 L. G. R. 364; 25 T. L. R. 39, referred to.

All other rights over other persons' property are private, whether they belong to a class or to an individual and whether they arise by grant, license, easement, customary right or any other origin. [p. 978, col. 2.]

It is settled law in India that every member or class of the public is entitled to use a public highway for conducting a religious or ceremonial procession without interference by any other member or class. [p. 978, col. 2.]

Even if there is no evidence of user for the particular purpose by the persons claiming the right, the right so to use them at any time is legally vested in them. [p. 979, col. 1.]

Sadagopa Charari v. Krishnamoorthy Rao, 30 M. 185; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204; 34 I. A. 93 (P. C.) and *Kandasawmy Mudali v. Subraya Mudali*, 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617, followed.

Brookbank v. Thompson, (1903) 2 Ch. 344; 72 L. J. Ch. 626; 19 T. L. R. 285; 89 L. T. 209; *Poole v Huskinson*, (1843) 152 E. R. 1039; 63 R. R. 782; 11 M. & W. 827 and *Vestry of Bermondsey v. Brown*, (1865) 1 Eq. 204; 55 E. R. 842; 35 Beav. 226; 11 Jur. (N. S.) 1031; 13 L. T. 574; 14 W. R. 213, referred to.

Where the ownership of a road is unknown, dedication of it to the public will be presumed from proof of its user by the public. [p. 979, col. 1.]

Semble:—Mere obstruction to a procession without proof of loss of property or personal injury may give rise to a cause of action. [p. 979, col. 1.]

But the obstruction must be specifically alleged in the plaint, and where it is found against, the suit is liable to be dismissed. A plaintiff cannot be allowed to prosecute his claim on the ground of a denial of his right by the defendant, which was not averred in the plaint [p. 979, cols. 1 & 2.]

Kandasawmy Mudali v. Subraya Mudali, 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617; *Andi Moopan v. Muthuvirama Reddi*, 29 Ind. Cas. 244; 29 M. L. J. 91; 17 M. L. T. 453 and *Brislingappa v. Dharmappa*, 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586, referred to.

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevely, in Appeal Suit No. 232 of 1913, preferred against that of the District Munsif, Kovilpatti, in Original Suit No. 204 of 1914.

The Hon'ble Mr. S. Srinivasa Aiyangar (with him Mr. S. Desikachariar), for the Appellant.

Dewan Bahadur Mr. L. A. Govindaraghava Aiyar (with him Mr. S. Muthia Mudaliar), for the Respondents.

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JUDGMENT.

AYLING, J.—The sole cause of action alleged in the plaint is the obstruction by defendants of plaintiff's marriage procession on 6th December 1909. Both the lower Courts have found against the fact of obstruction. On this ground alone this second appeal must be dismissed with costs, although I am in general agreement with the conclusions of my learned brother in the judgment which he is about to pronounce.

NAPIER, J.—This second appeal arises out of a judgment of the Subordinate Judge of Tinnevely reversing the decree of the District Munsif of Kovilpatti in a suit brought under Order I, rule 8, of the Code of Civil Procedure by the plaintiff on behalf of himself and other Nadars, his fellow-castemen, for a declaration that he and they are entitled to take their marriage processions along certain roads in the village of Mela Chaitalai and for an injunction to restrain the defendants, certain Reddis, Naickers and Asaris, from interfering with them. The District Munsif gave them a declaratory decree which has been set aside by the Subordinate Judge.

The first point taken by the Advocate-General for the appellant is that the Subordinate Judge has misunderstood the law applicable to the case. On this point I am clear that the appellant is entitled to succeed. The Subordinate Judge in paragraph 6 introduces a distinction between classes of public roads for which there is no authority to be found in the decisions of this Court or in English Law. He speaks of "public paths or highways in the largest sense." He quotes the well-known decision in *Sadagopachariar v. Rama Rao* (1) and reads the words "in the largest sense" into it. This manner of dealing with decisions of this Court is most improper. It is his duty to follow them without reservations. He relies on the judgment of the Full Bench of Calcutta High Court in the case of *Chunilul v. Ram Kishen Sahu* (2). If their Lordships in that case

intended to lay down that there were public roads limited to a class, I can find no authority for such a classification, nor is any authority quoted for the proposition and with great respect, I think that the method of classification is unfortunate. Public highways stand in a class by themselves. All other rights over other persons' property are private, whether they belong to a class or to an individual and whether they arise by grant, license, easement, customary right or any other origin. To call them village rights and village ways seems to me to use geographical and not legal terminology. There may doubtless be rights of user limited to the inhabitants of a village just as there may be rights limited to the members of a caste or the inhabitants of a street, but they are all private rights. This was clearly laid down in *Brooklebank v. Thompson* (3), where Joyce, J., speaking of a right of way to a church or a market vested in the inhabitants of a parish, describes it as in law a private, not a public, way having its origin in custom. A later case, *Farquhar v. Newburg Rural District Council* (4), decided by the Court of Appeal, re-states this proposition and adds that no public highway can be dedicated with such limited rights. "It is impossible to confer on this (public) road such rights and such rights only as existed over the churchway." This latter statement has reference to the well-established proposition that an attempt to dedicate a highway to a limited portion of the public is no dedication at all. [*Vide Poole v. Huskinson* (5) and *Vestry of Bermondsey v. Brown* (6)]. If, therefore, these are public roads as found by the District Munsif, there is no question that the appellant and his castemen are entitled to use them for their religious and ceremonial processions. That is settled law in this country [*Vide Sadagopachariar v. Rama Rao* (1), upheld by the Privy Council in *Sadagopa*

(3) (1903) 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209; 19 T. L. R. 285.

(4) (1909) 1 Ch. D. 12; 78 L. J. Ch. 170; 100 L. T. 17; 73 J. P. 1; 7 L. G. R. 361; 25 T. L. R. 39.

(5) (1843) 1 M. & W. 827; 152 E. R. 1039; 63 R. R. 782.

(6) (1865) 35 Beav. 226; 11 Jur. (N. S.) 1031; 13 L. T. 574; 14 W. R. 213; 1 Eq. 204; 55 E. R. 882.

(1) 26 M. 376.

(2) 15 C. 460; 12 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 892.

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Chariar v. Krishnamoorthy Rao (7), *Kandasawmy Mudali v. Subraya Mudali* (8) and other cases.]

Mr. Govindaraghava Aiyar next contended that the Subordinate Judge intended to find that these roads are private roads over which a limited class have a right to pass by custom. The short answer is that he has not found anything of the sort and he could not. There is no evidence that the soil of the roads is vested in the adjacent owners. The ownership is unknown and in such a case dedication to the public will be presumed from user. Further, he has not considered the question whether such a customary right vested in the adjacent owners exists, he has only considered the question—whether the plaintiff has proved a custom, a matter that does not arise. Nor is this custom pleaded. What is pleaded is that the roads belong to the adjacent owners and that the plaintiff and his castemen have no customary right to use them. The first contention has not been made out and this being so, the District Munsif on his finding on the evidence has properly held that the roads are public dedicated as highways, with the further result that even if there is no evidence of user for religious or ceremonial processions by the plaintiff and his castemen, the right so to use them at any time is legally vested in them, because as laid down by the Privy Council in *Sadagopa Chariar v. Krishnamoorthy Rao* (7), "all members of the public have equal rights in them." That disposes of the first question. The next objection taken by the respondents is that the suit must be dismissed, the cause of action not having been made out. It is conceded that if an order under section 145 or section 147 of the Code of the Criminal Procedure had been pleaded as the cause of action, the suit would have lain subject to any question of limitation; but it is contended that the cause of action has been found to be false by both Courts, and that even if true, there is no evidence of such special damages as is required by law. We are told that the mere obstruction of a procession is not enough, that loss of property or personal injury must be

proved. There is certainly authority for this proposition, *vide Kandasawmy Mudali v. Subraya Mudali* (8), but there are observations in a later case, *Andi Moopan v. Muthuvarama Reddy* (9), and in *Baslingappa v. Dharmappa* (10) which seem to be inconsistent with that view. It certainly seems to me strange that the offence of wrongful restraint should not give a cause of action and if the matter arose for decision, I should certainly desire to refer the question to a Full Bench. But in this case, both Courts have held that the story of the obstructed procession is false: Now this is the sole cause of action alleged. (*Vide* paragraph 12 of the plaint.) It is argued for the appellant that certain orders of the District Magistrate and the Head Assistant Magistrate, Exhibits II and III, are proved and that they are referred to in paragraph 7 of the plaint. That is partly true; but paragraph 7 does not refer to them specifically, but only alleges that some temporary orders are not binding on the plaintiff, and these orders were not put in by the plaintiff but by the defendants. There is only one cause of action alleged, which has been found against. The last contention is that the defendants have denied or are interested to deny the plaintiff's right within the meaning of section 42 of the Specific Relief Act. No such denial is pleaded as a cause of action, and I think it would not be proper to allow the plaintiff to substitute at the last moment a new cause of action for the one alleged and found to be false. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

V. R. P.

(9) 29 Ind. Cas. 248; 29 M. L. J. 91; 17 M. L. T. 453

(10) 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586.

(7) 30 M. 185; 4 A. L. J. 333; 11 C. W. N. 555; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204; 34 I. A. 93 (P. C.).

(8) 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617

SADANAND TEWARI v. DEB NATH MANJHI.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2549, 2763,
TO 2765 OF 1915 AND 30 OF 1916.

December 7, 1916.

Present:—Mr. Justice Mullick and
Mr. Justice Atkinson.

SADANAND TEWARI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

DEB NATH MANJHI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. (8)—Civil Procedure Code (Act V of 1908), s. 102—Rent, suit for, whether cognizable by Small Cause Court—Appeal, second—Bengal Rent Recovery Act (X B. C. of 1859), s. 10—Abwab, meaning of—Illegal cess.

A suit to recover arrears of rent of a holding is not cognizable by a Court of Small Causes and a second appeal in such a suit would not, therefore, be barred under section 102, Civil Procedure Code. [p. 98¹, col. 1.]

Soundaram Ayyar v Sennia Naicker, 23 M. 547; 10 M. L. J. 329; 8 Ind. Dec. (N. S.) 785, distinguished.

If a tenant in consideration for the use and occupation of land agrees to pay a certain amount of rent in cash and the price of certain quantities of produce, the total of the two items to constitute one whole rent or *jama*, the price of the produce would be recoverable as rent and would not be an *abwab*. [p. 98², col. 1.]

Kalanand Singh v. Eastern Mortgage Agency Co. Ltd., 19 Ind. Cas. 701; 18 C. L. J. 83; *Radha Charan Ray Chowdhry v. Golak Chandra Ghose*, 31 C. 834; 8 C. W. N. 529, referred to.

Second appeal from a decision of the Officiating District Judge, Manbhum, dated the 12th June 1915.

Mr. Atul Krishna Roy, for the Appellants.

Mr. Abani Bhusan Mukerji, for the Respondents.

JUDGMENT.

MULLICK, J.—Appeal No. 2549 arises out of Suit No. 1872 before the Deputy Collector of Manbhum; the appeal before the Judicial Commissioner in that suit is No. 10. Second Appeal No. 30 of 1916 arises out of suit No. 1882, which corresponds to Appeal No. 45 before the Judicial Commissioner. Second Appeal No. 2763 corresponds to Suit No. 1848 and First Appeal No. 33; Second Appeal No. 2764 corresponds to Suit No. 1870 and First Appeal No. 40; and Second Appeal No. 2765 corresponds to Suit No. 1878 and First Appeal No. 42. All these five suits were based

upon a registered *kabuliyat* executed in Suits Nos. 1848 and 1872 by the defendants themselves, and in the remaining suits by the predecessors of the present defendants.

The plaintiffs claim rent of five holdings amounting to various sums in cash, and including certain quantities either of paddy or *ghee* or both, the money value of which is alleged to be part of the contract of tenancy executed at the time of the execution of the *kabuliyats*. The defendants pleaded, first of all, payment; secondly, that the rate of rent was incorrect; thirdly, that the lands had not been properly described, and fourthly, that the suits were bad for misjoinder.

The plea of payment has been found against the defendants. But on the substantial question of what is the rate of rent, the Court held that the plaintiffs had not been able to prove the contract alleged by them, and decreed the suits at the rents admitted by the tenants. There was an appeal in all the suits except No. 1872 to the Deputy Commissioner, and in Suit No. 1872 there was an appeal to the Judicial Commissioner. The appeals to the Deputy Commissioner's Court were transferred under section 225 of the Chota Nagpur Tenancy Act of 1908 to the Judicial Commissioner, with the result that all five appeals were heard by the last named officer and dismissed. The present second appeals have been preferred to us by the plaintiffs.

The first point taken before us by the learned Vakil for the respondents is one as to jurisdiction. He urges that in the appeals in respect of Suits Nos. 1878, 1882, 1848 and 1870, which are below Rs. 100 in value, no appeal lay to the Judicial Commissioner at all and that if the first appeals had been heard by the Deputy Commissioner, the Deputy Commissioner's order would have been final. He urges that if the Judicial Commissioner had no jurisdiction, then we in second appeal have no jurisdiction. But he disregards the fact that these suits were transferred to the file of the Judicial Commissioner under the provisions of section 225 of the Chota Nagpur Tenancy Act, and that, therefore, the Judicial Commissioner had jurisdiction to deal with the appeals,

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although the subject-matter was less than Rs. 100 in value. The question then arises, whether in these suits there is any second appeal to us against the decision of the Judicial Commissioner. The learned Vakil for the respondents falls back upon clause 2 of section 223 of the Chota Nagpur Tenancy Act, and contends that as the suits were of Small Cause Court nature and less than Rs. 500 in value, no second appeal lies to us by reason of the provisions of section 102 of the Civil Procedure Code.

Now, if these suits had been suits of a Small Cause Court nature this contention would have prevailed, but the suits being rent suits were not cognizable by a Court of Small Causes, and, therefore, they did not come within the provisions of section 102 of the Civil Procedure Code. A second appeal clearly lies to us against the decree of the Judicial Commissioner in these four suits.

With regard to Suit No. 1872, in which the subject-matter was over Rs. 100 in value, the only ground urged by the learned Vakil for the respondents is that it falls within the provisions of section 102 of the Civil Procedure Code, and that no second appeal lies. I have already decided that this is not a suit of a Small Cause Court nature, and, therefore, this contention must also fail. Therefore, the plea of jurisdiction as regards all these five appeals has no substance.

Coming now to the merits of the cases, the first argument addressed to us is, that the registered *kabuliyats* containing the contract are invalid, and the learned Vakil points to the finding of the learned Judicial Commissioner which is to the effect that the *kabuliyats* were never acted upon. It is true that both the Court of first instance and the Court of first appeal found various reasons for believing that the executants of the *kabuliyats* were not aware of their contents. But I am unable in second appeal to go into any of these matters, for the simple reason that I find that no issue as to these *kabuliyats* having been executed without the knowledge of the defendants was ever raised at the trial. The defendants never pleaded that there was fraud, coercion or undue influence; and execution being admitted, it was not open to the Courts, without a special issue upon the point, to find that the defendants

in executing the *kabuliyats* were not aware of their contents.

The learned Vakil for the respondents relies upon a condition in the *kabuliyat* which is to the effect that the defendants are liable to ejectment on notice, and he contends that so hard a condition could never have been imported into the document with the knowledge of the executants. But as I have already said, there is nothing to show that the defendants challenged this document in the issues, and it seems to me that if they had done so the plaintiffs might quite possibly have adduced evidence to show that this term of the contract was made with their full knowledge and consent. In any event a complete answer to the learned Vakil's contentions is, that as no issue was raised on the point whether the defendants were or were not aware of the contents of the documents, the finding of the Judicial Commissioner cannot debar the plaintiffs from succeeding in this suit.

Then the learned Vakil for the respondents goes further and urges that the *kabuliyat* was in itself altogether invalid, and he relies upon section 79 of the Chota Nagpur Tenancy Act for the purpose of showing that a contract which bars a tenant from acquiring occupancy rights is a totally invalid contract. Now, referring to the *kabuliyat*, I nowhere find that there is any agreement barring the tenant from acquiring occupancy rights. The contracts were executed in 1303 F. S., that is 1896, at a time when the present Chota Nagpur Tenancy Act was not in force in the District of Purulia, and for all I can see, the term as to ejectment was a perfectly valid contract under Act X of 1859, which was the Act applicable to the contract at that time. There is not a word in the *kabuliyat* to show that the defendants were at that time occupancy *raiyats*, and, in my opinion, section 79 of the Chota Nagpur Tenancy Act has no application to the case. Therefore the finding of the learned Judicial Commissioner that the *kabuliyat* was not operative is, in my opinion, wholly erroneous.

Then the learned Vakil for the respondents contends that although the cash rents may be enforceable, the price of paddy and ghee is not enforceable, because these payments are *abwabs*,

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and he relies upon section 10, Act X of 1859, which directs that no illegal cesses are recoverable from a tenant. Now, the test as to whether such payments are *abwabs* or not has been laid down in many cases, of which one of the latest is *Kalanand Singh v. Eastern Mortgage Agency Co., Ltd.* (1), and the learned Judges observed there, "that if a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent although not described as such, the landlord would be entitled to recover the same, and the whole question in the case is, whether the items claimed are really part of the rent which was the consideration for the letting out of the land." To like effect is the opinion of Maclean, C. J., in *Radha Charan Ray Choudhry v. Golak Chandra Ghose* (2) and there the learned Chief Justice observes: "To my mind each of these cases depends upon its own particular circumstances, and we must look at the contract to see whether the payment which the tenant agrees to make is in reality part of the rent as opposed to what is known as an *abwab*." Now, applying that test to the cases before us, it is quite clear that upon the contracts entered into by the defendants the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain quantities of paddy or *ghee* or both, as the case may be, and that the total of these two items was to constitute one whole rent or *jama*, which was payable by the defendants. The total rental shown in the *kabuliyats* was clearly the consideration payable by the tenant for the settlement made with him by the landlord. There is no indication whatever that the price of paddy or *ghee* was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord.

In this view the amounts claimed for *ghee* and paddy were part of the total rent payable for the land, and the objection on the ground that the *zemindar* is

claiming an *abwab* is not tenable. This disposes of all the points raised before us in the argument.

We threw out a suggestion to the learned Vakil for the appellants, that possibly he might see his way to allowing the decree of the lower Appellate Court to stand for the years in suit, provided he got a declaration from us that for future years he was entitled to claim rent at the full contract rate. But he has not been able to accept our suggestion. In these circumstances he will get a decree for the full amount. We will set aside the decree of the learned Judicial Commissioner and substitute therefor a decree in each suit allowing the plaintiffs the full amount of rent claimed in the plaint, together with interest at 12 per cent. on the arrears. But the question of costs is with our discretion and having regard to the dilatory conduct of the plaintiffs, we direct that they get no costs in either Court.

ATKINSON, J.—With regard to the point taken by the Vakil for the respondents, namely that under the Provincial Small Cause Courts Act no second appeal lies in this case, the value of the appeal being under Rs. 500, section 15, sub section 1 defines the jurisdiction of a Court of Small Causes. It expressly says that no Court of Small Causes shall take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes. And in the Second Schedule under clause 8, one of the class of suits exempted is a suit for recovery of rent other than house rent. This, being an action for the recovery of rent other than house rent, would be *prima facie* excluded by the operation of section 15 and Schedule II of the Act.

The learned Vakil for the respondents this morning, in the course of the delivery of the judgment of this Court by my learned brother, referred for the first time to a case reported as *Soundaram Ayyar v. Sennia Naicken* (3) and he endeavoured to insinuate that the case had some application to the facts of the present case. A very cursory glance at the judgment will completely satisfy any

(3) 23 M. 547; 10 M. L. J. 329; 8 Ind. Dec. (N. S.) 785.

(1) 19 Ind. Cas. 701; 18 C. L. J. 83.

(2) 31 C. 534; 8 C. W. N. 529.

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observer that that case has decided nothing to controvert our decision and its accuracy as delivered by the judgment of my learned colleague. The head-note of the case is somewhat misleading and is as follows:—

"A suit for the recovery of rent other than house rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of section 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed Rs. 500."

It is well to observe that in that case power was given under section 15 of the Act to the Local Government Board to extend to the Court of Small Causes jurisdiction in cases of rent other than house rent, and it was upon that basis that the Court decided the case. In the case under reference it would appear that all the Courts of Small Causes in Madras had power to grant decrees in respect of claims for rent other than house rent, and it is only, necessary to clear up the matter, to refer to the judgment at page 555. It was a Full Bench decision presided over by Sir Arnold White, Chief Justice. The learned Judge deals with section 15 and describes the jurisdiction it confers, and then says:—

"The same section empowers the Local Government, subject to the exceptions in the Schedule and the provisions of any enactment for the time being in force, to direct that all suits of a civil nature of which the value does not exceed Rs. 1,000 shall be cognizable by the Court of Small Causes. Amongst excepted suits specified in the Schedule are suits for the recovery of rent other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto." (Here is the ground.) "By a notification, dated 24th January 1883, the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their Small Cause side all suits for rent falling within the pecuniary limits of their special jurisdiction."

The grounds of that decision and its *ratio decidendi* are obviously plain. The authority cited has no application to the present case.

I concur in the judgment of my learned colleague.

Appeals accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2430 OF 1915.

January 4, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

HARI MOHAN PAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

KAILASH CHNDRA DHUR—PLAINTIFF,
Sheikh IMAMUDDIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Evidence Act I of 1872, ss. 21, 31—*Admissions as to non-existing right, value of Title.*

A mere admission cannot create a title which was non-existent, though it would have been binding upon the person making it if the title admitted had really existed. [p. 984, col. 1.]

Appeal against the decree of the Sub-Judge, Dacca, dated the 16th August 1915, modifying that of the Munsif, Munshigonj, dated the 30th November 1914.

FACTS of the case appear from the judgment.

Babu Trailokya Nath Ghose, for the Appellants.—The defendants Nos. 3 and 5 are assignees from the purchaser at revenue sale of the *taluk* of which the plaintiff was a part-proprietor. He himself being a defaulting, proprietor, all right and title that he had in the estate was extinguished. The lower Appellate Court was wrong in holding that the plaintiff had *howladari* right, merely relying upon the admission made by the defendant in the road cess return. He had no *howladari* right, as the *kobala* upon which he relies as the basis of his title shows. An admission made in the road cess return cannot create a *howla* right in favour of the plaintiff. See *Jadu Nath Poddar v. Rup Lal Poddar* (1) and the observation of Mookerji, J., at pages 983

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and 984. The case of *Dharam Chand Poid v. Mouji Shahu* (2) also lays down that title cannot pass by admission or relinquishment when the Statute requires a deed of transfer. Admission would have been good evidence, if there was pre-existing right. In this case there was no such assertion of *howladari* right in the plaint.

Babu *Amarendra Nath Bose* (for Babu *Monmotha Nath Roy*), for the Respondents.—The *kobala* shows that the right purchased by plaintiff was a subordinate right and not a co-ordinate right. [Reads the *kobala*.]

[N. R. CHATTERJEA, J.—Both Courts are against you on that point, holding that you purchased the proprietary right. You did not even claim a *howla* right.]

JUDGMENT.—The plaintiff-respondent appears to have purchased the lands in dispute, which form part of a revenue-paying estate, from the proprietors of the estate. The estate was sold for arrears of revenue. The right, therefore, that the plaintiff had in the lands under his purchase was extinguished by the sale. The learned Subordinate Judge was in error in holding that the plaintiff had some right even after the sale. It is true that the defendant, who represents the purchaser at the revenue sale, in certain cess-return admitted that the plaintiff had a *howla* tenure. But a mere admission cannot create a title. The admission would have been binding upon the defendant had the plaintiff really any *howla* tenure. But it is not alleged, nor is there any evidence to show, that the plaintiff had any right in the lands, apart from the right which was purchased by him from the proprietors under the *kobala* of 9th *Assin* 1275. That right, as we have said, passed by the revenue sale, and that being so we think that the plaintiff's suit must fail.

The judgment and decree of the lower Appellate Court are accordingly set aside and those of the Court of first instance restored with costs in this Court and in the Court of first appeal.

Appeal allowed.

(2) 16 Ind. Cas. 440; 16 C. L. J. 436.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 51 of 1915.

August 17, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Phillips.

V. RAMASWAMI AIYAR—

PLAINTIFF—APPELLANT

versus

GNANAMANI NACHIAR—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), ss. 5, 6, Sch. I, Arts. 1, 55—Document, construction of—Principal and agent—Accounts settled, re-opening of Acknowledgment of liability—Release of agent from liability to account—Entries unstamped, admissibility of—Evidence—Settlement by compromise.

Accounts between a principal and agent were settled and the agent signed an entry to the following effect: "Due to me Rs. . . ." It was followed by a statement by the principal to the following effect: (page 70). "The balance of the liability is made up of moneys advanced by my agent from time to time on my behalf. The above does not include interest due on them." On the next page (page 71) it continued: "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent from all claims to account against him by me . . . in respect of the said receipts and disbursements. I hereby acknowledge the correctness of every one of the items of expenditure".

Held, per Curiam, that the entries constituted something more than a mere endorsement vouching simply for the correctness of the entries, that they contained an acknowledgment of a debt within the meaning of Article 1 of Schedule I of the Stamp Act and should have been stamped with a one-anna stamp. [p. 986, col. 2.]

Sitaram v. Ram Prasad Ram, 22 Ind. Cas. 858; 19 C. L. J. 87; 18 C. W. N. 697; *Mulji Lala v. Linga Makaji*, 21 B. 20; *Chitty's S. C. C. R.* 482; 11 Ind. Dec. (N. S.) 136 and *Galstaun v. Hutchison*, 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945, referred to.

Per Abdur Rahim, Offg. C. J.—The statement at page 71 is a release of the right to claim an account from the agent and was, within the meaning of section 5 of the Stamp Act, a distinct matter from the acknowledgment of the principal's liability to the agent for a certain amount, which is the effect of the preceding statement, and the entries are admissible in evidence as the agent paid into Court the penalty due under section 35. [p. 987, cols. 1 & 2.]

In applying section 5 of the Indian Stamp Act, one is concerned with what the parties purported to provide for by an instrument, and not whether any particular provisions were necessary or might have been dispensed with. [p. 987, col. 1.]

Limmer Asphaltic Paving Co. v. Inland Revenue Commissioners, (1872) 7 Ex. 211; 41 L. J. Ex. 106; 26 L. T. 63; 20 W. R. 610, referred to.

The statements do not amount to a settlement by compromise. [p. 988, col. 2.]

A settlement by compromise is a case in which the parties agree not to ascertain the exact balance

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but agree to take a gross sum as the balance, and not where parties having accounts between them meet and agree to settle those accounts by the ascertainment of the exact balance. [p. 988, col. 2.]

Henry McKellar v. John Wallace, 5 M. I. A. 372; 8 Moore P. O. 378; 1 Eq. Rep. 303; 1 Sar P. C. J. 453; 18 E. R. 936; 14 E. R. 144; 97 R. R. 62, referred to.

A settled account may be opened where substantial error is shown in the account or where fiduciary relations exist and a less considerable number of errors are shown or where fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown. [p. 989, col. 1.]

Williamson v. Barbour, (1878) 9 Ch. D. 529 at p. 533; 10 L. J. Ch. 147; 37 L. T. 698 and *In re Webb Lambert v. Still*, (1894) 1 Ch. 73; 63 L. J. Ch. 145; 70 L. T. 318, referred to.

Per Phillips, J.—The recital as to release relates only to the items in respect of which an acknowledgment is given and the two matters are not 'distinct' matters within the meaning of section 5 of the Stamp Act, and the document is an acknowledgment and, being unstamped, is inadmissible in evidence. [p. 990, col. 2; p. 991, col. 1.]

In order to bring a document within the terms of section 6 it must be read as a whole, and if as a whole it comes within two definitions in the Schedule then it must be stamped with the stamp of highest value, where the duties chargeable are different. [p. 990, col. 2.]

Appeal from the judgments of Mr. Justice Bakewell, dated the 26th and 29th March 1915 in the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 214 of 1914.

Messrs. J. L. Rozario and V. V. Srinivasa Aiyangar, for the Appellant.

Messrs. T. Narasimha Aiyangar and A. Suryanarayana Aiyar, for the Respondent.

This appeal coming on for hearing on the 7th and 9th respectively of August 1916 and having been posted to be spoken to on the 11th August 1916 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

ABDUL RAHIM, OFFG. C. J.—This appeal is from the judgment of Bakewell, J., dismissing a suit instituted by one Mr. V. Ramaswami Aiyar against the *zemindari* of Sivagiri to recover a sum of Rs. 43,116.12.4. The late *zemindar*, whose mother is the defendant, appointed the plaintiff, by powers of attorney dated the 31st July 1911 and 31st October 1912, his agent to manage his affairs at Madras and elsewhere excepting the *zemindari* itself. The plaintiff founds his claim to the extent of Rs. 31,000.12.4 on the basis of accounts settled

between him and the late *zemindar* on the 14th October 1913, showing this amount to be due to him for remuneration for services rendered by him and for moneys advanced by him to the *zemindar* from time to time. Of the balance Rs. 12,741.10.0 consists, he says, of various sums of money which he paid to certain creditors of the *zemindar* after his power-of-attorney was cancelled (that was on 15th October 1913) and which have not been recouped to him. He paid those debts as he had incurred liability for them on behalf of the *zemindar*. The rest of the amount claimed is on account of interest on these sums at the rate of 12 per cent. per annum, which he alleges the *zemindar* had agreed to pay.

It is alleged in defence that when the Court of Wards handed over the *zemindari* of Sivagiri to the deceased *zemindar* in April 1910 there was a saving of about 8 lakhs of rupees, but that about the middle of 1911 he came under the sinister influence of the plaintiff who acquired considerable ascendancy over him, with the result that the *zemindar* went on contracting large debts. The powers-of-attorney mentioned in the plaint were procured from the *zemindar* by means of fraud and undue influence, not for any lawful or legitimate purpose, but for contracting large and unnecessary debts so that the plaintiff might enrich himself at the expense of *zemindar*. The written statement goes on to state that about September 1913 some friends and relations of the *zemindar*, finding that he was going from bad to worse under the influence of the plaintiff, prevailed upon him to dismiss the plaintiff from his service and to renounce his company. As regards the settlement of account, the deed of release and the power-of-attorney executed by the *zemindar* on the 14th October 1913, it is stated that his signatures to these documents were obtained in suspicious circumstances when the *zemindar* had no proper and independent advice. The so-called settlement of account is impeached as false and fraudulent. It is stated that the plaintiff never rendered account to the *zemindar* and the latter never looked into any accounts; that the accounts relied on contain fraudulent omissions and false debits

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amounting to a considerable sum, as set out in the schedule attached to the written statement. The defendant charges that if an account be directed by the Court the plaintiff will be found to be liable to the defendant for not less than a lakh of rupees. The entire accounts commencing from 31st July 1911 to 13th October 1913, that is more than two years, and relating to about six lakhs of rupees are contained in 73 pages of a small book marked as Exhibit E. Page 69 shows that the amount to the debit of the *zemindar* on the 13th October 1913 was Rs. 3,58,140-12-4 and that to his credit Rs. 1,43,290-0-0, so that the total indebtedness of the *zemindar* is stated at Rs. 2,14,850 12-4. At the top of the next page, *i. e.*, 70, is the entry "due to me (*i. e.*, to the plaintiff himself) Rs. 24,850-12-4;" then underneath there appear 'details' consisting of four items of Rs. 40,000, 45,000, 25,000 and 80,000 as being due to other persons. At the foot there is a statement in these words: "The balance of the liability is made up of moneys advanced by my agent Mr. V. Ramaswami Aiyar from time to time on my behalf. The above does not include interest due on them." At page 71 it continues: "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent Mr. V. Ramaswami Aiyar from all claims to account against him by me or any one claiming under or in trust for me and from all claims, actions and demands whatsoever in respect of the said receipts and disbursements. I hereby acknowledge the correctness of every one of the items of expenditure." Underneath is the signature of the *zemindar*. At the next page Rs. 2,14,850-12-4 is carried forward, to which is added "salary from May to September 1913 Rs. 3,750" and "Interest on the loans advanced by me (*i. e.*, plaintiff) from time to time Rs. 2,400"—totalling Rs. 2,21,000-12-4. Underneath are the *zemindar's* initials.

The learned Trial Judge has rejected these statements, as in his opinion they contain an acknowledgment of a debt within the meaning of Article 1 of Schedule I to the Indian Stamp Act and should, therefore, have been stamped with a one-

anna stamp. Mr. C. P. Ramaswami Aiyar, the learned Vakil for the appellant, contends in the first place that this reading of the document is wrong. But there can be no doubt whatsoever that the statement "Due to me" followed by the endorsement "the balance of liability, etc.," set out above does amount to an acknowledgment of a debt. It clearly purports to be more than a mere endorsement vouching simply for the correctness of the entries. We have been referred to a number of decided cases, but in each case one has to look to the nature of the endorsement, as showing what the parties intended. Here the intention of the plaintiff and the *zemindar* clearly was that the statement in question should furnish evidence of the latter's liability. The cases which approach nearest to this are *Sitaram v. Ram Prosad Ram* (1), in which the words 'balance due Rs....' and *Mulji Lala v. Lingu Makaji* (2) where the words 'all accounts being made up Rs. 102 in full up to.....' were held to amount to an acknowledgment, while in *Gulstain v. Hutchison* (3) the statement which was held not to amount to an acknowledgment was "I accept as correct."

The next contention of Mr. C. P. Ramaswami Aiyar that the statement "The above does not include interest on them" is a stipulation to pay interest within the meaning of Article 1 is also untenable. The case of *Mulchand Lala v. Kashiullah Biswas* (4) has no bearing, as the words there were 'this amount will bear interest at the rate of Rs. 18-0 per cent. per mensem.'

It is then argued on behalf of the appellant that the statement at page 71 is a 'release' as defined in Article 55 of Schedule I to the Indian Stamp Act and, therefore, even if the writing at page 70 be held to be an acknowledgment of a debt, both should be read as one instrument to which either section 5 or section 6 of the Indian Stamp Act applies and that the document could not, therefore, be

(1) 22 Ind. Cas. 558; 19 C. L. J. 87; 18 C. W. N. 697.

(2) 21 B. 201; Chitty's S. C. C. R. 482; 11 Ind. Dec. (N. S.) 136.

(3) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.

(4) 11 C. W. N. 1120; 35 C. 111.

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excluded from evidence but should have been admitted, the plaintiff being allowed to pay the penalty prescribed by section 35 of the Act. Section 5 says: "Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act." And section 6 provides, "Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties." In my opinion the statement at page 71 "I have examined expenditure" was clearly intended to operate as a release of the *zemindar's* right to claim an amount from the plaintiff, and this is within the meaning of section 5 a distinct matter from the acknowledgment by the *zemindar* of his liability to plaintiff for a certain amount, which is the effect of the preceding statement. Mr. Narasimha Aiyangar contended on behalf of the respondent that where the subject-matter is one even though the instrument embodies distinct contracts, section 5 does not apply. He says that since there was an acknowledgment by the *zemindar* that as a result of the settlement of accounts a certain amount was due by him to the plaintiff, it followed that he himself could have no claim against the plaintiff. But in applying section 5 of the Indian Stamp Act one is concerned with what the parties purported to provide for by an instrument, and not whether any particular provisions were necessary or might have been dispensed with. Nor can it be said that acknowledgment by a principal upon a settlement of accounts that a certain amount is due by him to the agent is in its legal effect the same as a release by the former of his right to claim an account from the latter, which includes the right to open stated and settled accounts in certain circumstances. The English rulings cited by the respondent's learned Vakil such as *Limmer Asphaltic Paving Co. v. Inland Revenue Commissioners* (5), the effect of which is stated in Hals-
 (5) (1872) 7 Exch. 211; 41 L. J. Ex. 106; 26 L. T. 633; 20 W. R. 610.

bury's Laws of England, Volume 24, at page 707, throw no light on the present question and are based on the provisions of the English Stamp Act which are different in this respect from those of the Indian Stamp Act. I hold, therefore, that the statements at pages 69 to 71 of the account should be admitted into evidence as the plaintiff has paid into Court the penalty due under section 35.

Mr. Justice Bakewell, having refused to admit these statements in evidence, went into the accounts and came to the conclusion that they were not properly kept and contained considerable errors. Of the amount claimed by the plaintiff Rs. 15,250 is on account of his salary at the rate of Rs. 750 a month and the balance of Rs. 9,750 on account of moneys actually advanced by him. As regards the latter item the learned Judge was not satisfied that the plaintiff lent any money at all to the late *zemindar* or had any money of his own to lend. As for the arrears of salary he finds that plaintiff has failed to account for more than that amount of the *zemindar's* money in his hands. He selected three of the items mentioned by the defendant for special examination and found that the plaintiff omitted to credit to the late *zemindar* two items of Rs. 2,000-0-0 and Rs. 15,000-0-0 and wrongly charged him with a sum of Rs. 3,200.

The learned Judge rightly points out that the account kept by the plaintiff, if it can be called account at all, is of a most remarkable character. According to the evidence of the plaintiff himself it was not kept from day to day. Notes of the *zemindar's* transactions used to be made by the plaintiff on slips of papers and at the intervals of 2 or 3 months he used to go with them to his relation Mr. Duraisami Aiyar, who used to write the entries in the book, Exhibit E, to the plaintiff's dictation. These slips of paper have not been produced. The entries are not in any chronological order and the information which they furnish is of the most meagre character. To give an instance, it is not possible to ascertain how the sum of Rs. 24,850-12-4 said to be due to the plaintiff is made up. According to the statement quoted by the learned Judge from the plaintiff's own evidence, his method was to debit the *zemindar* with all the items on the debit

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side, to debit him with all the sums expended by the plaintiff on his behalf and all the sums borrowed by the *zemindar* from other persons and to give credit for all the sums on the credit side and to treat the balance arrived at as the plaintiff's money. It is pointed out that the plaintiff opened an account in August 1911 in his own name in the Indian Bank with Rs. 1,000, which he alleges was his own money; but moneys belonging to the *zemindar* were paid into this account and large sums were drawn out resulting in a debit balance of about Rs. 77,000 in February 1912. Then that account was closed. In January or February 1912 two accounts were opened one in his own name and another in the *zemindar's* name; the *zemindar's* account was debited with the Rs. 77,000. In all the three accounts the *zemindar's* moneys were paid and the plaintiff drew upon them for his own and the *zemindar's* purposes indiscriminately. The plaintiff opened a fourth account in the National Bank in his own name for the purpose of transactions in connection with 'the Madras Times' newspaper, in which the *zemindar* had acquired a large interest. Thus, as observed by Mr. Justice Bakewell, the plaintiff according to his own case inextricably mixed up the *zemindar's* moneys with his own, and the burden is entirely upon him to show by as clear evidence as possible what moneys he had of his own and advanced to the *zemindar* or spent on his behalf. This he has failed entirely to prove and his learned Vakil, Mr. C. P. Ramaswami Aiyar, has not in fact attempted to base his case on any such proof. The learned Trial Judge doubts if the Rs. 1,000 with which the first account was opened belonged to the plaintiff and, in my opinion, his doubts are fully justified by the circumstances.

The late *zemindar* of Sivagiri, who inherited a large and valuable *zemindari* and started with considerable funds at his credit, must have been a most reckless spendthrift for we find that during the four years that he lived after attaining majority he went through the several lakhs that were saved for him by the Court of Wards and died indebted to the extent of some lakhs. He had to start with the entire income of the *zemindari* at his dis-

posal but latterly received an allowance of Rs. 5,000 a month from the *zemindari*, exclusive of what he required for any extraordinary expense such as a trip to England. Then he had the income of his other properties at Madras and elsewhere. All the *zemindar's* moneys passed through the plaintiff's hands and it does not appear that the plaintiff had resources of his own out of which to make advances to the *zemindar*.

The agent's whole contention before us has been that, however badly he kept the accounts, his principal, the *zemindar*, was fully cognisant of the fact as evidenced by his initials at three or four places in Exhibit E, and we are asked to hold that the *zemindar* waived all enquiry and scrutiny. In fact it is argued that the acknowledgment and the release of the 14th October were in the nature of a settlement by way of compromise within the ruling in *Henry McKellar v. John Wallace* (5). But this is a new case which was not sought to be made in the plaint or at the trial. In fact the plaintiff's case had hitherto been that the *zemindar* used to examine the accounts with the aid of vouchers and put his initials to them on being satisfied as to their accuracy, and that the same process was gone through on the 14th October 1913 when the accounts were finally settled between the parties. The suit is based on the footing of stated and settled accounts and not on any settlement by compromise. To use the language of the Judicial Committee, "It is a case in which the parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance", and not "where persons meet and agree not to ascertain the exact balance but agree to take a gross sum as the balance." They go on to observe "in either case it may be vitiated by fraud; in either case it is good for nothing if, either from the collusion of the parties upon the circumstances under which the settlement takes place it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved or from misrepresentations made on the one side or the other, as it ought to have

(6) 5 M. I. A. 372; 8 Moore P. C. 378; 1 Eq. Rep. 809; 1 Sar. P. C. J. 453; 18 E. R. 936; 14 E. R. 144; 97 E. R. 62.

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been and that injustice has been done to either side." The very evidence so strongly relied upon by the appellant's Vakil such as the statement in Exhibit F and in Exhibit A shows not that there was any settlement by compromise but that the account was examined by the *zemindar* and acknowledged by him to be correct.

Now regarding the law as to when settled accounts will be opened there is no room for doubt. It is perhaps best stated in the words of Jessel, M. R., in *Williamson v. Barbour* (7): "Where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items, or where fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, there the Court opens the account and does not merely surcharge and falsify." Nor would the fact of a release following upon a settled account otherwise liable to be opened make any difference. In *In re Webb, Lambert v. Still* (8) Lindley, L. J., says: "What is necessary in order to set aside a settled account or a release, or both together, when the release proceeds upon the footing of an account? It is essential to show that there has been some injustice done—to show that there has been some fraud, some pressure, some overcharge, something wrong to cloak up which the release has been obtained. Prove that, and the release cannot stand." In the same case Davey, L. J., states the law in this way: "I take it that a release in the eye of a Court of Equity is nothing more than a record by deed of a settled account, and, unless the settled account is unimpeachable, the fact of the parties having signed a release will not assist those who depend upon it for a defence." In the circumstances of this case the Court will not hesitate to open the so-called settled account in spite of the release, if any substantial error is shown in the account. The evidence leaves no doubt that the *zemindar* when he put his initials or signature did not at all under-

stand the account: I do not believe that he even examined any vouchers or that vouchers were regularly submitted to him as alleged. In fact vouchers dating from 1911 were in possession of the plaintiff in October 1913, when he handed them over to the *zemindar's* Solicitors Messrs. King and Partridge. The *zemindar* who was not a man of any business capacity appears to have been considerably under the influence of the plaintiff and was in fact afraid of him for some reason or other—it may be because he was living an unusually wild life. The facts lead to the only possible inference that the *zemindar* signed whatever the plaintiff asked him to sign without caring or venturing to enquire what it was. Even according to the plaintiff himself it was only at considerable intervals that the account (Exhibit E) was shown to the *zemindar* and that account gives the least possible information both as to the receipts and disbursements and was so drawn up as to confuse rather than elucidate matters. The learned Trial Judge is in fact right in saying that Exhibit E can scarcely be called an account, and I doubt if there is any real question in this case of opening a stated and settled account. In any case the facts show that the plaintiff not only failed to perform the most elementary duty of an agent in keeping his principal fully informed of the state of his affairs but deliberately did everything to mislead him.

I shall very briefly deal with the items dealt with by Mr. Justice Bakewell. The first is a sum of Rs. 2,000, which the plaintiff received from the Stable Company but did not enter to the credit of the *zemindar*. The explanation is, as if it was any explanation at all, that he spent Rs. 1,150 for purchasing a jewel for the *zemindar* and the balance Rs. 850 was paid towards the price of a press. So far as the jewel is concerned the plaintiff has failed to prove that it was bought for the *zemindar* and not for himself. The next item is Rs. 15,000 consisting of two sums of Rs. 5,000 and Rs. 10,000 remitted from the *zemindari* on 10th May 1913 and 28th May 1913, for which the plaintiff gave receipts to the Dewan but which, it is charged, he has not entered

(7) (1875) 9 Ch. D. 529 at p. 533; 50 L. J. Ch. 147; 37 L. T. 698.

(8) (1894) 1 Ch. 73; 63 L. J. Ch. 145; 70 L. T. 318.

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in the account. Mr. C. P. Ramaswami Aiyar on behalf of his client has tried in the first place to make out, on the strength of Exhibit XXI, that the Rs. 5,000 was remitted direct to the *zemindar* by a telegraphic money order. But if that were so, the fact ought to have been noted in the receipt given by the plaintiff as in the instance referred to by the learned Trial Judge. Then it is contended that the whole amount of Rs. 15,000 must be included in the Rs. 1,20,000 received from 24th May 1912 to August 1913. According to the particulars given by Mr. Chandrasekhara Aiyar, Pleader for the plaintiff, in answer to the question put to the plaintiff by the learned Judge during trial it is suggested that this is part of the Rs. 30,000 entered in Exhibit E under date 6th December 1912 (page 33), 'Estate Manager Rs. 30,000.' It is argued that this Rs. 15,000 must be taken to have been accounted for, because while the defendant's case is that between the above-mentioned dates Rs. 1,06,100 in all were remitted from the *zemindari* (Schedule II to the written statement), the plaintiff has given credit for Rs. 1,20,000. But the plaintiff states (page 391) that the Rs. 30,000 referred to above is the amount referred to in the *zemindar's* pass book (Exhibit VI, page 109) in entries dated 29th November 'By drafts Rs. 29,500, *Hundi* through South Indian Bank, Tinnevely, Rs. 429-6-0 and amount received Rs. 70-10-0.' Mr. Narasimha Aiyangar, the learned Vakil for the defendant, is, therefore, right when he says that the Rs. 30,000 which is included in the Rs. 1,20,000 is what the plaintiff received from the Tinnevely Bank and is in addition to the Rs. 1,06,100 received by the plaintiff from the *zemindari* as shown by his own receipts. The plaintiff has not, therefore, accounted for the two sums of Rs. 10,000 and Rs. 5,000, and his own statements in his first cross-examination on this point quoted in the judgment of the Court of first instance make it amply clear that he had no explanation to give. The 3rd item is a sum of Rs. 3,200 paid to D'Angelis and Sons in March 1913 with which the plaintiff has debited the late *zemindar* twice over, first in the 'Madras Times' account (Exhibit XXX, page 164) and again in Exhibit E (page

38). Mr. C. P. Ramaswami Aiyar points out that the credit slip for this amount does not bear his client's initials and therefore, he says, the 'Madras Times' clerk ought not to have entered the amount in that account. But the evidence of Mr. Salanson who audited the 'Madras Times' account makes it clear that the plaintiff did not take objection to the entry in question. The findings of the learned Judge as to all these items are correct. They constitute serious errors in the accounts relied on by the plaintiff and fully justified the learned Judge in not treating them as closed by any settlement. He gave an opportunity to the plaintiff to apply for an account to be taken, but he did not avail himself of that opportunity. In fact the plaintiff's suit is not for the taking of accounts but for the recovery of a definite sum on the footing of settled accounts. The 3 items, which have been examined amount to more than what might be due to the plaintiff on account of arrears of salary, and it is not proved that he advanced any moneys of his own to the *zemindar*. The appeal will be dismissed with costs.

PILLIPS, J—I agree in the order proposed, but I have considerable doubt as to whether the interpretation put upon the endorsement in Exhibit E by the learned Chief Justice is correct. Inasmuch as the recital as to release relates only to the items in respect of which an acknowledgment is given, the two matters do not appear to me to be "distinct" matters within the meaning of section 5 of the Indian Stamp Act, for the two matters are very closely connected and are practically the same. In order to bring a document within the terms of section 6, it seems to me that the document must be read as a whole, and if as a whole it comes within two definitions in the schedule then it must be stamped with the stamp of highest value, where the duties chargeable are different. In this case the whole document can be read as an acknowledgment, the implied release in which is put into words, but the whole document cannot be read as a release to which the acknowledgment is subsidiary. The intention of the parties must also be looked to in construing the document and here they can hardly have intended

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the document to operate as a release, for a draft release deed was in existence at the time when Exhibit E was signed and was signed and registered immediately afterwards. I would, therefore, agree with Bakawell, J., that the document is an acknowledgment and being unstamped is inadmissible in evidence. I have only dealt very briefly with this point, as the admission of or rejection of the document does not affect the case on the merits.

Appeal dismissed.

V.R.P.

PATNA HIGH COURT.

CIVIL REVISION CASE NO. 133 OF 1916.

December 13, 1916.

Present: Mr Justice Jwala Prasad.

JADUNANDAN SAHAY—DEFENDANT—

APPLICANT

versus

JUNG BAHADUR SAHAY—PLAINTIFF

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction—Small Cause suit tried on Original Side—Defendant not objecting in first instance—Revision—High Court, power of, to interfere.

Where a Small Cause suit is tried on the Original Side, the parties not raising any question of jurisdiction in the Trial Court, and an appeal from the decree of the latter Court is heard and decided by the District Judge, it is open to the High Court to look into the merits of the case and either to interfere or not to interfere with the decree of the lower Courts as the justice of the case may require. [p 992, col. 2]

Suresh Chunder Maitra v. Kristo Rangini Dasi, 21 C. 249; 10 Ind. Dec. (N. S.) 794; *Parameswari v. Jayat Chandra Das*, 27 Ind. Cas. 972; 21 C. L. J. 141; 19 C. W. N. 900 and *Ram Lal v. Kabul Singh*, 25 A. 135; A. W. N. (1902) 219, relied upon.

Ramasamy Chettiar v. R. G. Orr, 26 M. 176; 12 M. L. J. 264; *Kollipara Seetapathy v. Kankipaty Subaya*, 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; *Shankar-bhai v. Somabhai*, 25 B. 417; 3 Bom. L. R. 129 and *Maharana Shri Davlatsinghji v. Khachar Hamir Mon*, 4 Ind. Cas. 830; 34 B. 171; 11 Bom. L. R. 1330, not followed.

Civil revision against the judgment of the Sub-Judge, Chapra, dated the 26th April 1916, modifying the decree of the Munsif, 4th Court, Chapra, dated the 10th December 1915.

Mr. Harnarain Prasad, for the Applicant.

Messrs. R. L. Dutta, Sivasaran Lal, Rajendra Prasad and Rai Tribhuan Sahai, for the Respondent.

JUDGMENT.—This is an application under section 115 of the Code of Civil Procedure. The opposite party brought a suit for contribution against the petitioner in respect of Rs. 202, which the opposite party was obliged to pay to meet the cost for the preparation of paper books in certain appeals in the High Court in which both the petitioners and the opposite party were appellants. The petitioner was liable to pay to the plaintiff-opposite party half the costs for the preparation of the paper-books. The suit was instituted in the Court of the Munsif at Chapra and was valued at Rs. 135-6-0 principal with interest. The suit was cognizable by a Small Cause Court under Schedule II, rule 41, of the Provincial Small Cause Courts Act, IX of 1887. Under section 16 of the Act, the trial of the suit was barred by any Court other than the Court of Small Causes in the district of Saran. The Munsif had no power to try a Small Cause suit. He had no jurisdiction to entertain the suit or to try it. The petitioner-defendant did not, however, raise any objection to the suit being tried by the Munsif. The suit was tried by the Munsif on the Original Side, who gave a decree to the plaintiff for Rs. 25 only, (i.e.,) for a smaller sum than that claimed by the plaintiff. Both parties appealed. The appeals were heard by the Subordinate Judge of Saran, who by his judgment dated April the 26, 1916, decreed the appeal preferred by the plaintiff and gave a decree to him for the entire sum claimed by him. He dismissed the appeal preferred by the applicant.

The applicant does not challenge the finding of the lower Appellate Court on the merits of the case. He, however, urges that the trial of the case by both the Courts below on the Ordinary Civil Side was without jurisdiction and hence the decree passed by the Court below should be set aside by this Court under its revisional powers under section 115 of the Code of Civil Procedure.

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The only question is what order should the High Court make, assuming that the suit was of the nature cognizable by a Small Cause Court.

There is a conflict of decisions of the different High Courts as to what should be done in a case of this kind.

The Calcutta High Court, in *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1), where a suit cognizable by a Small Cause Court was tried both in the Munsif and the District Judge's Courts on the Ordinary Civil Side, without objection to the jurisdiction being made by the parties, held that section 646B of the Code of Civil Procedure (1882) modified the effect of section 16 of the Provincial Small Cause Courts Act in such a manner as to make it incompetent for either party to plead want of jurisdiction of the Court which tried the suit. The Court further held that the High Court had full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial.

This view was confirmed by the Calcutta High Court in *Parameswari v. Jagat Chandra Das* (2).

The Allahabad High Court, in *Ram Lal v. Kabul Singh* (3), where a case tried as a Small Cause suit was referred by the District Judge under section 646B of the old Code of Civil Procedure to the High Court for setting aside the decree of the Munsif on the ground that the suit was not cognizable by the Small Cause Court and that the Munsif who tried the suit had exercised a jurisdiction which was not vested in that Court by law, declined to interfere on the ground that the party had not raised any objection to the jurisdiction of the first Court to try the suit and had raised it for the first time before the District Judge, and hence there was no erroneous holding as to jurisdiction by the 1st Court.

There was a conflict of decisions in the Madras High Court. A Division Bench of the

Madras High Court in *Ramasamy Chettiar v. R. G. Orr*, (4) declined to follow the Calcutta ruling in *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1), whereas another Division Bench of the same Court adopted the principles of the Calcutta ruling and declined to interfere in second appeal in a Small Cause Court case tried by the first Court and the District Court of Appeal on their original side without any objection by the parties as to the jurisdiction of the Courts. The Full Bench of the same Court in *Kollipara Setaipaty v. Kankipaty Subbaya* (5), however, set aside the Appellate Court decision in a Small Cause Court case tried by the first Court on its original side. The Full Bench declined to follow the Calcutta ruling in *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1) and the Madras ruling in *Parameswaran Nambudri v. Vishnu Embrandri* (6) and went back on the ruling in *Ramasamy Chettiar v. R. G. Orr* (4).

The Bombay High Court in *Shankarbhai v. Somabhai* (7) and in *Maharana Shri Davlatsinghji v. Khachar Hamir Mon* (8) reversed the decree of the Appellate Court on the ground that it had no jurisdiction to try an appeal of a case which was of a Small Cause Court nature, although it was tried by the 1st Court under its ordinary jurisdiction.

Following the principles of the decisions in the Calcutta and the Allahabad Courts, I hold that in a case like the present one, where the parties had not raised any question as to jurisdiction in the Court that tried the suit, it is open to the High Court to look into the merits of the case and either to interfere or not to interfere with the decree of the lower Courts as the justice of the case requires. If the Court has this discretion vested in it by Order XLVI, rule 7 of the Code of Civil Procedure, corresponding to section 646 of the old Code, where the matter comes up to it in reference by the District Court, the High Court has surely power

(1) 21 C. 249; 10 Ind. Dec. (N. S.) 798.

(2) 27 Ind. Cas. 972; 21 C. L. J. 141; 19 C. W. N. 900.

(3) 25 A. 135; A. W. N. (1902) 219.

(4) 26 M. 176; 12 M. L. J. 264.

(5) 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718.

(6) 27 M. 478.

(7) 25 B. 417; 3 Bom. L. R. 129.

(8) 4 Ind. Cas. 830; 34 B. 171; 11 Bom. L. R. 1330.

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to exercise the same discretion to interfere or not to interfere, when the matter comes up to it under section 115 of the Code of Civil Procedure on the application of any party. Under section 115 the Court's power is discretionary, as the word "may" in that section indicates. In the present case the parties did not object in the first Court to the suit being tried as an ordinary civil suit. The Munsif gave a partial decree, holding that the claim for the rest of the amount was barred by limitation. Both parties appealed to the District Judge. The learned Subordinate Judge who heard the appeals gave a decree for the entire sum claimed by the plaintiff. The Subordinate Judge had Small Cause Court powers up to the value of Rs. 500 and had, therefore, jurisdiction to try the suit if it had originally been instituted before him on the Small Cause Court side. He had, of course, no jurisdiction to hear appeals from the decision of a Small Cause Court Judge. He heard the appeal from the decision of the Munsif as an ordinary Appellate Court. From the judgment of the Subordinate Judge it is clear that he went thoroughly into the merits of the case and gave judgment after a careful consideration of the evidence on the record. The lower Appellate Court has held that the parties had submitted to the jurisdiction of the first Court to try the suit without any objection and the petitioner was not prejudiced by the trial and hence it was not proper to throw out the suit at that stage. If the suit is thrown out at this stage by the High Court, the plaintiff's claim will probably be barred by limitation and the plaintiff will be left without any remedy.

Having regard to the circumstances of the case and to the fact that there has been a prolonged trial of the suit in both the Courts below and that the litigation has been a protracted one and lasted for a number of years, it is not at all desirable in the ends of justice to interfere with the decree of the lower Appellate Court under section 115 of the Code of Civil Procedure and to drive the parties to a fresh trial involving heavy expenses and waste of time. I, therefore, decline to interfere with the decree of

the lower Appellate Court and dismiss the application with costs, hearing fee one gold mohur.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 547
OF 1915.

January 9, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

KAILAS CHANDRA SARKAR—CREDITOR
—APPELLANT

versus

KANTIRAM DAS BANIA—INSOLVENT—
RESPONDENT.

*Provincial Insolvency Act (III of 1907), ss. 6, 16, 46
—Creditor's decree against insolvent, execution of—
Jurisdiction.*

A creditor who has obtained a decree and who has proved his debt in the insolvency proceedings, is at liberty to execute his decree against the property which he alleges to be the property of the insolvent upon his undertaking to hand over to the Receiver all moneys realised in execution for the benefit of the general body of creditors. [p. 994, cols. 1 & 2.]

An insolvency Court has jurisdiction, and would exercise a wise discretion, in permitting an executing creditor at his own risk and at his own costs to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some *benamidar* or other person on behalf of the insolvent. [p. 994, col. 2.]

Appeal against the order of the District Judge, Rangpur, dated the 27th of May 1915.

FACTS material to the report will appear from the judgment.

Babu *Girija Prasanna Sanyal*, (for Babu *Atul Chunder Gupta*), for the Appellant.—The debtor in this case has obtained an order of adjudication. The creditor avers that the debtor has excluded from his sworn assets property, both moveable and immoveable of which he is in possession and enjoyment in the pseudonym of other persons. The creditor intending to proceed against these properties presented an application for leave under section 16 of the Provincial Insolvency Act to the insolvency Court at Rangpur. The learned Judge has rejected the application holding that he has no jurisdiction to entertain it under the said section.

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[FLETCHER, J.—I think there he is right.]

I respectfully submit he is not. An adjudication order follows upon a petition almost as a matter of course if the petition conforms to the conditions stated in section 6. Thereafter the debtor's assets vest in the Court or the Receiver appointed by the Court. The Receiver is competent under section 20 to initiate proceedings for realising the property of the debtor. But in a case like the present where the insolvent puts his assets at Rs. 23 and his debts at more than Rs. 1,500, the Receiver cannot be reasonably expected to make a move. The provision in section 16 under sub-clause (2), therefore, enacts that there should be secured a remedy to the aggrieved creditor who would otherwise be left without any. The section, however, cautiously arms the Court with adequate discretion and enables it to put the creditor to terms. The enactment in question corresponds to section 9 (1) of 46 & 47 Vic. C. 52 (The English Bankruptcy Act, 1883); but unfortunately the point is covered by no reported authority under either the English or the Indian Act.

[FLETCHER, J.—Why don't you take proceedings to discover the insolvent's property?]

There is, I submit, no provision in the Provincial Insolvency Act like section 36 of the Presidency Act which enables the creditor to do so.

[RICHARDSON, J.—Is there any appeal from the order complained of?]

Yes, there is under section 46, clause (2).

Nemo for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal against an order passed by the learned District Judge of Rangpur, dated the 27th May 1915. The appeal arises out of an application made in some insolvency proceedings. The appellant before us is a creditor who appears to have proved his debt in the insolvency proceedings. This creditor obtained a decree against the insolvent. He then applied to the learned District Judge for leave to execute the decree that was held by him. The District Judge was of opinion that he had no jurisdiction to do so. I am not satisfied that that is right. Many orders have been made under the Provincial Insolvency Act declaring that a creditor is at liberty to execute his decree

against the property alleged to be the property of the insolvent upon his undertaking to hand over to the Receiver of the estate of the insolvent for the benefit of the general body of the creditors the sum so realised in execution. It seems to me that, in that view, the learned District Judge would have exercised a wiser discretion in permitting this executing creditor at his own risk and at his own costs to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some *benamidar* or other person on behalf of the insolvent. In that view, we ought to reverse the decision of the learned District Judge and, in lieu thereof, make an order that the creditor, the appellant before us, be permitted to execute his decree against the property which he alleges is the property of the insolvent upon his undertaking to hand over to the Receiver all moneys realised in execution for the benefit of the general body of the creditors. The appellant is entitled to add his costs in this appeal to his claim. We assess the hearing-fee at one gold *mohur*.

RICHARDSON, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1622 OF 1915.

June 14, 1916.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.

MADHUR SAH—PLAINTIFF—APPELLANT
versus

THAG SAH—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 27—Sale by unregistered deed—Subsequent sale to another by registered deed—Suit to register deed and for declaration that subsequent sale is void, nature of—Specific performance—Registration Act (XVI of 1908), s. 49—Evidence—Unregistered sale-deed, admissibility of.

An unregistered sale-deed cannot be used in evidence of a contract which in itself affects property. [p. 996, col. 1.]

Plaintiff obtained an unregistered sale-deed of the property in dispute from the first defendant, who subsequently sold the same property to the second defendant under a registered sale-deed. Plaintiff thereupon instituted a suit against both defendants asking (1) that defendant No. 1 should be ordered either to register the unregistered sale-deed or to execute and register a second sale-deed, and (2) for a declaration that the transaction between the de

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fendant No. 2 and defendant No. 1 was null and void, and for possession of the property:

Held, that the suit was one for specific performance under section 27 of the Specific Relief Act. [p. 995, col. 2.]

Surendra Nath Nag Chowdhury v. Gopal Ghunder Ghosh, 8 Ind. Cas. 794; 12 C. L. J. 864, referred to.

Second appeal from a decision of the Subordinate Judge, Chapra, dated the 30th April 1915, affirming that of the Munsif, Chapra, dated the 4th December 1914.

Mr. Harihar Prasad Singh, for the Appellant.

Mr. Nirsu Narayan Sinha, for the Respondent.

JUDGMENT.—In this case the facts are, that the plaintiff obtained on the 23rd July 1912, a deed of sale executed by the defendant No. 1 and duly attested in respect of the property in suit. This document was not then and has not up to date been registered. On the 13th August 1912, the first defendant sold the same property to the second defendant by a document duly registered. The plaintiff thereupon instituted a suit against both defendants, the relief asked for being, first, that the defendant No. 1 should be required either to register the existing unregistered sale-deed or to execute and register a second sale-deed and against defendant No. 2 he asked for a declaration that the transaction between the defendant No. 2 and defendant No. 1 was null and void by reason of the previous transaction with the plaintiff and should be so declared null and void and possession of the property delivered to the plaintiff.

During the pendency of the suit the defendant No. 1 compromised the case with the plaintiff and executed and registered a fresh document as desired by the plaintiff. The defendant No. 2 continued to contest the suit. The lower Courts held that the suit as framed was not maintainable and concurred in dismissing the plaintiff's suit.

Against these decisions a second appeal is laid in this Court. The judgment delivered by the lower Appellate Court begins: "This was not a suit for the specific performance of a contract." I do not see how a suit for specific performance could have been framed otherwise than in the frame of the

present suit. Under sections 27 (a) and 27 (b) of the Specific Relief Act the plaintiff was entitled to a decree for specific performance as against the defendant No. 1, and for possession as against the defendant No. 2 if the defendant No. 2 could have been shown to have had knowledge of the plaintiff's contract at the time when he entered into his own contract. Clearly it was a suit for specific performance. The lower Courts seem to have converted it into a suit for the registration of a document and to have discussed only cases in which suits for the registration of a document were either maintained or dismissed. This case, in my opinion, is a perfectly simple one under the Specific Relief Act and must be remanded to the lower Courts for further consideration. There is now no question of any suit against the defendant No. 1 for registration. That part of the suit has been compromised between the plaintiff and defendant No. 1. The original document remains unregistered. The registered document is dated subsequent to the document of the defendant No. 2.

The point in issue is very simple. Is the plaintiff's second document void by reason of the title of the defendant No. 1 having passed by his sale to the defendant No. 2? Or is the defendant No. 2's title void by reason of an existing contract between the parties of which he was fully aware? The only point for consideration is, whether the unregistered document can be considered as evidence of this contract? Great stress has been laid upon the case of *Surendra Nath Nag Chowdhury v. Gopal Ghunder Ghosh* (1) and the long line of case-law quoted therein. That case was a clean case under section 27 (a) of the Specific Relief Act, and inasmuch as in a case of this description the contract itself does not affect the property until it has been reduced to writing and registered, it may be said that an unregistered deed may be used as evidence of that contract as between the contracting parties,* but I cannot take that decision to be authority for the proposition that in a case against third parties under section 27 (b) an unregistered deed can be used in evidence, for it is clear that the existence of the previous contract is of vital

(1) 8 Ind. Cas. 794; 12 C. L. J. 464.

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importance in the case. The contract itself is a transaction affecting property, and I hold that an unregistered sale-deed cannot be used in evidence of a contract which in itself affects property.

The appeal is, therefore, decreed and the suit remanded for enquiry upon two issues by the lower Appellate Court upon the evidence recorded by the Court of first instance. The first of these issues is—was there a valid contract between the plaintiff and defendant No. 1 prior to the registered conveyance to the defendant No. 2? and was the defendant No. 2 aware of this prior contract? If either or both of these issues are decided in favour of the defendant the suit will be dismissed. If both issues are decided in favour of the plaintiff his suit will be decreed.

In the decision of these issues the lower Appellate Court will take heed that the unregistered deed is not to be used in evidence. If it appears that it is necessary to take further evidence on the question of the defendant's knowledge of the previous contract, the lower Appellate Court is directed to remand the suit for the taking of such evidence.

Costs to follow the result.

Appeal decreed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 105 OF 1916.

November 20, 1916.

Present:—Mr. Justice Walsh and

Mr. Justice Stuart.

LADU RAM AND ANOTHER—APPELLANTS

versus

MAHABIR PRASAD—OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), ss. 43 (2), 46 (2)—“Person aggrieved,” meaning of—Appeal—Offence, nature of.

A creditor brought to the notice of the Court allegations against an insolvent said to constitute an offence under section 43, sub-section (2), of the Provincial Insolvency Act. The Court decided that there was no case. On the creditor's appeal:

Held, that the creditor was not an “aggrieved person” within the meaning of the words as used in section 46 (2) of the Act and was not, therefore, entitled to appeal.

Iyappa Nainar v. Manikka Asari, 27 Ind. Cas. 241, followed.

The offences dealt with under section 43, sub-section (2), of the Provincial Insolvency Act are in the nature of disciplinary offences, that is to say, offences committed by the insolvent during the insolvency in the nature of breaches of duty to the Court and not offences against the general criminal law.

First appeal from an order of the District Judge, Ghazipur, dated the 19th April 1916.

Mr. K. N. Laghate, for the Appellants.

Mr. Haribans Sahai, for the Respondent.

JUDGMENT.—In our opinion this preliminary objection must prevail. The respondent has been adjudicated an insolvent. No Receiver has been appointed. The rights of the Receiver must, therefore, under section 23 be exercised by the Court. The present appellant by an application of the 22nd of November 1915, brought to the notice of the Court allegations said to constitute an offence under section 43, sub-section (2). It is to be observed that the offences dealt with under that section are in the nature of disciplinary offences, that is to say offences committed by the insolvent during the insolvency in the nature of breaches of duty to the Court and not offences against the general criminal law. The Insolvency Court on the 19th of April 1916, decided that there was no case. The present appellant claims to have a right of appeal as being a person described by section 46, sub-section (2), as “a person aggrieved by an order made by the District Court under section 43, sub-section (2).” He can only be aggrieved as a member of the public is aggrieved by a decision in a case of which he does not approve. He is not “an aggrieved person” in the sense in which the words are used by the section. We, therefore, think he has no right of appeal. We agree with the head-note in the case of *Iyappa Nainar v. Manikka Asari* (1) decided by the Madras High Court. We are not, however, prepared to go the length of the reasons given in the judgment. The question whether a right of appeal exists at all for example by a Receiver if there happens to be one, does not arise in this case. We, therefore, leave that question open to be decided when it

(1) 27 Ind. Cas. 241.

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arises. We dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 243
OF 1915.

January 9, 1917.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

GANGA PRASAD DUTT—DECREE-HOLDER
—APPELLANT
versus

Rani HEMANGINI DEBI, EXECUTRIX TO
THE ESTATE OF LATE Raja JOGENDRA
NATH ROY BAHADUR AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 12—
Mesne profits, ascertainment of, application for
—Decree directing ascertainment in execution,
legality of—Dismissal for default, effect of—Sub-
sequent application barred—Decree for possession and
mesne profits, form of.

Under the terms of Order XX, rule 12, Civil Procedure Code, mesne profits are assessed by an enquiry in the suit itself and not in execution, and the mesne profits so assessed form part of the money recoverable under the decree. [p. 998, col. 1.]

Puran Chand v. Roy Radha Kishen, 19 C. 132; 9 Ind. Dec. (N. S.) 534; *Upendra Chandra Singh v. Sakhi Chand*, 15 Ind. Cas. 709; 16 C. L. J. 3, followed.

Ram Kishore Ghose v. Gopi Kant Shaha, 23 C. 242, *Upendra Chandra v. Sakhi Chand*, 7 C. L. J. 301; 12 C. W. N. 3, not followed.

A Court, therefore, acts in excess of its powers under the new Civil Procedure Code of 1908, if it passes a decree directing that mesne profits should be ascertained in execution. [p. 998, col. 1.]

The dismissal for default of an application for ascertainment of mesne profits bars subsequent applications even though the decree in terms directed its ascertainment in execution. [p. 997, col. 2.]

Per Richardson, J.—The proper way or ways of drawing up a decree for mesne profits are indicated in Mulla's Edition of the Civil Procedure Code in the notes to rule 12, Order XX. [p. 998, col. 1.]

Appeal against the order of the Subordinate Judge, Pabna, dated the 31st May 1913.

Babu Purna Chandra Roy, for the Appellant.

Babu Preo Sanker Majumdar, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the decree-holder against an order of the learned Officiating Subordinate Judge of Pabna, dated the 31st May 1913. The appellant, the decree-holder, brought a suit for recovery of possession of certain land and also for mesne profits. The decree was made as long ago as 1909. The first, what is called in this country the execution case, was in 1909 in which possession was given of the land. Then there was another execution case to realise the costs of the suit. Then came a series of applications to the Court for assessment and realisation of mesne profits, the last of which is the present application presented to the Court on the 25th March 1913. On this application coming on before the learned Officiating Subordinate Judge, he held that the application was not one made in execution of the decree but an application in the suit itself and that, the former applications having been dismissed for default of the decree-holder, the decree-holder had precluded himself from applying to the Court for assessment and realisation of the mesne profits. In the present appeal, various cases have been cited. On the one hand we have got the Full Bench decision in the case of *Puran Chand v. Roy Radha Kishen* (1) which seems to me to be obviously against the appellant. On the same side we have got the decision in the case of *Upendra Chandra Singh v. Sakhi Chand* (2) that is also clearly against the view put forward by the appellant. On the other side, we have got the decision in the case of *Ram Kishore Ghose v. Gopi Kant Shaha* (3) which is opposed to the decision reported as *Upendra Chandra Singh v. Sakhi Chand* (2). That decision in *Ram Kishore Ghose v. Gopi Kant Shaha* (3), was followed in a case in *Upendra Chandra v. Sakhi Chand* (4). But the learned Judge who presided over the Court in that case was the same Judge who presided over the Court that decided the case reported as *Ram Kishore Ghose v. Gopi Kant Shaha* (3). The case in *Ram Kishore*

(1) 19 C. 132; 9 Ind. Dec. (N. S.) 534.

(2) 15 Ind. Cas. 709; 16 C. L. J. 3.

(3) 23 C. 242.

(4) 7 C. L. J. 301; 12 C. W. N. 3.

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Ghose v. Gopi Kant Shaha (3) has received judicial notice on several occasions and, so far as I can see from the reports, it never received such notice with approval except in the case reported as *Upendra Chandra v. Fakhi Chand* (4). The case does not end there. The present Code is materially different from the old Code. Under the present Code, it cannot be suggested that mesne profits are assessed in what is called the execution department. Under the terms of Order XX, rule 12, it is quite clear that mesne profits are assessed by an enquiry in the suit itself and the mesne profits so assessed form portion of the money recoverable under the decree. Whatever might be argued under the former Code, it seems to me, under the terms of the present Code, that there are no grounds for suggesting that mesne profits are assessed in what is called the execution department.

The last argument that was placed before us by the learned Vakil for the appellant was that the decree in this case stated that mesne profits would be ascertained in execution. It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law. The method in which mesne profits are ascertained under the present Code of the Civil Procedure is not by an enquiry in execution but by an application in the suit itself. I am of opinion that the learned Judge in this case came to a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee at seventy five rupees.

RICHARDSON, J.—I agree. The provisions of the present Code on the subject are clear, and the inaccurate language used in the decrees before us must be construed in a sense conformable with those provisions. It may be worthwhile to add that the proper way or ways of drawing up a decree for possession and mesne profits is indicated in Mulla's Edition of Civil Procedure Code in the notes to rule 12 of Order XX.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 2864 OF 1914.

June 28, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Kingsford.

HARI PRASAD MISSEK AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KODO MARYA AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1852), s. 6 (e)—Mesne profits, decree directing ascertainment of, whether can be transferred—Civil Procedure Code (Act V of 1908), O. XXII, r. 10.

Plaintiffs Nos. 1 and 2 obtained a decree (a) for possession of certain immoveable property, and (b) directing an enquiry as to mesne profits. They sold their right to recover mesne profits under the decree to plaintiffs Nos. 3 and 4. Subsequently all the four plaintiffs applied to the Court to ascertain the mesne profits. An objection was raised that the transfer of the right to recover mesne profits was invalid under section 6 (e) of the Transfer of Property Act:

Held, that the transfer was valid, the right of the original decree-holders being not a mere right to sue but a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits. [p. 999, col. 1.]

Held, further, that under the present Code of Civil Procedure proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution, so that the assignees ought to have applied to the Court for permission to continue the suit under Order XXII, rule 10, of the Civil Procedure Code; but their omission to do so, under the circumstances of the case, could not be held fatal to their right to continue the suit. [p. 999, col. 1.]

Prasanna Kumar Panja v. Asutosh Roy, 20 Ind. Cas. 685; 18 C. W. N. 450, referred to.

Second appeal from an order of the District Judge, Bhagalpur, dated the 22nd August 1914, confirming that of the Munsif, Banka, dated the 9th March 1914.

Mr. Lal Mohan Ganguly, for the Appellants.

Messrs. Naresk Chandra Sinha and Baikuntha Nath Mitter, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—Respondents Nos. 1 and 2 obtained against the appellants a decree (a) for possession of certain immoveable property, and (b) directing an enquiry as to mesne profits. Having executed their decree for possession of the property they sold to respondents Nos. 3 and 4 their right to recover mesne profits under the decree which they had obtained. The two

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original decree-holders and their transferees then presented a petition to the Court of first instance praying that the amount of mesne profits due under the decree might be ascertained. In that petition it was stated that the original decree-holders had transferred their rights to respondents Nos. 3 and 4. Various defences were put forward and amongst them was a plea that the transfer of the right to recover mesne profits was contrary to law. That plea was overruled by the Court of first instance and also by the lower Appellate Court. The only question which we have to decide in this second appeal is whether the decree for mesne profits was capable of being transferred. It is contended that the right which the decree-holders had under their decree was a mere right to sue within the meaning of clause (e) of section 6 of the Transfer of Property Act. It seems to me that the right of the original decree-holders was not a mere right to sue but was a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits. The decree for possession and mesne profits was passed under the present Code of Civil Procedure and it is quite clear that under the present Code proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution. The decree-holders transferred to respondents Nos. 3 and 4 their right to mesne profits. It seems to me that if the respondents Nos. 3 and 4 had followed the procedure prescribed, they would have made an application to the Court under Order XXII, rule 10, praying for permission to continue the suit, as assignees of the original plaintiffs decree-holders. No such application was made but an application was made by all four persons as above explained. The first Court made an order in favour of respondents Nos. 3 and 4 and must, I think, be taken to have allowed them to continue the suit as assignees of the original decree-holders. As a matter of fact no objection has been taken before us on the ground that the procedure prescribed by Order XXII, rule 10, was not followed. The omission to make a formal application under rule 10 cannot be held to be fatal to the right of respondents Nos. 3 and 4 to carry on the pro-

ceedings. In my opinion what they acquired was something much more than a right to sue. It was a right to carry on the suit in which a preliminary decree had been made and to obtain the mesne profits. I would confirm the decision of the Courts below. The view which I take is supported by the decision of the Calcutta High Court in the case of *Prasanna Kumar Panja v. Asutosh Roy* (1).

I would dismiss this appeal with costs.

KINGSFORD, J.—I agree.

Appeal dismissed.

(1) 20 Ind. Cas. 685; 18 C. W. N. 450.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 653
OF 1915.

December 13, 1916.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walmsley.

NARAIN CHANDRA DALAL—DEFEND-
ANT—APPELLANT

versus

Maharaja MANINDRA CHANDRA
NANDI AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 23, 76, (1), (2), cl. (f)—Gardening lease—Occupancy raiyat, right of, to erect dwelling-house on holding.

An occupancy raiyat does not exceed his right in building a pucca dwelling-house on an insignificant portion of his holding taken for the purpose of gardening. [p. 1000, col. 2.]

Such building need not be suitable to the holding, but it must be suitable under the circumstances of the raiyat who makes it. [p. 1000, col. 2.]

Hari Kishore Barna Sarma v. Baroda Kishore Acharja Chowdhry, 8 C.W.N. 754, 31 C. 1041, followed.

Appeal against the decree of the Additional District Judge, 24-Pergannas, dated the 22nd January 1915, reversing that of the Munsif, Basirhat, dated the 6th September 1913.

FACTS of the case appear from the judgment.

Barbus Banku Behary Mullick and Satyendra Nath Mitter, for the Appellants.—The defendants-appellants are the tenants of the plaintiff. They say they are permanent tenants at fixed rates; the plaintiff says they were merely occupancy raiyats.

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The *jama* in question comprises 40 *bighas* of garden land on $\frac{1}{4}$ *cottah* of which the tenant has erected a suitable dwelling-house for himself.

The plaintiffs have sued for removal of the building.

Two points arise in the case:—(1). The *jama* is held at a fixed rate since 1871; hence the presumption under section 50, Bengal Tenancy Act, is that it is a permanent *jama*. No doubt there was a small variation of the rent but a small unexplained variation of 16 *gandas* in a rental of Rs. 3-3-4 *gandas* does not matter at all. See *Anundlall Chowdhry v. Mr. James Hills* (1), *Munsoor Ali v. Bunoo Singh* (2) *W. M. Grant v. Har Sahay Singh* (3).

(2). Even if it was not a permanent tenancy, the tenant by building the *pucca* house did not diminish the value of the land; on the other hand it was an improvement, see section 23 read with section 76 (f) of the Bengal Tenancy Act. *Hari Kishore Barna Sarma v. Baroda Kishore Acharja Chowdhry* (4), *Hari Mohan Misser v. Surendra Narayan Singh* (5).

An occupancy *raiyat* is entitled to build a suitable dwelling-house for himself and his family on a portion of the holding. Merely because a *pucca* house has been erected will not entitle the landlord to object. A *raiyat* has the right to make a *pucca* building, as his interest in the holding is not precarious and temporary.

Babu Bhudeb Chandra Roy, for the Respondents.—The learned District Judge has found that the holding has not been held at a uniform rate of rent from the time of the Permanent Settlement; I submit this is a finding of fact and cannot be interfered with in second appeal.

I submit that on the second point the tenant having erected a *pucca* structure he has changed the nature of the tenancy from an agricultural to a residential one. Cases go to show that the tenant is permitted

to erect only houses of a temporary nature. Besides in this case the tenants were asked not to build when the construction was in progress.

The appellants were not called upon to reply.

JUDGMENT.—Two points have been argued in this case *first*, that the Judge was wrong in holding that the presumption of fixity under section 50 of the Bengal Tenancy Act has been rebutted by the fact that the rent was increased from Rs. 3-3-0 odd to Rs. 3-4-0 odd and *secondly*, that he was wrong in holding that the defendant in this case had exceeded his rights under the law in building a suitable house for himself on a holding whatever its nature was.

With regard to the first point, we do not think it necessary to go into the matter in this case, as it seems to us that the finding of the learned Judge that there has been a variation at the time of the *dakhil kharij*, seems to be a finding of fact.

With regard to the second point, we think that the learned Judge is clearly wrong. Upon the learned Judge's own finding the defendant is an occupancy *raiyat*; and if he is an occupancy *raiyat*, then under section 23 of the Bengal Tenancy Act he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy. Now, the purpose of the tenancy was gardening. It is not found that the building of the house in question upon 1 *cottah* and a quarter out of 40 *cottahs* of land is in any way impairing the value of the land or rendering it unfit for the purposes of the tenancy, that is gardening.

In the next place, under section 76, clause (f), the *raiyat* is entitled to erect a suitable dwelling-house for himself and his family together with all necessary out offices. It has been held in the case of *Hari Kishore Barna Sarma v. Baroda Kishore Acharja Chowdhry* (4) that the building need not be suitable to the holding; it must be suitable under the circumstances of the *raiyat* who makes the building. In the present case the building is not held to be unsuitable to the person who built it.

(1) 4 W. R., Act X Rulings, 33.

(2) 7 W. R. 282.

(3) 20 Ind. Cas. 53; 18 C. L. J. 76.

(4) 8 C. W. N. 754; 31 C. 1014.

(5) 34 C. 718; 2 M. L. T. 399; 11 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 M. L. J. 361 (P. C.).

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In this connection we may refer to the remarks of their Lordships of the Privy Council in *Hari Mohan Misser v. Surendra Narayan Singh* (5). That was a case of land taken for agricultural purposes on which an indigo factory consisting of *pucca* houses was built. The High Court held that the *raiyat* had exceeded his rights in building the factory and that this was not within the purposes of the tenancy. The learned Judges said: "Where, as in this case, land has been let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purpose of the tenancy, because, the purpose of the tenancy being the cultivation of crops, that is agricultural purposes, the portion of the land built upon will evidently be unfit for such purposes." With regard to this, their Lordships of the Privy Council observed "the proposition of law is laid down broadly, without reference to the circumstances of individual cases, without regard to the size of the holding, or of the area withdrawn from actual cultivation or to the effect of such withdrawal upon the fitness of the holding, taken as a whole, for profitable cultivation."

In the present case the learned Judge in the Court below has not taken all these matters into consideration and we think that he is clearly wrong. The house is built for dwelling purposes, upon his finding by an occupancy *raiyat*; but he does not find that it has impaired in any way the value of the property or that the house is unsuitable to the circumstances of the *raiyat*. Under the circumstances, he was not justified in ordering its demolition.

There is another matter which must be adverted to in this connection. The house had been almost finished when the *zamindar* took notice of it. The house must have cost a good deal to the party who built it. This circumstance ought to have been taken into account before ordering a demolition. We think that the tenant in this case has not exceeded his right in building a *pucca* house on a very insignificant portion of his tenancy.

We accordingly allow the appeal, set aside the judgment of the lower Appellate Court and restore that of the first Court with costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 55 OF 1916.

January 5, 1917.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

BHAIRON PRASAD AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Mahant SOMVARPURI—PLAINTIFF—

RESPONDENT.

Agra Tenancy Act (II of 1901), s. 41—*U. P. Land Revenue Act* (III of 1901), s. 36—*Ex-proprietary tenant—Agreement to enhance rent before 10 years of creation of tenancy, validity of.*

A registered agreement executed by a tenant of an ex-proprietary holding, before the expiration of the period of 10 years from the creation of the ex-proprietary tenancy, to pay enhanced rent is a valid agreement and effect can be given to it. [p. 1003, col. 1.]

Appeal, under section 10 of the Letters Patent, against the decree of Mr. Justice Walsh, reported as 34 Ind. Cas. 441, dated the 7th April 1916, confirming that of the District Judge, Allahabad, dated the 29th August 1914, who upheld the decree of the Assistant Collector, first class, Allahabad, dated the 25th April 1914.

FACTS.—The appellants were the ex-proprietary tenants of the land in dispute. Under section 36 of the U. P. Land Revenue Act (III of 1901) the rent of the land was fixed at Rs. 50 on the 26th April 1908. On the 10th of July 1908 the appellants executed a registered instrument whereby they agreed to enhance the rent from Rs. 50 to Rs. 72-6-0. The respondents brought a suit for recovery of rent at the above rate out of which this appeal has arisen.

The suit was contested on the ground that the agreement was not binding as it was against the provisions of section 36 of the U. P. Land Revenue Act and section 41 of the Agra Tenancy Act.

Mr. Kanhiya Lal, for the Appellants.—Section 36 of the U. P. Land Revenue Act provides that the rent fixed under that section shall not be liable to enhancement for a period of ten years except by order of a Settlement Officer under section 87 of this Act and save as provided by section 41 of the Agra Tenancy Act 1901 or section 35 B of the Oudh Rent Act 1886.

Section 41 of the Agra Tenancy Act 1901, clause 3, provides that the term for which

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the rent of an ex-proprietary tenant is fixed by decree or order of a Revenue Court shall not be less than ten years.

Sections 35A and 35B of the Oudh Rent Act, 1886 show that there could be no enhancement within ten years except under extraordinary circumstances. Section 41 of the Agra Tenancy Act comprises the provisions of both the sections 35A and 35B of the Oudh Rent Act. Hence section 36 of the U. P. Land Revenue Act read in the light of section 41 of the Tenancy Act clearly shows that the intention of the Legislature was that when once rent has been fixed under section 36 Act III of 1901 it cannot be enhanced within ten years except under extraordinary circumstances mentioned in sub-clauses (c) to (g) of clause 1 of section 41, Act II of 1901, or those mentioned in section 35B of the Oudh Rent Act, 1886.

Mr. S. D. Sinha, for the Respondents.—Section 36, Act III of 1901, says: "save as provided by section 41 of North Western Provinces Tenancy Act." This clearly shows, that rent fixed under that section could be enhanced within ten years under section 41 of the Tenancy Act. One of the means by which it could be done was by a registered instrument. The agreement is binding inasmuch as the provisions of section 41, Tenancy Act have been complied with. The interpretation put by the appellant will make the provisions of section 36, U. P. Land Revenue Act, absolutely useless.

Mr. Kanhiya Lal was heard in reply.

JUDGMENT.—The facts connected with this appeal may be very shortly stated. The defendants having sold their proprietary rights became ex-proprietary tenants of the *sir* lands under the provisions of section 10 of the Tenancy Act. An application was made to the Collector to fix the rent on the ex-proprietary holding under the provisions of section 36 of the Land Revenue Act. The rent was fixed at the sum of Rs. 50. Subsequently, by a registered agreement between the plaintiffs and the defendants, the rent was enhanced to the sum of Rs. 72-6-0. The plaintiff brought a suit in the Revenue Court to recover this rent. The defendants, amongst other pleas, raised the defence that no rent save the rent fixed by the Collector could

be recovered until after the expiration of 10 years from the time of the creation of the ex-proprietary tenancy. The Revenue Court held that the plaintiff was entitled to recover the enhanced rent. An appeal was taken to the District Judge who confirmed the decree of the Court of first instance. The learned District Judge found that the agreement was entered into because the plaintiff was about to take steps to get rid of the order of the Collector by an application in revision or by an application for enhancement. We merely mention these matters to show that there was no fraud on the part of the plaintiff. A second appeal was preferred to this Court and the learned Judge, who heard the appeal, affirmed the decree of the Courts below. The present appeal is under the letters patent against the decree of the learned Judge of this Court.

The question argued before the District Judge was the short question whether or not a tenant of an ex-proprietary holding could enter into a valid agreement to pay enhanced rent, it being admitted that the agreement was carried out by means of a registered instrument but before the expiration of the period of 10 years from the creation of the ex-proprietary tenancy. We wish particularly to point out that there was no suggestion that the enhanced rent was greater than the favourable beneficial rent at which ex-proprietary tenants are entitled to hold under the provisions of section 10 of the Tenancy Act. At the hearing before the learned Judge of this Court the discussion seems to have been somewhat wider than in the Court of the District Judge and there are certain remarks of the learned Judge of this Court as to the power of ex-proprietary tenants to contract themselves out of the provision of the Tenancy Act. We do not think that these questions arise in the present case and we do not wish to be taken as expressing our concurrence with some of the remarks which fell from the learned Judge of this Court on that subject. The only question which we think properly arises in the present case is the question whether the registered agreement executed by the defendants to pay Rs. 72-6-0 as rent for the

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holding in lieu of Rs. 50 fixed by the Collector is or is not a valid agreement and one to which effect can be given. Section 36 of the Land Revenue Act provides that "when a right of occupancy has been created under the provisions of section 10 of the North Western Provinces Tenancy Act of 1901...in favour of an ex-proprietary tenant, the Collector shall ...pass an order specifying the land in which such occupancy right has been created, and fixing the rent payable therefor." Sub-section (2) is as follows: "The rent, so fixed shall be payable from the date the ex-proprietary tenancy arose subject to the law of limitation as to arrears of rent, and save as provided by section 41 of the North Western Provinces Tenancy Act of 1901 or section 35B of the Oudh Rent Act of 1886 shall not be liable to enhancement or abatement for a period of 10 years, except by order of a Settlement Officer under section 87 of this Act." The clause that we have just quoted seems by necessary implication to mean that the rent fixed by the Collector can be enhanced or abated in the manner provided by section 41 of the Tenancy Act notwithstanding that the period of 10 years has not elapsed. Section 41 of the Tenancy Act is as follows: "The rent of an ex-proprietary or occupancy tenant shall be liable to enhancement or abatement only (a) by registered agreement, or (b) by decree or order of a Revenue Court." The section goes on to provide that "when so enhanced or abated, the rent shall not be again liable to enhancement or abatement until or unless as provided in the following clauses of the Act." It will be seen that section 41, so far as we have quoted it, applies not to the "fixing" of a rent for the first time but to the "enhancement" or "abatement" of a rent which has already been "fixed". We now come to the part of the section which creates the difficulty. Sub-section 3 is as follows:—"The term for which the rent of an ex-proprietary or occupancy tenant is fixed by decree or order of a Revenue Court shall not be less than 10 years, but no term in excess of 10 years shall be so fixed except upon agreement by the parties." It is at once to be remarked that sub-

section 3 does not seem to properly belong to section 41. It is one more example of unskilful drafting in this Act. The earlier part of the section as we have already remarked deals with the *enhancement* or *abatement* of the rent. Sub-section 3 refers to the fixing of the rent by a decree or order of the Revenue Court and not (expressly at least) to the enhancement of it. The contention on behalf of the appellant is that the only meaning which can be given to sub-section 3 is that the rent fixed by the Collector must be the rent for the period of 10 years at least, from the time when the ex-proprietary tenancy was created and that no enhancement or abatement can be made during that period of 10 years. It is contended that unless this meaning be attributed to the sub-section the words are quite superfluous. Reference is made to sections 35 (a) and 35 (b) of the Oudh Rent Act as showing what the intention of the Legislature was. It is pointed out that there was no special reason why in this respect the Legislature should have intended that there should be any difference in the law in Agra and the law in Oudh and it is said that the provision in the Oudh Rent Act shows clearly that the rent in Oudh could not be abated or enhanced during the period of 10 years. It is no doubt difficult to reconcile the provisions of sub-section 3 of section 41 of the Agra Tenancy Act, with the earlier part of the section. But the mere fact that we are unable to reconcile (except by speculation) the provisions of the two sub-sections is not itself sufficient reason why we should hold that the registered agreement executed by the defendants in the manner provided by the first sub-section of section 41 and also in accordance with section 36, sub-section 2, of the Land Revenue Act is invalid. We think that the Court should interpret the section in favour of the legality of the registered agreement rather than in favour of its illegality. We think that the view taken by the learned District Judge was correct and that the learned Judge of this Court properly upheld his decree. We accordingly dismiss the appeal with costs.

Appeal dismissed.

KARTIC REWANI *v.* THE CENTRAL KARKEND COAL CO., LTD.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 18 OF 1916.

June 29, 1916.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.KARTIC REWANI—PLAINTIFF—APPELLANT
versus

THE CENTRAL KARKEND COAL

CO., LTD.—DEFENDANT—RESPONDENT.

Trespasser—Ejectment, suit for, by tenant against trespasser—Landlord supporting trespasser, effect of.

A tenant is entitled to eject a trespasser from property in possession of the former, and the mere fact that the latter is supported in his defence by the landlord does not give him any right to retain the property as against the tenant. [p. 1005, col. 1.]

Letters Patent Appeal under section 10 of the Letters Patent.

Messrs. Saroshi Charan Mitter, Baikuntha Nath Mitter and Sailendra Nath Palit, for the Appellant.

Mr. Pugh (with him Messrs. Karunamoy Roy and Bankim Chandra Mukherji), for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against a judgment of a learned Judge of this Court setting aside a decree passed by the Additional Subordinate Judge of Manbhum which affirmed a decree of the Munsif of Dhanbaid. The appellant before us was the plaintiff in the suit. He claimed a decree for *khas* possession of a tank. He alleged that the tank had been excavated by his paternal grandfather, and had been held by his grandfather, his father and himself in *niskar* right, that is, in some kind of rent free tenure. He alleged that his grandfather, his father and he himself in succession had held possession, that while his father was in possession of the tank the defendant Company took water and earth from it and paid his father therefor, that in 1319 *Fasli* the defendant Company laid claim to the tank, that there was a case in the Criminal Court which was decided against the plaintiff, and hence the plaintiff was compelled to bring the present suit. The defendant Company denied that the plaintiff or his father or grandfather had ever been in possession of the tank. They denied that the tank had been excavated by the plaintiff's grandfather and they pleaded that in 1906 they took possession of the tank upon the verbal permission of

the Manager of the Raja of Jharia who is said to be the owner of the land, and that after taking possession they had improved the tank in various ways by deepening it and raising banks round it. The Munsif found that the plaintiff had failed to prove his *niskar* right in the tank but that all his other allegations had been established. In particular, he found that the plaintiff had proved that the tank had been excavated by his grandfather, that it was the property of the plaintiff at the date of suit, and that it had been in his possession all along. The Munsif found also that the defendant Company had failed to prove that they had obtained permission from the Raja's Manager to take possession of the tank. On appeal the Additional Subordinate Judge confirmed the findings of the Munsif. He said that it was proved that the tank had been excavated by the grandfather of the plaintiff more than 30 years before the suit, and that the plaintiff, his father and grandfather had all along been in possession. He definitely rejected the evidence adduced by the Company to prove that the Raja had given permission to the Company to take possession, and accordingly he confirmed the Munsif's decree in favour of the plaintiff. On second appeal to this Court the learned Judge before whom the case came observed that on the findings of the Courts below the plaintiff was entitled to succeed if at all on the strength of long continued possession, that a person suing merely on the strength of long continued possession was no doubt entitled to a decree for possession against a trespasser by whom he had been ousted, but that the defendant Company was not in the position of a trespasser inasmuch as the company was being "supported in the suit" by the Raja who was the landlord, and that the Company "must be considered a permissive occupant and its possession co-ordinate to that of the plaintiff." Before dealing with the ground upon which the learned Judge of this Court dismissed the plaintiff's suit I propose to deal with other contentions which have been advanced by learned Counsel for the Company. In the first place it was urged that in a suit for ejectment the plaintiff must recover *secundum allegata et probata*. Learned Counsel contended that inasmuch as the plaintiff

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iff had failed to prove that he and his ancestors held the land in *niskar* right the suit should have been dismissed, that the plaintiff should not have been permitted to succeed on the strength of possession, however long continued, that the defendant Company had had no notice of such a case and had had no opportunity of meeting it. There appears to me to be no force in this contention. Every single allegation of the plaintiff has been proved except the allegation that he held the tank in *niskar* right. The Court of first instance and the Subordinate Judge held that that allegation had not been proved because the plaintiff had not produced any document in support of it. Both Courts, however, as I read their judgments, went further and held that the plaintiff had proved that he was the owner of the tank. The plaint contains repeated allegations that the plaintiff and his ancestors had been in possession all along. These allegations were definitely denied by the defendant Company who alleged that the possession had all along been with the Raja. Evidence on the question of possession was produced on both sides and there is no ground whatever for the suggestion that the defendant Company was taken by surprise in having to meet the allegations regarding possession. Next, it was contended that such possession as has been proved by the plaintiff was not possession of the kind which would entitle him to succeed even as against a trespasser. It was said that his possession was either secret or permissive or possibly that of a mere squatter, that at best he was a kind of tenant-at-will liable to be ejected by the Raja at any time and that, inasmuch as it had been found that the Raja was supporting the defendant Company, the latter was in a better position than the plaintiff, therefore the plaintiff whether a tenant or a person who had encroached upon his landlord's land was not entitled to succeed against the defendant Company which was claiming under the Raja. The answer to all this is that the findings of the Court below shew very clearly that the plaintiff's and plaintiff's ancestor's possession was neither secret nor permissive nor that of a mere squatter. It was open and long continued to the knowledge of the defendant Company, which

actually dealt with the plaintiff's father as the person in possession and the person entitled to dispose of the water. Nor is the defendant Company in the position of a person claiming under the landlord. Its attempt to prove that it obtained the permission of the landlord to take possession of the property has failed. It may be, as contended by Counsel, that it is entitled to prove facts which occurred after the institution of the suit at any time up to the filing of the written statement. But it has neither pleaded nor proved any claim under the Raja other than that set out in paragraph 12 of the written statement which has been negatived by the findings of the Courts below. Next it was said that the suit is barred by the provisions of section 139 (5) of the Chota Nagpur Tenancy Act, which lays down that all applications to recover occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord shall be instituted in the Court of the Deputy Commissioner and not in any other Court. This point was not taken either in the first Court, or in the Court of First Appeal, nor was it taken in the memorandum of appeal to this Court. The defendant Company served a notice on the plaintiff that it intended to raise the point at the hearing before the learned Judge who decided this case in this Court, but apparently did not put it forward. In my opinion there is no force in it. There is nothing to show that the plaintiff in this case is a tenant within the meaning of the Act. He has certainly not been ejected by his landlord and on the findings it is impossible to hold that the defendant Company claims under or through the landlord. Next it was contended that the defendant Company is entitled to retain possession of this land under the lease of the colliery which was granted by the Raja. The defendant Company is by reason of various intermediate assignments in the position of a lessee of the colliery. It is said that the lease contains a clause authorising the Company to take *parti* land required for the service of the Company at the rate of 4 annas a *bigha*. It was neither pleaded nor proved that the tank now in question was required for the service of the Company, and on the findings it is impossible to hold that

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the tank is *parti* land within the meaning of the lease. And this brings me to the last point which has been urged by the learned Counsel for the Company, namely, that the Company is entitled to resist this suit because it is being "supported" by the Raja. This expression is used by the Court of First Appeal and it was relied upon by the learned Judge of this Court. I do not know what the Court of First Appeal meant by saying that the defendant Company was being "supported" by the Raja. As far as I can ascertain it meant no more than that the Company was being assisted in its defence by the Raja. It appears to me that such support by the Raja gives the defendant Company no right whatever to retain the land against the plaintiff and, when the learned Judge of this Court held that the support of the Raja placed the Company in as good a position as that of the plaintiff, I think he must have overlooked the important finding by the lower Appellate Court that the Company had failed to prove the permission of the Raja pleaded by them. The defendant company was in my opinion in the position of a trespasser at the date of this suit and the fact that the Raja "supported" the defence does not put the Company in any better position. For these reasons I am of opinion that this suit should not have been dismissed by this Court. I would allow this appeal and set aside the judgment of the learned Judge of this Court and dismiss the appeal to this Court with costs of both hearings. The result is that the suit will be decreed with costs throughout.

SHARFUDDIN, J.—I agree.

Appeal allowed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 64
OF 1915-16.

August 5, 1916.

Present:—Mr. P. J. Fagan, F. C.
LAKHI AND OTHERS—PLAINTIFFS—
PETITIONERS
versusAMAR SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.*Punjab Tenancy Act (XVI of 1887), s. 5 (1) (c)*
—Settlement "along with the founder" and "by the founder," distinction between—Presumption.

Settlement along with the founder in section 5 (1) (c) of the Punjab Tenancy Act means settlement contemporaneously, or in association with the original founder during the initial stages of foundation and development of the village. [p. 1007, col. 2.]

Atar Singh v. Diwan Singh, 94 P. R. 1880, referred to.

Settlement by the founder might take place after those stages had passed. There is a fair presumption, though it is rebuttable by adequate proof, that where a cultivator is shown to have commenced to reside in and to cultivate *shamilat* land in a village during the lifetime of a founder thereof, such founder being at the time *lambardar* or otherwise directly concerned with the management of the *shamilat*, the cultivator in question was settled in the village "by the founder thereof as a cultivator therein," and so far fulfils the requirements of section 5 (1) (c). [p. 1007, col. 2.]

Revision from the decree of the Commissioner, Ambala, dated the 9th November 1915.

Mr. Broadway, for the Petitioners.

Mr. Duni Chand, for the Respondents.

JUDGMENT.—1. I will deal with the three cases Nos. 64, 65 and 66 in one order as the facts with which the revision is concerned are the same in all of them. They are fully set out and discussed in the orders of the learned Commissioner, of the Collector and of the original Court.

2. The learned Commissioner came to the conclusion that Hazari was not settled as a cultivator in the village of Bobwa, that is to say, as I understand, that he did not cultivate land there but was engaged solely in carrying out whatever at that period may have been the duties of a *patwari*. There is, of course, no direct proof that he did cultivate land. From an inspection of the Settlement Record of 1840 (the first Regular Settlement) it appears that the cultivating body of the village consisted of proprietors (*maliks*), *qadim kisans* and *toladars*. The last two terms are explained at pages

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218, 229* and 230 of the Hissar District Gazetteer from which it will be seen that the *kadim kisan* was a proprietor of his holding without any share in the *shamilat*. The Settlement Record of 1840 contains no list nor register of cultivators, except one of *kadim qisans* and the name of Hazari does not appear on this. He and his appointment as *patwari* are expressly mentioned in the *wajib-ul-arz* of 1840, but nothing is said as to his having been given land to cultivate, whereas had he been a cultivator it seems very unlikely that this fact would not have been alluded to. It is true that the word *be-dakhl* is used with reference to him but this is a somewhat slender foundation on which to rest the conclusion that he was a cultivator in addition to being a *patwari*. A good deal has been made of the fact that Hazari's recorded emoluments only amounted to Rs. 2 per mensem, but it must be remembered that he was a *banya* by caste and as was customary with the *patwaris* of those days it is probable that he made money by trade and money-lending. It is true that in 1857 his son Nathu appears from the Settlement Record of 1863 to have been cultivating some 200 *bighas* or 150 acres as a tenant but this does no more than render it possible that Hazari may have cultivated some or all of that area in his life-time and certainly does not amount to proof that he did so. On the whole I agree with the Commissioner as regards this part of the case, being of opinion that there is not sufficient material for a definite affirmative finding that Hazari was a cultivator in the village.

3. There remains the question whether Nathu in virtue of his having cultivated land in the village from 1857 or thereabouts, can be regarded as having been settled in the village by the founder thereof as a cultivator therein. Regarding this the facts are that, as appears from the Settlement Records of 1840 and 1863 A. D., Basti, son of Piru, one of those who joined in the original foundation of the village and who was, therefore, one of the joint founders, was alive as late as 1863. He was not a *lambardar*. Basti who was one of the three persons who held that office was a son of Sham Das, one of the founders. The land which Nathu, son of Hazari, cultivated in

1863 was village *shamilat* which according to an entry in the *wajib-ul-arz* of 1863 was managed by the *lambardars* in consultation with certain other proprietors who are mentioned by name but do not include Basti, son of Piru. It would appear, therefore, that Basti, son of Piru had nothing to do with settling cultivators on the *shamilat* in 1863 and we may assume that the same was the case in 1857.

4. There are no published rulings as to the facts or circumstances which would for the purposes of section 5 (1) (c) of the Tenancy Act constitute in the case of a tenant a settlement of him in a village by the founder thereof as a cultivator therein. Settlement along with the founder, the other alternative allowed by the above clause, doubtless means settlement contemporaneously or in association with the original founder during the initial stages of the foundation and development of the village—see *Atar Singh v. Diwan Singh* (1). Settlement by the founder, on the other hand, might take place after those stages had been passed. As to this it is, I think, a fair presumption, rebuttable of course by adequate proof of facts inconsistent with or contradicting it, that where a cultivator is shown to have commenced to reside in and to cultivate *shamilat* land in a village during the lifetime of a founder thereof, such founder being at the time a *lambardar* or otherwise directly concerned with the management of the *shamilat*, the cultivator in question was settled in the village "by the founder thereof as a cultivator therein" and so far fulfils the requirements of section 5 (1) (c).

In the present case it appears that when Nathu, son of Hazari, began to cultivate *shamilat* land, Basti, son of Piru, the then sole surviving founder, was not a *lambardar* nor did he share in the management of the *shamilat*. Under these circumstances the presumption which has been defined above is not applicable or rather would, if applied, be sufficiently rebutted. For these reasons I agree with the learned Commissioner's conclusion that it is not satisfactorily established that Nathu was settled in the village of Bobwa by one of the founders. The plaintiffs have, therefore, no claim to

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occupancy rights under section 5 (1) (c). The petitions for revision are dismissed. Applicants will pay respondent's costs in this Court.

Revision rejected.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 2055 OF 1915.

July 11, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

KALIKA DUTT MANDAR—PLAINTIFF—
APPELLANT

versus

TULSI MANDAR—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (b), interpretation of—Appeal—Evidence, additional, when may be admitted—Court, discretion of.

Rule 27 (b) of Order XLI of the Civil Procedure Code, 1908, does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a document.

Second appeal from a decision of the District Judge, Bhagalpur, dated the 25th May 1915, confirming that of the Munsif, Madhupura, dated the 9th January 1915.

Mr. Rajendra Prasad, for the Appellant.

Mr. Krishna Sahay, for the Respondent.

JUDGMENT.—The plaintiff in this suit sued upon a bond in which it was set forth that the consideration upon which this bond was given was an existing consideration under a previous bond and account. The Court of first instance refused to accept the oral evidence given in support of this consideration and pointed out that it was impossible to give the plaintiff a decree without reliable accounts, the previous bond itself and a close inspection of these papers.

Upon appeal from the decree of the first Court dismissing the plaintiff's suit, the appellant offered to place before the District Judge the original bond whereby the original consideration might have been proved. The learned District Judge refused to accept the bond and dismissed the plaintiff's appeal. Against that decision an appeal is made to this Court. The short point, therefore, is, what document should an Appellate Court

accept under Order XLI, rule 27? •Rule 27 (a) has nothing to do with the case before us, and the case comes under rule 27 (b), "If the Appellate Court requires any document to be produced...to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence...to be produced." This does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. In this case the burden of proof was upon the plaintiff and in the absence of proof of the consideration the Court was in a position to pronounce judgment in favour of the defendant. The document was not required to enable the Court to pronounce judgment. The highest at which it can be put is that it might have been required in order to enable the Court to pronounce judgment in favour of the plaintiff which is an entirely different thing. The question remains whether sufficient cause was shown for admitting the document in the lower Appellate Court. From the record of the case as tried before the learned Munsif it is clear that the plaintiff was fully aware of the precise place, namely the record-room at Bhagalpur, in which this document might have been found. He took no steps to search for it and produce it in time for use during the adjudication of his claim, and the learned District Judge exercised, in our view, a very sound discretion in refusing to regard the pure laziness of the plaintiff in the lower Court as sufficient cause for giving him a peculiar license in the Appellate Court.

The appeal is dismissed with costs.

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Where, at the head of a *kabuliyat*, an amount of rent was written down as the consolidated rent or the total rent which the tenant undertook to pay for the land and in arriving at the total several items were taken into consideration, one of which was given as the *jama* rent:

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The question of granting time is always one of discretion and that discretion cannot be properly exercised until the general conduct of the party applying for time throughout the case has been scrutinized.

When a date is fixed for a case, it is the business of the litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for securing their attendance upon the date fixed. If he chooses to file a process-fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing.

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— Possession, non-adverse in inception, when becomes adverse—Landlord and tenant—Non-payment of rent after expiry of term, effect of—Kabuliyat, contents of, when admissible—Evidence.

When possession is non-adverse in its inception, it is necessary to prove some overt act of adverse possession before adverse possession can be deemed to exist.

Mere non-payment of rent by the tenant after the expiry of the stipulated term will not make his possession adverse as from that date. The presumption is that the tenant continues to retain physical possession as he retained it before.

Where there is a *kabuliyat* but no lease, the executant of the *kabuliyat* cannot utilise the contents of that document against the owner of the land for his own benefit. But the owner of the land can utilise the contents of the *kabuliyat* to prove what the executant of the *kabuliyat* has undertaken to do. A BIJAI NARAIN SINGH v. PARBHU NARAIN SINGH 395

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Where a Small Cause suit, instituted in the Court of a Munsif invested with Small Cause Court powers, is heard and decided by the Munsif as a regular suit and not summarily, his decree is not appealable. But if appealed from and reversed, the High Court is bound to set aside the appellate decree on revision as passed without jurisdiction. **A ABDUL MAJID v. BEDYADHAR SARAN DAS, 14 A. L. J. 94 92**

— **Suit for rent not exceeding Rs. 100 in value—Order of District Judge in execution, whether appealable, when not relating to questions of title.**

There is no appeal to the High Court against an order passed in execution of a decree in a rent suit not exceeding Rs 100 in value, the order not deciding any question relating to title to land or some interest in land as between parties having conflicting claims thereto or to any of the matters specifically referred to in section 153 of the Bengal Tenancy Act. **C PRAFULLA KRISHNA DEB v. NOSIBANNESSA BIBI, 24 C L J 331 425**

— **Suit undervalued Jurisdiction—Appellant, duty of—Objection, how taken 451**

— **Withdrawal of suit, leave for—Appellate Court, powers of—Jurisdiction—Order giving leave "to withdraw appeal with liberty to bring a fresh suit," effect of—Intention of Court—Res judicata 414**

— **(CRIMINAL, pendency of, against findings**

— **Stay of criminal proceedings, expediency of 477**

—, (SECOND) See APPEAL.

— **Adverse possession, plea of, whether open in second appeal.**

The question of adverse possession is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. **C PRIYANATH MITER v. ANATH NATH DEV 942**

— **Decree, dismissing suit but granting permission to bring fresh suit, construction of—Appeal against granting permission to bring fresh suit, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXII, r. 1.**

A suit for redemption was deliberately dismissed by the first Court. Plaintiffs appealed and the lower Appellate Court upheld the decree by the following order: "However, in upholding the order of the lower Court, I order that the appellant hereby has permission to sue again when he has collected his evidence provided that this cause of action is still continuing." Defendants appealed against so much of the decree, as purported to permit the plaintiff to bring a fresh suit. A single Judge of the High Court held that no appeal lay treating the appeal as one against an order under Order XXIII, rule 1, of the Civil Procedure Code, of 1908. On an appeal under the Letters Patent:

Held, that the decree of the lower Appellate Court could not be treated as an order granting the plaintiff permission to withdraw the suit with liberty to bring a fresh suit and that, therefore, the appeal to the High Court was not an appeal from an order but an appeal against that portion of the decree of the lower Appellate Court which was in favour of the plaintiffs. **A BHARAT SINGH v. JAWALI 940**

APPEAL (SECOND)—concl'd.

——— *Finding of fact—Circumstantial evidence.*

A finding of fact, although based merely upon circumstantial evidence, cannot be questioned in second appeal, unless it is vitiated by some illegality or irregularity. **O BALKISHEN v. RAJ BAHADUR**, 3 O. L. J. 644 **439**

——— *Findings of fact, whether can be questioned.*

Findings of fact can be questioned in second appeal if they are not clear. **O SARABJIT SINGH v. RAMPUR MATHRA ESTATE**, 3 O. L. J. 468 **27**

——— *Findings of mixed law and fact* **92**——— *Limitation, plea of, whether can be raised for first time in second appeal*

Per *Piggot, J.*—It would be contrary to sound principles to allow a defendant to raise for the first time in second appeal a plea, even one of limitation, which could not be determined without the taking of fresh evidence upon a question of fact not at all raised in the Courts below. **A BABU LAL v. JALAKIA**, 14 A. L. J. 1146 **343**

——— *Misjoinder of parties, whether good ground* **97**——— *Notice, insufficiency or invalidity of, if can be pleaded for first time in second appeal.*

In an ejectment suit where the defendants did not plead any want of notice in the first Court and there was no issue regarding it:

Held, that the plea of insufficiency or invalidity of notice could not be allowed to be raised for the first time in second appeal. **M MUTHU REDDI v. MUTHU VENKATAPATHI REDDI**, 4 L. W. 168; 31 M. L. J. 354; (1916) 2 M. W. N. 180 **1**

——— *Question of law—Question of fact—Construction of document—Sale or mortgage*

If a question decided by the lower Appellate Court is a question to be decided on the construction of a deed then the question is one of law, but if it is to be decided not on the construction of the deed but on the deed combined with surrounding circumstances then it is a question of fact

For instance, if the question a Court has to answer is, is this document, taken on its own wording, a sale or a mortgage, then the question is one of law, if on the other hand the question to be answered by the Court is, this document on the face of it is a mortgage, but was the contract actually entered into between the parties something different, namely a sale, and if in order to decide this question the Court has to consider the terms of the mortgage and the surrounding circumstances, then it is a question of fact. **P AHMAD KHAN v. ALAM KHAN**, 120 P. L. R. 1916; 115 P. W. R. 1916 **297**

ARBITRATION, reference to, scope of—Right of arbitrators to rely on custom—Award decreasing allowance on reduction, legality of **271**ARBITRATION AND AWARD—Award set aside, effect of—Estoppel **198**——— *Objections, evidence in support of—Objector to be given chance of adducing proof—Court, duty of Civil Procedure Code Act of 1908, s. 15—Material irregularity—Revision.*

ARBITRATION AND AWARD—concl'd.

Where a party to a suit referred to arbitration files objections to the award, he ought to be given a chance of calling evidence in support of his objections; and, if the Court refuses to give him such time, the refusal amounts to a material irregularity. **O BETANA v. KEDAR NATH**, 3 O. L. J. 683 **400**

ARBITRATION ACT (IX OF 1889), applicability of **140**ASSAM LAND AND REVENUE REGULATION (I OF 1886), S. 63 **252**——— S. 70 **239**

——— Ss. 70, 71, 63—Sale, auction, for arrears of revenue Person having acquired title by adverse possession, whether defaulter—Purchaser, rights of

In an auction sale held under section 60 of the Assam Land and Revenue Regulation, 1886, what is sold is the estate and the purchaser is entitled to take that estate as against the defaulting proprietors.

Where, at the time a revenue sale takes place under section 70 of the Assam Land and Revenue Regulation, 1886, a person has by adverse possession acquired a good title to a portion of the estate sold, he is also a defaulter by reason of section 63 of the Regulation and cannot assert a good title as against the purchaser as an unrecorded proprietor. **AFT. R. ALL v. BROJENDRA KISHORE ROY**, 24 C. L. J. 60 **252**

——— S. 71 **252**

——— Ss. 70, 80, 85—Date of confirmation of sale—Sale certificate, whether conclusive as to date of confirmation of sale.

An entry in a sale-certificate as to the date of confirmation of sale cannot possibly affect the provisions of sub-section (2) of section 80 and sub-section (3) of section 85 of the Assam Land and Revenue Regulation. Such entry cannot, under section 85 of the Regulation, be conclusive evidence as to the date of confirmation of sale and the Court is competent to look beyond the sale certificate to determine the date of confirmation of sale.

Title to property purchased at a sale held under the Assam Land and Revenue Regulation vests in the purchaser from the date when the sale becomes final under section 80, and the possession of a person who occupies portions of it becomes adverse to the purchaser from that date, and not from the date when possession is delivered to the purchaser by the Revenue Authorities. **C JITENDRA KUMAR PAL v. CHOWDHURY v. MOHENDRA CHANDRA SARMA**, 24 C. L. J. 62 **239**

——— Ss. 80, 85 **239**

ATTORNEY AND CLIENT—Admission by attorney, effect of.

An admission of an attorney, until satisfactorily explained away, is cogent evidence against his client. **C KETOKKY CHURAN v. SARAT KUMARI DABEE**, 20 C. W. N. 995 **71**

BATHARA PAPERS, admissibility of, in evidence **829, 895**

BENGAL CESS ACT (IX B. C. OF 1880), Ss. 14, 20—Suit for recovery of rent due under karn liyat, whether comes under the Act

A suit brought by a landlord to recover certain rent, alleged to have been due by the tenant under a

BENGAL CESS ACT—concl'd.

kabuliyat, does not come under section 14 of the Cess Act IX B. C. of 1887), and, therefore, the Court is not precluded by reason of section 20 of the Act from giving the plaintiff-landlord a larger amount than the amount mentioned in the cess return. **C SRINANTES LAL MAITY v. SIBU RAUL** 755

— S. 20

755

BENGAL ESTATES PARTITION ACT (VIII B.C. OF 1876)—*Partition of holding—Consent of tenant—Abandonment, what constitutes*

There is nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies without the consent of the tenants and on general principle there is no reason why such a partition should not be made.

There is in this respect no difference between a partition under the Estates Partition Act and a partition made by a Civil Court.

Where a holding has been split up, a sale by the tenant of an entire plot that has been separated constitutes abandonment which entitles the landlord to re-enter. **PAT RAM LOCHAN KORE v. JAGERNATH MISSEB**, 1 P. L. J. 270 440

BENGAL ESTATES PARTITION ACT (V OF 1897), Ch. VI 495

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. OF 1881), S. 53—*Landlord and tenant—Tenant holding over without landlord's assent, right of—Ejection—Notice to quit, necessity of.*

Under the Bengal Landlord and Tenant Procedure Act a tenant, who is not a cultivator with a right of occupancy, remaining in possession, without the landlord's assent after the expiration of his lease, does not acquire any interest in the land and is liable to be ejected forthwith in the manner prescribed in section 53 of the Act without any previous notice to quit.

Semble—The position might be different where the provisions of the Bengal Tenancy Act apply.

From the mere fact that the landlord tolerates the continuance in occupation of the tenant after the expiry of the term of his lease, the inference does not follow as a matter of course that he accepts his former tenant as his tenant in future.

On the determination of the lease for a term, the lessee is bound to surrender possession to the lessor; on default he may be ejected without notice to quit, unless he has been allowed to hold over with the landlord's assent, either express or implied; but the mere continuance by a tenant of his possession after the expiration of his lease does not give him the status of a tenant. **C PARAMANANDA SINGH v. SYJOU SINGH**, 24 C. L. J. 80 201

BENGAL LAND REVENUE SALES ACT (XI B. C. OF 1859), S. 3, *object of—Benami purchase, right of third party to raise question of.*

The object of section 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* 'certified purchaser', and not to preclude a third party from enforcing his claim against the true owner in respect of the *benami* property.

BENGAL LAND REVENUE SALES ACT—concl'd.

Therefore, in a suit by a third party to enforce his right in respect of property sold under Act XI of 1859, the question whether the defendant purchased the property *benami* is not excluded from the consideration of the Court by reason of section 36 of the Act. **C JAGABANDHU DUTT v. RAJANI KANTA PAL** 790

BENGAL MUNICIPAL ACT (III B. C. OF 1894), Ss. 44, 45 515

— Ss. 237, 271, 353, 44, 45—*Sanction for prosecution by public authority, whether to be under seal—Report of out-door inspector recommending prosecution signed by Chairman, whether complaint—Notice against accused by Vice-Chairman how validated.*

In the absence of any legislative enactment a sanction for prosecution by a public authority does not require to be under seal.

Where a report of offences under sections 230 and 271 of the Bengal Municipal Act was made by the out-door inspector of a Municipality in a printed form, the columns of which were duly filled up and in the remarks column occurred the remark, "submitted to the District Magistrate with recommendation to prosecute the party under sections 230, 271 of the Bengal Municipal Act," and it bore a stamp of eight annas and was signed by the Chairman of the Municipality:

Held, that the document was not a petition of complaint by the Chairman but was an order or consent by the Chairman as representing the Commissioners for or to the prosecution as required under section 353 of the Bengal Municipal Act and was sufficient under the law for the purpose of the prosecution.

Held, also, that the notice against the accused issued on the authority of the Vice-Chairman without any delegation of authority by the Chairman by a written order, was not invalid as the consent of the Chairman was subsequently obtained to the act of the Vice-Chairman. **C KRISTO LALL v. CHAIRMAN OF HOOGHLY-CHINSURAH MUNICIPALITY**, O C W. N. 824; 24 C. L. J. 57 515

— Ss. 240, 241, 242A (b)—*Construction of platform on open space between house and drain, whether 'erection' of building—Gaya Municipal Rules, r. 1, whether ultra vires—Statutory rules, object and construction of—Notice of removal or demolition under section 241—3—Remedy of party aggrieved—Omission to appeal to Commissioners, effect of—Suit for declaration and injunction against Municipality, maintainability of.*

The erection of a platform on an open space between the outer wall of a house and the street drain is an 'erection' within the meaning of section 240 of the Bengal Municipal Act, for which the previous sanction of the Municipality is necessary.

Rule 1 of the Rules framed by the Gaya Municipality under the powers vested in them by section 241 of the Act is not *ultra vires* or unreasonable.

An order, therefore, issued by the Municipality to a house owner to leave an open space between the external wall of his house and the drain adjoining the road is not illegal.

BENGAL MUNICIPAL ACT—concl'd.

A person aggrieved by an order under section 241 (3) must exhaust the statutory remedy provided in section 242A before going to the Civil Courts for redress.

Section 241 (d) indicates the line or foundation upon which a Municipality should frame their rules. If they exceed their jurisdiction and the limitation imposed upon them by the section, then their rules will be *ultra vires*. Where the rules are framed in the interests of public health they should not be construed in too strict and too limited a sense.

The rules, after receiving the assent of the Lieutenant-Governor, should be read as if they were incorporated in the Statute, unless there is something in them patently outside the jurisdiction conferred by it. **PAT CHAIRMAN OF GAYA MUNICIPALITY v. SUKAN SINGH**

— Ss. 241, 242A (b) 854
— Ss. 271, 353 515

BENGAL REGULATION VIII OF 1819, Ss. 8, 18—

Co-sharer zemindars—Application for sale—Notice—Place of service.

When co-sharer zemindars jointly making an application for the sale of a *patni* under Regulation VIII of 1819 have several *kutcheries*, the notice required by section 8 of the Regulation must be served upon each *kutchery* and the service of notice at the *kutchery* of any individual co-sharer would not be a sufficient compliance with the provisions of the Regulation.

The provisions of Regulation VIII of 1819 must be strictly complied with. **C PANCHANON v. RAMENDRA SUNDAR TRIBEDI**

— S. 18 895

BENGAL RENT ACT (X B. C. OF 1859), S. 10—

Abwab, meaning of—Illegal cess.

If a tenant in consideration for the use and occupation of land agrees to pay a certain amount of rent in cash and the price of certain quantities of produce, the total of the two items to constitute one whole rent or *jama*, the price of the produce would be recoverable as rent and would not be an *abwab*. **PAT SADANAND TEWARI v. DEB NATH MANJHI** 980

— S. 82—*Eviction of raiyat—Status of under-raiyat after ejectment of occupancy tenant for non-payment of rent—Locus standi to object to decree against occupancy tenant.*

After an occupancy tenant has been ejected from a holding for non-payment of rent, his under-raiyat is a mere trespasser, and is liable to ejectment at the instance of the landlord.

An under-raiyat has no *locus standi* to question the validity of a decree of ejectment passed against the occupancy tenant. **PAT BISHEK NARAIN DAS v. CHANDRA KANTA NAIK**, 20 C. W. N. 1240; 1 P. L. J. 543 658

BENGAL RENT RECOVERY ACT (VIII OF 1881, Ss. 4, 11, 16 955

BENGAL TENANCY ACT (VIII B. C. OF 1885), Ss. 3 (5), 105—*Landlord and tenant—Holding declared kabil lagan—Rent assessed—Suit by landlord for damages for use and occupation previous to assessment of rent, nature of—Small Cause Court, jurisdiction of.*

Where a holding was entered in the survey as *kabil lagan* and a rent fixed for it under section 105 of the Bengal Tenancy Act, and the landlord sued the tenant for damages for use and occupation of the land previous to the assessment of rent:

Held, that the sum claimed was 'rent' within the meaning of section 3 (5) of the Bengal Tenancy Act and, therefore, the suit was not cognisable by a Small Cause Court. **PAT MAHADEO RAI v. KESHO PERSHAD SINGH**, 1 P. L. W. 45; 2 P. L. J. 91 909

— Ss. 19, 20—*Occupancy rights, acquisition of—Hindu Law—Widow's estate—Acquisition of occupancy rights during lifetime of widow—Ejection by reversioners, validity of.*

Occupancy rights are not the creation of a *zemindar* or of the manager or of the temporary holder of an estate; any person cultivating lands in an estate acquires in time occupancy rights therein and the temporary holder can do nothing to prevent the acquisition of those rights save by evicting the occupancy *ryot* by legal process. Any person holding in good faith as a cultivating *ryot* land under a temporary manager, proprietor or even lease-holder would acquire occupancy rights therein after twelve years' cultivation.

Hence occupancy rights acquired during the time when an estate was in the hands of a Hindu widow cannot be questioned by the reversioners after her death. **PAT HARMANOGEE NARAIN SINGH v. GANOUR SINGH**

— S. 20 360
— S. 23 999

— S. 23—*Occupancy holding, rendering unfit of, for tenancy—Holding market on portion of holding, whether makes it unfit for tenancy—Injunction, grant of.*

The withdrawal of one-tenth portion of an occupancy holding from actual cultivation for a purpose totally unconnected with agriculture, such as the establishment of a market, renders the holding unfit for the purpose of the tenancy within the meaning of section 23 of the Bengal Tenancy Act.

Where some of the landlords of an occupancy holding, in whose favour a deed of release has been executed by the tenants and to whom possession of one-tenth portion of the holding has been relinquished for the purpose of enabling them to hold a market thereon, attempt to erect structures and hold a market thereon, the other landlords are entitled to restrain them from executing their design.

Section 23 of the Bengal Tenancy Act is applicable not only to cases where the land (of an occupancy holding) is made permanently unfit but also to cases where it is made temporarily unfit for the purposes of the tenancy. **C RAJKISHORE MONDAL v. RAJANI KANT**, 24 C. L. J. 85 249

— S. 25—*Transfer of Property Act (IV of 1882, s. 114(g))—Landlord and tenant—Ejectment—Forfeiture—Denial of landlord's title, what amounts to.*

The denial of a landlord's title by a tenant, in order to involve forfeiture of the latter's interest, must be

BENGAL TENANCY ACT—contd.

expressed and not implied and must precede the institution of the suit for ejectment on the ground of denial of title. **PAT SAMUNDAR SINGH v. MUKH LAL SINGH** 935

S. 29—Landlord and tenant—Amalgamation of tenancies, whether changes their incidents—Enhancement of rent—Pleadings—Appeal, fresh basis for claim, whether can be adopted in.

Where two occupancy holdings are amalgamated without any registered document, the lands remaining the same, and the consolidated *jama* is enhanced more than 2 annas in the rupee on the old *jama*, then unless it is proved that a new tenancy has been created or the parties intended to create a new tenancy, the incidents of the old tenancy remain unchanged, so that the landlord cannot get enhanced rent in contravention of the provisions of section 29 of the Bengal Tenancy Act.

Where the plaintiff's case in the lower Court was not that a new tenancy had been created or that the parties had intended to create a new tenancy by the amalgamation of the old tenancy, he cannot be allowed to contend in second appeal that a new tenancy was created by the amalgamation. **C KRISTADHAN GHOSE v. GOLAM MANDAL** 862

S. 29, scope of—Compromise decree enhancing rent more than two annas in rupee, validity of.

Section 29 of the Bengal Tenancy Act applies only to the case of a money rent of an occupancy *raiyyat* and not to that of a tenant at fixed rate. There is nothing in that section or in any other provision of the Act to prevent a landlord or tenant from entering into any agreement whereby the status of the tenant is raised from an occupancy *raiyyat* to that of a tenant at fixed rate, and as a consideration for the tenant for acquiring a higher status the rent is enhanced more than two annas in the rupee. **PAT MOHAMAD JAN v. COMMISSIONER OF PATNA** 797

Ss. 52, 188—Co-sharer landlord, right of suit by, for his share of excess area—Kabuliyat, construction of.

Where a *kabuliyat* described the land let out as 50 *bighas* by guess, and provided that the lessees should enjoy the land rent-free for two years and thereafter should pay rent at the rate of Rs. 2 per *bigha* fixed in perpetuity for as much land as was cleared and brought under cultivation, and that when the surrounding lands were all brought under cultivation, the lessees would be liable to pay rent for the entire area in their possession at the stipulated rate:

Held, (1) that, after all the surrounding lands had been brought under cultivation, a co-sharer landlord could, under the general law, maintain a suit upon the *kabuliyat* for his share of the rent for the entire area, (which was in excess of the 50 *bighas* provided he made the other co-sharers *pro forma* parties to the suit;

(2) that such a suit was not a suit for the rent of additional area under section 52 of the Bengal Tenancy Act, and, therefore, section 188 would be no bar to it. **C BHOSAI v. AMINUDDI**, 21 C. W. N. 371 847

S. 73 Rent, suit for—Parties, necessary—Transferee of tenant, liability of.

BENGAL TENANCY ACT—contd.

Under section 73 of the Bengal Tenancy Act a landlord has a right to make both the tenant and his transferees jointly liable for the rent. **PAT SURAJ-NARAIN SINGH v. SUGRA** 842

S. 74—Illegal cess—Katihari, whether legal charge.

Where *katihari* is entered in the Record of Rights as payable by a tenant, the presumption is in favour of the charge being legal.

A *katihari* charge payable by a tenant to the *zemindar* in respect of looms worked by the latter in his house, is not an illegal cess within the meaning of section 74 of the Bengal Tenancy Act. **PAT BHAGWATI PRASAD v. MAHBUB MOMIN** 813

Ss. 76 (1), (2), cl. (f), 23—Gardening lease—Occupancy *raiyyat*, right of, to erect dwelling-house on holding.

An occupancy *raiyyat* does not exceed his right in building a *pucca* dwelling-house on an insignificant portion of his holding taken for the purpose of gardening.

Such building need not be suitable to the holding, but it must be suitable under the circumstances of the *raiyyat* who makes it. **C NARAIN CHANDRA DALAL v. MANINDRA CHANDRA NANDI** 999

S. 87—Abandonment—Forfeiture—Usufructuary mortgage with possession, whether amounts to abandonment.

Mere execution of a usufructuary mortgage and delivery of possession to the mortgagee of his holding by a tenant who continues to reside in the village, does not entail forfeiture of the tenancy nor does it amount to an abandonment of the holding within the meaning of section 87 of the Bengal Tenancy Act. **PAT AJODHYA PRASAD SINGH v. JAGDEO SINGH** 915

S. 87—Landlord and tenant—Abandonment of holding—Waiver of abandonment, suit for rent, whether amounts to.

Abandonment can be found without any reference to section 87 of the Bengal Tenancy Act, as the Act does neither lay down that an abandonment by a tenant can only be made according to the procedure prescribed by section 87 nor does it confine the tenant to that procedure.

A suit for rent against a tenant, after he has abandoned the lease, without any knowledge of the abandonment on the part of the landlord, cannot operate as a waiver of the abandonment. **C PRIYA-NATH MITTER v. ANATH NATH DEV** 942

C. H. X Ss 106, 107, scope of—Withdrawal of suit under s. 106, when bars civil suit—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3).

Order XXIII, rule 1 (3) of the Civil Procedure Code, in the absence of permission to bring a fresh suit, precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn; but the withdrawal of a suit without permission to bring a fresh suit under section 106, Bengal Tenancy Act, for a declaration that the entry of the defendant's name in the Record of Rights as the owner of a share in a *haveli* was not correct, does not bar a suit in the Civil Court for declaration of the plaintiff's title to and for recovery of possession of the said share.

BENGAL TENANCY ACT—conold.

The bar under section 109 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject-matter of the investigation made under Chapter X of the Bengal Tenancy Act.

Questions relating to declaration of title to and recovery of possession of immoveable property are entirely foreign to the jurisdiction of a Revenue Officer under section 103, Bengal Tenancy Act, his work being confined to a decision of the point whether the entry in a Record of Rights is correct or not. **C. ASWINI KUMAR AICH v. SARADA CHANDAN BASU**, 24 C. L. J. 79 **253**

Ss. 103B, 17B, 74—Record of Rights, presumption as to correctness of entries in—*Katihar*, whether legal charge illegal cess **813**

S. 11 B, scope of—*Record of Rights*, entry in, history of proceedings as to, relevancy of.

The statutory provision in section 103, Bengal Tenancy Act, says nothing as to the value to be attached to an entry in the Record of Rights: it only says that the entry must stand and be presumed to be correct until it is proved by evidence to be incorrect.

It is open to a Court to consider the history of the proceedings which have resulted in a particular entry in a Record of Rights. **PAT MAHTAB KHAN v. SHEOBARAT FLEI** **353**

— S. 105 **909**

— S. 105A **641**

— Ss. 106, 09 **253**

— Ss. 109, 105, 105A—*Record of Rights*, suit for amendment of entries in—*Jurisdiction of Civil Courts*.

In proceedings under section 105 of the Bengal Tenancy Act, to which plaintiffs were parties, certain entries in the Record of Rights, describing plaintiffs as tenure-holders and defendants as *riyats*, were affirmed as correct. Plaintiffs brought a suit asking that the Record of Rights be amended and their names entered as *riyats* instead of those of the defendants, and that they should be put in possession:

Held, that the status of the plaintiffs having already been determined under section 05 of the Bengal Tenancy Act by a Revenue Court having jurisdiction, the suit was barred by section 09 of the Act. **PAT RAM DAYAL PANDEY v. GENDA TEWARI**, 1 P. L. J. 49 **641**

— S. 147B **813**

— S. 53 **25**

S. 113—*Appeal in suit for recovery of rent where amount claimed does not exceed Rs. 100*—*Rent*—*Mafi* allowed to jeth *riyat*; whether amounts to rent.

A *mafi* from the total rent allowed by the landlord to a jeth *riyat* in consideration of services to be performed by the latter is not rent, inasmuch as the amount is payable by the landlord to the tenant and, therefore, a decision ascertaining the amount of such *mafi* is not a decision as to the amount of rent annually payable by a tenant, within the meaning of section 153 of the Bengal Tenancy Act. **PAT SAFAIT HOSSAIN v. WAIZUDDIN**, 20 C. W. N. 1207; 1 P. L. J. 501 **670**

— S. 188 **847**

BENGAL VILLAGE CHAUKIDARI ACT VI B. O. OF 1870), S. 48—*Chaukidari chakran land*—*Settlement with one of several zemindars*, validity of—*Jurisdiction*.

The Collector has no jurisdiction to settle village *chowkidari chakran* land with only one of several *zemindars* under section 43 of Act VI of 1870. **PAT MUHAMMAD ABU ZAFAR v. RAM PERSHAD KUMAR** **937**

BILL OF EXHIBITION—*Consignment of goods*—*War*, declaration of, effect of—*Acceptance* **258**

BILL OF LADING, construction of—"Or so near thereunto as a ship may go," meaning of—*Restraint of Princes*, what amounts to—*Reasonable apprehension*.

The clause usually inserted in bills of lading to the effect that the goods shipped are to be delivered at a certain port "or as near thereunto as the ship may safely get", must be taken to refer not to the voyage or the carriage of the goods but to their unloading or delivery. It means that the ship should get within the ambit of the port although she may not be able to enter it. The clause would not justify a shipowner delivering the goods at a different destination owing to war or natural causes.

The exception as to 'restraints of Princes' will justify a shipowner refusing to ship goods, which he has agreed to carry to a certain port, if he has a reasonable apprehension that the adventure will be frustrated by restraints of Princes. It is not necessary that the apprehension should be due to a restraint in operation at the date of the refusal.

Defendants agreed on 21st July 1914 to carry 1,250 tons of seeds for the plaintiffs to Antwerp by the 'September shipment'. On August 4th war broke out between England and Germany, and by September 11th the latter had overrun Belgium. On the latter date the defendants refused to ship the goods:

Held, that the defendants could avail themselves of the exception as to restraints of Princes contained in the bill of lading, as they had a reasonable apprehension that Antwerp was no longer a safe port.

Obiter dictum—The apprehension of restraint of Princes may be reasonable, though it is unfounded.

Occurrences subsequent to the refusal of a shipowner to ship goods may be taken as a text of what was the true state of things when the breach of agreement to ship occurred. **S. SANDAY PATRICK & Co. v. BRITISH INDIA STEAM NAVIGATION Co.**, 10 S. L. R. 100 **25**

BOMBAY COURT OF WARDS ACT (Bom. Act I of 1905), Ss. 31, 3, applicability of **186**

BOMBAY DISTRICT POLICE ACT (Bom. Act IV of 1890), S. 13 **353**

— Ss. 42, 44, 13, scope of—*Public street*—*Vyasan-tol* of procession, prohibition of, for all time and throughout a district—*Government Resolution* of the 11th May 1911, if ultra vires—*Public*, right of, to use public roads.

The Government of Bombay Resolution dated the 6th of May 1911 prohibiting *Vyasan-tol* processions in the District of Belgaum for all time is illegal and ultra vires and is not covered either by section 42 or by section 44 of the Bombay District Police Act.

Section 42 of the Bombay District Police Act expressly limits the powers of prohibition conferred upon the Magistrate both in time and in place, the

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limitation of place being to a particular town or village or the vicinity thereof. Section 44 (1) of the District Police Act deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited.

Section 13 (2) of the District Police Act does not confer any unlimited power on the Government to prohibit processions.

All members of the public have a right to use the public streets in a lawful manner, and it lies on them who would restrain them to show some law or custom abrogating the privilege.

Therefore, the *Lingayats* of the District of Belgaum have a right to exhibit *Vyasantol*, their religious symbol, in procession in any public street, subject to the lawful orders that may be passed under any provisions of law such as section 144 of the Code of Criminal Procedure or sections 42 and 44 of the Bombay District Police Act. **B DUNDAPPA MALAPPA SIGANDHI v. SECRETARY OF STATE**, 18 BOM. L. R. 460 **363**

BOMBAY KHOTI SETTLEMENT ACT (BOM. ACT I OF 1890), S. 9 **22**BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), Ss. 56, 153 **295**BOMBAY PREVENTION OF GAMBLING ACT (BOM. ACT IV OF 1887), S. 6—*Criminal Procedure Code* (Act V of 1898), s. 103—*Search of gaming house by Police without mashirs, legality of—Evidence discovered in illegal search, admissibility of.*

A search conducted under section 6 of the Bombay Prevention of Gambling Act, is not rendered illegal by the mere non-presence of *mashirs* as required by section 103 of the Criminal Procedure Code.

But such an omission in case of searches conducted under the provisions of the Criminal Procedure Code would render them illegal, although the illegality would be no bar to the consideration of the evidence discovered by the search. **S KADIR MOHAMED v. EMPEROR**, 18 CR. L. J. 49; 10 S. L. R. 137 **33**

— S. 6—*Evidence Act* (I of 1872), ss. 123, 125—*Warrant issued under s. 6, containing direction for seizure of all money found on people in gaming house, legality of—Complaint on oath forming basis of warrant issued under s. 6, right of accused to inspection of.*

A warrant issued under section 6 of the Bombay Prevention of Gambling Act is not rendered wholly bad or illegal by reason of its containing a direction for seizure of all money found on people in the gaming house; such a direction should be regarded as mere surplussage not affecting the main purpose of the warrant.

Non-production by a Court of the complaint on oath which forms the foundation of a warrant issued under section 6, is not improper, if the object of the production is to ascertain merely the name of the informer.

Per *Fawcett, A. J. C.*—The Court should decline to sanction any step which would in practice almost necessarily result in the disclosure of the name of the informer, contrary to the provisions of section 123 of the Evidence Act. **S BAGHUMAL WAPHUMAL v. EMPEROR**, 18 CR. L. J. 70; 10 S. L. R. 134 **54**

BOMBAY PREVENTION OF GAMBLING ACT—concl'd.

— S. 12—*Playing cards for very insignificant stakes near a masjid—Offence, trifling—Sentence.*

Accused, who were peons and mill-hands, were convicted by a Magistrate for gambling in that they played cards for very insignificant stakes on a hot afternoon under the cool shades of a *masjid* and were sentenced to fifteen days' imprisonment each:

Held, that the offence was very trivial and the sentence inflicted grossly disproportionate and that a warning or a small fine would have answered the ends of justice. **B MAHAMAD NATHU v. EMPEROR**, 18 CR. L. J. 97; 18 BOM. L. R. 940 **305**

BURDEN OF PROOF—Consideration, non-receipt of, plea as to—Bond, recital in, as to receipt of consideration, whether evidence of such receipt **31**

— *Corporations and individuals, position of.*

So far as the rule of burden of proof goes no difference can be made between corporations and individuals. **PAT LACHMI NARAIN MARWARI v. CHAIRMAN OF THE RANCHI MUNICIPALITY**, 1 P. L. J. 197 **269**

— Ejectment suit **924**

— Ex parte case—*Evidence, otherwise unreliable, not to be relied upon—Court, duty of.*

A Court ought not to rely in an *ex parte* case on evidence otherwise unreliable, simply because the case is *ex parte*. **O SARABJIT SINGH v. RAMPUR MATHRA ESTATE**, 3 O. L. J. 468 **27**

Landlord and tenant—Ejectment—Assignee from tenant, resistance by, to landlord's entry—Right to resist, proof of, by defendant **357**

— , objection as to, in appeal after evidence fully recorded:

The question of the burden of proof is only a question of procedure and where the evidence has been fully recorded on both sides and the Court has only to adjudicate upon it, no such question arises. **PAT MAHTAB KHAN v. SHEOHARAT TELI** **353**

— Order-sheet, correctness of entries in—Presumption **66**

— Registration—Consideration, receipt of—Presumption.

Where a vendor admits receipt of consideration in respect of a transfer at the time of registration, the onus is on him to show that he did not in fact receive it, and the presumption arising from his admission is not rebutted by his mere denial of such receipt. **P RAHMAT v. ZABITA** **874**

BURMA LAWS ACT (XIII OF 1896), S. 13—'Hindu,' meaning of—Hindu Law, applicability of—*Kalais*, law applicable to—Caste regulations, force of—Court, duty of **780**

CALCUTTA MUNICIPAL ACT (III B. C. OF 1899), Ss. 152, 158, 160—*Notice for re-valuation—Fresh notice, necessity of, when altering valuation from one basis to another.*

Section 158 of the Calcutta Municipal Act provides only for the issue of a notice for re-valuation and there is no provision in the Act for the issue of a fresh notice when, after hearing objections under section 160, the Chairman alters the valuation already made by him.

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Where, therefore, the Chairman of the Calcutta Municipal Corporation, after issuing a notice under section 158 of the Calcutta Municipal Act for the re-valuation of a holding on the basis of the cost of construction and value of land instead of on the rental value, made a certain valuation, and then after hearing objections of the owner, taken under section 160 of the Act, altered the valuation on the rental basis:

Held, that the notice given under section 158 was sufficient and not defective. **C CORPORATION OF CALCUTTA v. NRITYA KALI DASSEY** 932

— Ss. 158, 160 932

— S. 286—*Highway or drain, vesting of, in Municipality, effect of—Municipality, powers of—Owner of land covered by drain, rights of—Injunction—Declaration.*

A house-drain alongside a public street made by the owner of the adjoining premises, to which the land covered by the drain appertains, for the outlet of water therefrom is excluded from the operation of section 286 of the Calcutta Municipal Act.

The legal effect of the statutory vesting of a street or a drain in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street or the drain exists; but only the surface and so much of the air-space above and so much of the soil below the surface vest in and belong to the Municipality as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public; and to this extent only, the owner of the land covered by the street or drain is divested of his property.

In construing an Act like the Calcutta Municipal Act, Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public Corporation without compensation granted to the proprietor, but the reasonable inference should be that the right of the owner was intended to be abridged only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public.

When a highway vests under a Statute in a local authority, the property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway and subject to this qualification the original owner's rights and property remain, and if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property.

English, American and Indian Case-Law considered.

The plaintiffs' land, covered by a drain that had vested in the Calcutta Corporation under section 286 of the Calcutta municipal Act, having been included within the boundaries of the Municipal land, they brought a suit for a perpetual injunction against the Corporation and for a declaration of their title to the land:

Held, that the plaintiffs were entitled not only to a declaration of title but also to a perpetual injunction restraining the Corporation and its officials and

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servants, from interfering with the exercise by the plaintiffs of their right of ownership in the disputed land, except in so far as such interference might reasonably be required for the control, protection and maintenance of the drain thereon for the use of the public. **C KSHETRA MOHAN GHOSH v. CORPORATION OF CALCUTTA**, 24 C. L. J. 358; 21 C. W. N. 234 96

CANTONMENT HOUSE ACCOMMODATION ACT (II of 1902), S. 6, orders passed under—*Appeal—Civil Courts, whether can interfere* 267

— Ss. 35, 37, 6—*Orders passed under s. 6—Appeal—Civil Courts, whether can interfere.*

A Civil Court has no jurisdiction to interfere with, or question the propriety of, orders passed on proceedings before special tribunals created by special legislative enactments for that purpose, and whose orders have been declared by the Legislature to be final.

Section 35 of the Cantonment House Accommodation Act constitutes the Officer Commanding the Division the legal tribunal to which any person aggrieved by a notice issued under section 6 of the Act may have recourse, and under section 37 of the Act his decision is final. **S DE VERTEUIL v. CANTONMENT COMMITTEE, KARACHI**, 10 S. L. R. 113 267

— S. 37 267

CASTE DISABILITIES REMOVAL ACT (XXI of 1830), S. 1—*Apostacy, effect of, on descendants of convert—Claim, reversionary, by descendant of convert to estate of deceased Hindu, maintainability of—'Renouncing,' 'excluded,' 'deprived,' meaning of.*

The removal of disabilities on rights of inheritance by an apostate provided for by Act XXI of 1830 applies only to the convert himself and not to his descendants.

The descendants of a convert to Christianity, therefore, cannot maintain a reversionary suit to the estate of a deceased Hindu.

Per *Oldfield, J.*—The 'renunciation' and 'deprivation' referred to in section 1 of the Act apply only to rights which have accrued and not to persons who were born in another religion before the succession opened. Under the section protection is, in terms, given only to one person, the one who has renounced or been excluded or deprived, and it cannot be extended by construction to others.

Per *Bakewell, J.* The words "having been excluded and being deprived of caste" connote an act directed against a particular person, and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community. **VI VAITHILINGA ODAYAR v. AYYATHORAI ODAYAR** 753

CATTLE TRESPASS ACT (I of 1871), S. 20 374

C. P. LAND-REVENUE ACT (XVIII of 1881), S. 61A—*'Protected' gaontia, whether can surrender tenure—Gaontia, power of, to confer permanent rights—Adverse possession, nature and commencement of.*

Plaintiff's ancestor, who was *zemindar* of the village in dispute, granted a lease of it in *gaontia* tenure to one D, and fresh leases were in succession granted to his son and grandson, the last named becoming a

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'protected' *gaontia* under section 65A of the Central Provinces Land Revenue Act, 1881. On his death in 1900, his second son *K* was recorded as *gaontia*, and in 1907 the latter surrendered the tenure to the plaintiff. In 1911 plaintiff sued defendants for possession of the lands, and the latter, all of whom belonged to the family of the *gaontia*, resisted the *zemindar*'s claim on the grounds that *K* had no power to surrender the tenure to the plaintiff, that they had been in adverse possession of the lands both as against the *gaontia* and as against the *zemindar* and that the suit was barred by limitation:

Held, (1) that there was nothing in the incidents of the tenure of a "protected" *gaontia*, as set out in section 65A of the Central Provinces Land Revenue Act, 1881, which in any way suggested that a *gaontia* was not entitled to relinquish his rights;

(2) that the suit was not barred by limitation as possession could not be adverse to a person who was not himself entitled to claim present possession, and so long as the *gaontia* tenure subsisted, the *zemindar* was not entitled to actual possession of any portion of the village and the possession of the defendants did not become adverse to the plaintiff until the tenure was relinquished in 1907.

A *gaontia* cannot confer rights of a permanent character in the village which would be binding upon the *zemindar* after the *gaontia* tenure ceases to exist. **PAT LAL NARUPRAJA SINGH v. BHABANI TELI**, 1 P. L. J. 293 107

— S. 136G—Partition ordered by Deputy Commissioner—Appeal—Jurisdiction—Sambalpur Civil Courts Act (IV B. C. of 1906)—Deputy Commissioner and District Judge, positions of

In the Sambalpur District, the District Judge under the Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887) has succeeded to the position of the Deputy Commissioner under the Central Provinces Civil Courts Act (XVI of 1885). Therefore, an order passed by the Deputy Commissioner under section 136D of the Central Provinces Land Revenue Act (XVIII of 1881) must be deemed to be an order of the District Judge and an appeal against it lies to the High Court and not to the District Court. **PAT PADMAN LOCHAN MISRA v. KRISHNA CHANDRA MISRA**, 1 P. L. J. 290 115

— S. 138—Lambardar *Gaontia* in Sambalpur District, settlement of *rai-yati* lands by, validity of.

A *lambardar Gaontia* of a village in the District of Sambalpur has authority, according to custom, to make settlement of *rai-yati* lands without the consent of his co-sharer *Gaontias*.

Quære.—Whether he can grant a permanent lease of such lands. **C. SIDHESWAR PANDA v. PITBAS GAONTIA**, 24 C. L. J. 83 261

CHOTA NAGPUR TENANCY ACT (VI B. C. of 1908) 658

— S. 208 955

— Ss 212, 215—Sale in execution of decree—Right to deposit purchase-money—'Claims', meaning of—Jurisdiction of Court to determine whether person depositing money is interested in the holding sold—Appeal, whether lies—Jurisdiction.

CHOTA NAGPUR TENANCY ACT—concl'd.

A person cannot get a sale set aside under section 212 of the Chota Nagpur Tenancy Act merely upon his putting before the Court a series of statements which may be totally untrue. The Court is bound to enquire into the truth of the allegations made in the application.

The word "claims" used in section 212 of the Chota Nagpur Tenancy Act is used in the sense of asserting that a thing is one's own or affirming one's possession of a thing.

In execution of a decree for rent a tenure was sold. A person claiming to hold *dar-mukavari* interest in the tenure claimed to be entitled to deposit in the Court the sum indicated by section 212 of the Chota Nagpur Tenancy Act to get the sale set aside. The first Court rejected the application but on appeal the Judicial Commissioner held that he was entitled to deposit the sum in Court:

Held, that an appeal lay to the Judicial Commissioner from the order of the first Court. **PAT PAN-CHANAN MAHTO v. KUNAI MAHTO**, 2 P. L. J. 153 891
— S. 215 891

— S. 231—Execution—Sale—Judgment-debtor, application by, to set aside sale—Limitation.

Respondent obtained a decree on a mortgage-bond executed by the appellant, and in execution of that decree the latter's holding was sold and purchased by the former. Appellant applied to set aside the sale more than one year after its date:

Held, that under the provisions of section 231 of the Chota Nagpur Tenancy Act, the application should have been made within one year of the date of the sale, and that, consequently, it was barred by limitation. **PAT NILMANI GOSWAMI v. ROHAN MAHTI**, 20 C. W. N. 1243; 1 P. L. J. 483 683

CHOWKIDARI CHAKRAN LANDS—Right of *zemindar*—Burden of proving that land is *chowkidari chakran land*—*Kabuliyat* executed at Permanent Settlement, construction of—Undertaking to continue *sardars* and *paiks* in *Pergunnah*, meaning of—Right to determine employment of *paik* on service tenure—Resumption of land.

Chowkidari chakran lands are lands which at or before the Permanent Settlement had been appropriated or assigned for the maintenance of the Police force and by reason of such appropriation excluded from the *zemindari* assessment. The *zemindar* is precluded by Bengal Regulations I of 1793 and XIII of 1805 from utilising *chowkidari chakran* lands for remunerating persons who are his personal servants and perform no Police duties, but the onus of proving that the lands in dispute are so appropriated or assigned is on the Government.

Where in January 1801, the *zemindar* of *Pergunnah Nayabasan*, which was settled with him in that year, executed a *kabuliyat* in favour of the Government under which he was bound to maintain and keep the same "*sardars* and *paiks*" that had all along existed in the *Pergunnah*, and to carry out whatever orders might be passed by the Magistrate on the *paiks*:

Held, that the *sardars* and *paiks* referred to in the *kabuliyat* were *sardars* and *paiks* employed on Police duty; that the document had no reference to *paiks*.

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who held *jagirs* within the Pergunnah on tenure services personal to the *zemindar* himself and having no connection with the local Police; and that the *zemindar* was entitled to determine the employment of a *paik* who was in his personal service and held a *jagir* on service tenure determinable when his employment ceased, and to recover possession of his *jagir*. **P C RAM CHANDRA BHANI DEO v. SECRETARY OF STATE**, 20 C. W. N. 1245; 20 M. L. T. 235; (1916) 2 M. W. N. 175; 4 L. W. 251; 14 A. L. J. 1009; 18 Bom. L. R. 838; 24 C. L. J. 296; 31 M. L. J. 745; 43 C. 1104 **223**

CIVIL COURTS, *whether can determine questions of orthodoxy.*

Per *Twomey, J.*—It is not within the province of Civil Courts to determine questions of orthodoxy. **L B MAUNG CHIT MAUNG v. MA YAIT** **780**

CIVIL PROCEDURE CODE (ACT XIV OF 1882), **S. 244** **836**

— Ss. 282, 283 **78**

— S. 283 **767**

— S. 287 **872**

— S. 315—*Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Sale under old Code—Sale, setting aside of, after passing of new Code—Refund of purchase-money, claim for—Procedure—Execution—Suit.*

The last clause of section 315 of the old Civil Procedure Code (Act XIV of 1882) prescribing that the right to recover the purchase-money on cancellation of a sale can be enforced in execution, has been repealed by O. XXI, r. 93, of the new Code (Act V of 1908). The latter rule provides for the refund of purchase-money where a sale is set aside in execution proceedings. But even where the sale was held under the old Code, if it is set aside in a separate suit after the passing of the Act V of 1908, the purchaser must enforce his claim only by a separate suit. **M INRI TARINI v. KOMOLO BISOI** **763**

— S. 375—*Compromise decree—Decree creating mortgage and directing sale of property—Lawful agreement—Decree, whether in excess of what 'relates to the suit'—Registration, whether necessary—Interest, provision for, penal whether relievable—Registration Act (XVI of 1908), s. 17, Excep. cl. VI—Transfer of Property Act (IV of 1882), s. 99.*

A decree based on the terms of a compromise between the parties to a suit for money and creating a mortgage of properties for the amount that is payable and directing sale of the properties in default of payment within a certain time, is a mortgage decree and is executable as such. An agreement in pursuance of which such a decree is passed is a lawful agreement within the meaning of section 375 of Act XIV of 1882. Section 99 of the Transfer of Property Act has no application to such a decree nor is it repugnant to public policy.

Such a decree is not beyond the scope of section 375, Civil Procedure Code (Act XIV of 1882), as not relating to the suit which was one for money and, therefore, is not one passed without jurisdiction.

Such a decree falls under section 17, exception clause VI, of the Registration Act and does not require to be registered.

CIVIL PROCEDURE CODE—1882—concl'd.

An agreement to pay an enhanced rate of interest, not from the date of default but from that of the original obligation, is in the nature of a penalty and is unenforceable.

A penalty will be relieved against even where it is embodied in a decree passed by consent of parties. **M KANDULA PEDA LINGA REDDI v. KAKUMANU HANUMAYYA** **764**

— S. 462—*Compromise for minor by Court of Wards—Leave of Court, whether necessary—Court of Wards Act (IX B. C. of 1879), Ss. 18, 57* **971**

CIVIL PROCEDURE CODE (ACT V OF 1908), S. 2 **900**

— S. 2, O. XXI, R. 66—*Proclamation of sale—Order fixing upset price—Decree—Appeal.*

An order of a Court tentatively fixing, for the purpose of an auction-sale, the market value of the property and deciding the figure at which the bidding should commence, cannot be regarded as a conclusive determination of any right of parties and is not a decree within the meaning of section 2 of the Code of Civil Procedure. No appeal lies against such an order. **M RAMANATHAN CHETTY v. SOMASUNDARAM CHETTIAR**, (1917) M. W. N. 141 **897**

— S. 10—*Stay of suit Jurisdiction—Principal and agent—Accounts, agent, whether can demand.*

One of the essential conditions which have to be fulfilled before an order staying a suit under section 10 of the Civil Procedure Code can be passed, is that both the Courts before whom the suits are pending must be of "concurrent jurisdiction", in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted.

Obiter dictum.—An agent cannot bring a suit for accounts against his principal, but only for the balance due upon an account. The agent alone is liable to render accounts, the principal is not. **N GOPIKISAN v. PADAMRAJ**, 12 N. L. R. 174 **510**

— Ss. 11, 107, O. XXII, R. 11, O. XXIII, R. 1—*Appeal—Withdrawal of suit, leave for—Appellate Court, powers of—Jurisdiction—Order giving leave 'to withdraw appeal with liberty to bring a fresh suit', effect of—Intention of Court—Res judicata—Decree, construction of—Order incorrect—Party, duty of.*

By the Full Bench.—It is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

Per *Spencer, J.*—Where, in an appeal by a plaintiff against a decree dismissing his suit, the Appellate Court permits him to withdraw his appeal with liberty to bring a fresh suit, the decree of the lower Court is wiped out and in effect set aside though nothing else is substituted for it and the institution of a fresh suit, pursuant to the order, is not barred as *res judicata*.

A decree should be given an effect which is intelligible and it should be presumed to be legally effective for obtaining the relief sought and granted.

Per *Phillips, J., contra.*—An order of a Court of Appeal allowing a plaintiff appellant to withdraw the appeal with liberty to bring a fresh suit does not operate *per se* as a reversal of the lower Court's decree, or as wiping it out. The order amounts,

CIVIL PROCEDURE CODE—1908—contd.

in substance, to a striking off of the appeal, the decree of the Trial Court being left unaffected, and a fresh suit on the same cause of action is barred as *res judicata*. The order cannot be read in the light of what the Court might have intended.

Where an order of Court is drafted in such a way as to fail to give effect to the Court's intention, it is the duty of the party to apply to have it set corrected. *M BALIDE KAMAYYA v. PRAGADA PAPATYA*, 21 M. L. T. 82; (1917) M. W. N. 217; (1917) M. W. N. 246 414

— S. 11, O. XXI, Rr. 60 to 63—*Claim petition, order on*—*Res judicata*.

An order in a claim case deciding the question of the validity of a *wakf* is not conclusive as *res judicata* in a suit between the same parties in which the property in dispute is not that which was the subject of the claim case though both were included in the *wakf*.

An order in a claim case is conclusive as between the parties only as regards the particular property in dispute. *C ASNA BIBI v. JAIGUNNISSA BIBI*, 21 C. W. N. 222 887

— S. 11—*Execution proceedings—Connected suits, for partition, decrees in—Identity of subject-matter and parties—Execution application, dismissal of, on ground that relief was granted on previous application in connected suit—Subsequent application for division of specific omitted properties—Patent mistake of Court, effect of—Res judicata*.

Two suits were filed for partition (Original Suit No. 1 of 1889 and Original Suit No. 1 of 1899) in which the parties were the same, though differently arrayed, and the properties in dispute were identical. The Court decreed in Original Suit No. 1 of 1889 that the properties be divided into equal parts and that the plaintiffs should be put in possession of one of them. Plaintiffs in the said suit made an application for execution of the decree, but it was dismissed on the ground that the properties had already been divided in a prior execution of the decree in the other suit, Original Suit No. 1 of 1889, and that the matter could not be re-opened. It was pointed out that 3 acres and 72 cents were left undivided in the previous execution proceedings, but the Subordinate Judge took no notice of it and his order of dismissal was affirmed on appeal by the High Court. The plaintiffs put in the present application for division of the 3 acres and 72 cents. The records disclosed that the Subordinate Judge made a patent mistake when he said that all the properties including the said 3 and odd acres were divided. It was contended that the application was barred as *res judicata*:

Held, that the real question in the previous application and in the appeal to the High Court was whether the previous partition was liable to be re-opened at all, and not as to the particular items of property which had or had not been divided and that the present petition was not affected by the rule of *res judicata*. *M PODURU LAKSEMI NARAYANA v. PONNADA PALLAMRAJU*, 4 L. W. 101; (1916) 2 M. W. N. 118 354

CIVIL PROCEDURE CODE—1908—contd.

— S. 11—*Res judicata*—“*Allegus contrarius non-audiendus*,” *applicability of—Widow, alienations by—Reversioners, suit by—Suit, subsequent, by reversioners to redeem mortgage by widow, whether barred—Cause of action*.

A claim for possession by way of denunciation of alienations made by a previous holder of land is based on a different cause of action from a claim for redemption.

Therefore, a suit for redemption of a mortgage by the representatives of the mortgagor is not barred, either by the rule of *res judicata* or by the maxim “*Allegus contrarius non audiendus*”, simply because the plaintiffs in a previous suit, as reversioners of the mortgagor, denounced alienations made by the latter. *P SHAM SINGH v. GAMAN*, 172 P. W. R. 1916 447

— S. 11—*Res judicata*—Compromise decree disallowing interest—Execution—Interest, claim for, legality of 674

— S. 11—*Res judicata—Execution proceedings, order at one stage of—Right to question in another stage—Order-sheet, correctness of entries in—Presumption—Burden of proof*.

An order made at one stage of execution proceedings cannot be questioned at a later stage, unless the party sought to be bound by such order had no notice of the proceedings.

A first application for the execution of a decree was not made in accordance with law within three years of the passing of the decree. On a second application for execution made within three years of the first, the Court directed a writ of attachment to issue. The order-sheet showed that the order for attachment was made after service of notice upon the judgment-debtor, but the execution case was dismissed for default. On a third application for execution made within three years of the second, the judgment-debtors appeared and contended that the execution was barred:

Held, that so long as the order for attachment passed on the second application for execution stood, the judgment-debtors could not contend that the execution of the decree was barred unless they established that the order was made without notice to them.

Held, also, that in view of the entry of service of notice in the order-sheet the onus lay upon the judgment-debtors to establish that the notice was not served upon them.

Ex parte entries made in the order-sheet of a Court are not conclusive evidence of their correctness, but there is no presumption that the entries are false.

A party, therefore, who contends that they do not correctly state the events that have taken place must start his case. But the position is different where the entry affects a person who is not a party to the proceedings and he questions its correctness. *C BINDU RASHINI DASYA v. KESHAB LAL BASU* 66

— S. 11—*Res judicata—Execution—Sale of khoti lands—Suit by judgment-debtor to recover possession of lands sold on ground of non-transferability, whether barred*.

Certain *khoti* lands belonging to plaintiff were sold in execution of a decree obtained by defendant

CIVIL PROCEDURE CODE—1908—contd.

against plaintiff and were purchased by the former. Plaintiff subsequently sued to recover possession of the lands on the ground that they were occupancy lands and were not transferable under section 2 of the Khoti Settlement Act:

Held, that, as the sale in execution decided as between the plaintiff and defendant that the lands sold were not occupancy lands, the plaintiff could not be allowed to re-open that question. **B KASHINATH KRISHNA JOSHI v. DHONDSHET BHAWANSHET**, 18 Bom. L. R. 786; 40 B. 675 **22**

— S. 11—*Res judicata*—*Jurisdiction, ouster of, by plea of res judicata*—*‘Competency of Court’*—*Decision as to jurisdiction, affirmation of, by common Court of Appeal or Revision, effect of—Rent, suit for—Jurisdiction, finding on, whether res judicata in rent suits for later years—Civil or Revenue Court—Madras Estates Land Act (Mad. I of 1908), ss. 3, (2), 189—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

The doctrine of *res judicata* does not apply to questions of jurisdiction, in other words, the plea of *res judicata* to oust or confer jurisdiction is an incompetent plea.

The finding of a Court on an issue joined by the parties that a particular Court or a particular class of Courts has jurisdiction to try a case or a case of a particular nature, is not *res judicata* in a subsequent suit, whether the decision was given purely as a question of law or on the facts found in the particular case. A Court cannot be compelled to try a case which it has in reality no jurisdiction to try by preventing the parties from proving the facts which show it. The finding cannot comply with the requirements of section 11, Civil Procedure Code, unless it is that of a competent Court, and the competency of that Court to record the finding has to be determined by the facts and considerations put forth in the later suit.

Plaintiffs sued defendants for rent for *Fasli* 1322 in a Small Cause Court. Defendants pleaded that the suit was cognizable by the Revenue Court, as the land for which rent was claimed was an estate under section 3 (2) of the Estates Land Act. The plaintiffs urged that the plea was *res judicata* by virtue of the finding of the same Court in a prior suit for rent for *Fasli* 1321, which the High Court refused to disturb in revision under section 25 of Act IX of 1887:

Held, that neither the finding in the former suit nor the mere refusal of the High Court to interfere with it operated as *res judicata*.

Per *Oldfield, J.*—The refusal of the High Court to interfere with the Munsif's decision under section 25, Act IX of 1887, did not supersede that decision or substitute any new decision for it. Although the High Court, as the appellate authority from both Civil and Revenue Courts, might have been a 'competent Court' and its confirming decision might have been *res judicata* between the parties if the question had been raised in an appeal, the decision relied on by the plaintiffs is useless for that purpose.

Per *Krishnan, J.*—The jurisdiction of a Court created by a Statute is determined by the Statute itself; it can neither be added to nor determined by any act of the litigant parties; and such jurisdiction can-

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not be conferred on a Court by any estoppel operating between the parties. The plea of *res judicata* is really a plea of a species of estoppel, i.e., estoppel by judgment or verdict, and such a plea to oust or confer jurisdiction is an incompetent plea.

A Court of Appeal or Revision, when it comes to a finding of its own, really finds only what the Trial Court should have found if it was acting correctly and legally, and for purposes of *res judicata*, that finding can be treated as the correct finding of the first Court and not as a finding of the Appellate or Revisional Court as the Original Court. **M SUREN RAO v. PERUMAL REDDY**, 5 L. W. 467 **906**

— S. 11—*Res judicata*—*Litigating under the same title, meaning of—Decree against person as heir of another wrongly described as dead, whether binding upon him when he becomes such heir.*

Defendant No. 1 got a decree for *khas* possession of certain property in a contested suit brought against defendant No. 5 as the son and heir of the plaintiff who was wrongly described as dead. Subsequently the plaintiff, on return home from pilgrimage, instituted a suit against defendant No. 1 and defendant No. 5 for recovering possession of the property on declaration of his title, and got a decree. Defendant No. 1 thereupon preferred an appeal, during the pendency of which the plaintiff having died, defendant No. 5 was substituted in his place as his legal representative:

Held, that the decree obtained by defendant No. 1 against defendant No. 5 in the previous suit was not binding as *res judicata* upon defendant No. 5 in the subsequent litigation as he was not litigating under the same title in the two cases. **C RAMANI MOHAN ROY v. JAGUBANDHU KARMAKAR** **881**

— S. 11, O. XIV, R. 1—*Res judicata*—*‘Matter’ in s. 11, meaning of—Question of law, decision on, when res judicata—Mixed questions of law and fact, treatment of—Landlord and tenant—Ghattathumulu, levy of, finding as to, whether res judicata in subsequent suit between same parties.*

A decision on an abstract question of law is not *res judicata*.

Where a decision on a point of law, whether it be on the construction of a document or of a Statute or on Common Law or on Customary Law settles a question that arises directly out of the conflicting views as to the rights of the parties, it is *res judicata*.

Though it is a convenient treatment to say that a particular case is a mixed question of law and fact and that the doctrine of *res judicata* does not, therefore, apply to it, it must be seen what exactly are the issues involved and decided. The question whether an issue arising in a case is of law or of mixed fact and law, must depend on the way in which the issues are framed, quite apart from the question which is really decided in the case. Any issue which, as framed, contains questions of fact and law must be split up in such a manner that a pure issue of law can be framed on the hypothesis of the finding of fact one way or the other.

A defence or claim based on a question of law is a 'matter' within the meaning of Explanation II to section 11, Civil Procedure Code. A 'matter' must some-

CIVIL PROCEDURE CODE—1908—contd.

times include an issue of law and where the point of law directly affects the rights in litigation between the parties to the suit, it is a 'matter' within the meaning of the section.

Plaintiff, a *zemindar*, sued his tenants to recover a cess known as *ghattuthumulu* in 1902. The Munsif held that the plaintiff was not entitled by sheer force of custom to a perpetual payment of the cess by the *inamdars* without any obligation on his part to maintain any of the old irrigation works in the villages concerned. Plaintiff preferred a similar suit against the defendants in 1905 when a similar decision was given. The District Judge, on appeal, reversed the Munsif's decree. In second appeal, the High Court called for findings as to whether the parties and the subject-matter were the same as in the suit of 1902 and, on receipt of findings in the affirmative, pronounced judgment in 1912 stating, 'we accept the finding and set aside the decree':

Held, that the Munsif's judgment of 1902 was *res judicata* and the decision of the High Court in 1912 that that decision was *res judicata* was also *res judicata*. **M. BONMEDEVARA VENKATA v. ANDAVOLU VENKATARATNAM**, 32 M. L. J. 63 **857**

— S. 11—*Res judicata*—Mortgage-decree—Sale of mortgaged property—Execution for balance due after appropriation of sale-proceeds **741**

— S. 11—*Suit to vacate order in claim proceedings*—*Res judicata*.

Where the object of a suit is to vacate an order passed in claim proceedings, the latter cannot operate as *res judicata*. **M. PANTHASARATHY CHETTY v. YELCHOORI NARAYANA CHETTY**, 5 L. W. 161 **401**

— S. 11, EXPL. IV, O. II, R. 2—*Res judicata*—*Matters which ought to have been made grounds of attack in previous suit*—"Intentionally relinquishes a portion of his claim," meaning of—*Ignorantia juris haud excusat*, applicability of.

A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as "a portion of his claim" which can be "intentionally relinquished" within the meaning of Order II, rule 2, Civil Procedure Code.

The word *jus* used in the maxim "*ignorantia juris haud excusat*" denotes general law and not a private right.

Where plaintiff sued as one of several joint plaintiffs seeking a declaration of their alleged reversionary rights and not claiming possession, and on the dismissal of that suit, he claimed possession on an alleged exclusive title which would have been inconsistent with the claim preferred by him and his co-plaintiffs in the previous suit and of which he had no knowledge until the decision in the former suit:

Held, that the subsequent claim was not barred under explanation IV of section 1, Civil Procedure Code, as it could not have been brought forward by the plaintiff as a ground of attack in the former suit.

Held, also, that the subsequent suit was not barred under rule 2, Order II.

Quare.—Whether in a suit to recover possession of property a plaintiff is bound to support the claim made by him by bringing forward every title which he has, or claims to have, in respect of such property. **P. AISHAN v. MUHAMMAD DIN**, 24 P. R. 1916 **119**

CIVIL PROCEDURE CODE—1908—contd.

— Ss. 20 (c), 21—*Jurisdiction*—*Breach of betrothal contract, suit for damages for*—*Court, jurisdiction of*.

A Court has jurisdiction to entertain a suit if the cause of action arose, wholly or in part, within the local limits of its jurisdiction. Therefore, a suit for the breach of a contract of betrothal can be tried by a Court within the local limits of whose jurisdiction the breach took place, even though the defendants reside elsewhere.

A judgment of a Court which had no jurisdiction to try a suit should not be set aside, unless there has been a failure of justice by reason of the suit having been instituted at the wrong place. **P. BHAG SINGH v. LABH SINGH**, 93 P. R. 1916 **114**

— S. 20 (c)—*Promissory note, assignment of*—*Place of assignment, institution of suit at*—*Jurisdiction of Court*—"Cause of action wholly or in part," meaning of.

The assignment of a promissory note by the payee is a part of the "cause of action" within the meaning of section 20 (c), Civil Procedure Code, and the assignee can sue on it in the Court having jurisdiction where the assignment took place.

On the principle of *stare decisis*, the said rule is applicable to India. **M. MANEPALLI MANGAMMA v. MANEPALLI SATHIRAJU**, 32 M. L. J. 816; 5 L. W. 246 **681**

— S. 24 **484**

— S. 24—"Court of Small Causes" interpretation of—*Suit of Small Causes Court nature, transfer of, to Court not invested with Small Cause powers*—*Decision*—*Appeal*.

The expression "a Court of Small Causes" in section 24 (4) of the Code of Civil Procedure, 1908 includes Courts invested with Small Cause Court Jurisdiction as well as Courts constituted under Act IX of 1867.

Therefore, where a suit of Small Cause Court nature instituted in a Court lawfully empowered to try it as such is transferred by a District Judge under section 24 (4) of the Civil Procedure Code, 1908, to a Court not invested with the jurisdiction of a Court of Small Causes, the latter Court must, for the purposes of the suit, be deemed to be a Court of Small Causes and as such no appeal lies from its decision in such a case **A. SURESH v. RAGHUNATH DAS**, 15 A. L. J. 69 **809**

— S. 47 **825, 836**

— S. 47, O. XXI, R. 2, O. XX, R. 11—Civil Procedure Code (Act XIV of 1882), s. 244—*Agreement for stay of execution before decree, whether adjustment of decree*—*Execution*—*Agreement, plea of, in bar* **836**

— S. 47, O. XXI, r. 90—*Limitation Act (IX of 1908), Sch. I, Art. 166*—*Execution*—*Sale, application to set aside*—*Objections*—*Limitation*.

Where objections in a petition to set aside an execution sale relate not only to material irregularity in publishing or conducting the sale but go further and include objections to the whole procedure starting with illegal attachment, the petition is admissible under section 47, Civil Procedure Code, and is not

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time-barred though filed beyond the 30 days allowed for an application under Order XXI, rule 90, Civil Procedure Code. **L B RAMASWAMY CHETTY v. MAUNG TAU** 827

— Ss. 47, 115, O. XXI, Rr. 58, 63, O. XLIII—*Madras Civil Rules of Practice*, rr. 134, 179—*Application under r. 179 for payment of moneys standing to credit of different suits—Objection by decree-holder in latter suit—Order upholding objection, nature of—Remedy of party aggrieved—Appeal—Revision.*

C filed a suit on a mortgage against A and obtained a decree for sale of the mortgaged property. B, who held a decree against A in another suit, attached the profits of the mortgaged property deposited in Court to the credit of C's suit by a Receiver, and applied under rule 179 of the Civil Rules of Practice, Madras, for the issue of a cheque for a sufficient part of the attached money. C objected claiming a charge on the amount for any balance that might be due to him after sale of the property. C's objection was upheld by Court and B's petition dismissed. B filed a petition in the High Court to revise the said order:

Held, (1) that B's petition should have been for the transfer of moneys to the credit of B's suit;

(2) that the dispute was not covered by section 47, Civil Procedure Code, and the order was not appealable as one passed under section 47, Civil Procedure Code;

(3) that the order should be treated as one falling under Order XXI, rule 58, Civil Procedure Code, on C's claim and was not subject to appeal or revision, whether it was passed under rule 179 of the Civil Rules of Practice in C's suit or under rule 137 of the Civil Rules of Practice in B's suit or under Order XXI, rule 60, in B's suit;

(4) that B's remedy was to proceed by way of a suit under the provisions of Order XXI, rule 63, Civil Procedure Code.

Per Oldfield, J.—The words "proceed as if the attaching decree-holder was the assignee of the judgment-debtor to the extent of the amount due to the latter" in rule 179 of the Madras Civil Rules of Practice are intended merely to make provision for the method by which the attaching creditor is to obtain the benefit of his attachment; it invests him with no legal character and does not expressly or impliedly justify the application of section 47 of the Code of Civil Procedure to the determination of his rights.

Attachment no more creates or transfers a right of ownership in a fund in Court than in any other description of property.

It may not be safe to hold generally that where the remedy by suit is open, interference by way of revision is unjustifiable, but where the Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. **M PONNURANGAM PILLAI v. LAL KHAN SAHIB** 348

— S. 47—Mortgage—Mortgaged property whether can be sold in execution 397

CIVIL PROCEDURE CODE—1908—contd.

— Ss. 47, 73, 115, 2—*Rateable distribution applications, order on—Appeal—Revision.*

Respondent, judgment-debtor, applied for payment to him of a certain sum of money lying in Court deposit and realised by the sale of his partition decree by the Court. Certain creditors who had applied for rateable distribution of the same objected to the application. The Court decided that the money was not attachable by the decree-holders as their decrees were against the respondent's family property, whereas the money in Court was his separate property. The decree-holders appealed against the said order. The Appellate Court held that no appeal lay and dismissed the appeals. They then preferred appeals and revision petitions separately to the High Court against the order in appeal:

Held, that the order was virtually one under section 47, Civil Procedure Code, and was appealable, and that no revision petition lay.

Per Oldfield, J.—An order obtained by an attaching creditor under section 73, Civil Procedure Code, ordinarily embodies expressly or impliedly three distinct decisions (1) that his application for execution is generally valid; (2) that the fund in Court is available towards satisfying his claim; and (3) that he is entitled to a particular portion of it. When an objection to the order is based on the invalidity of the execution application or the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under section 47, though it may be contained in an order passed ostensibly under section 73, Civil Procedure Code.

Per Krishnan, J.—The order, so far as it affected each decree-holder separately, was an order between him and the judgment-debtor and related to the execution of his decree, as it refused his prayer to pay towards his decree a certain sum of money of his judgment-debtor representing his rateable share in the whole amount, which he claimed was attachable. It is thus an order falling under section 47, Civil Procedure Code, and is clearly appealable.

In so far as an order under section 73 of the Code of Civil Procedure can be treated as an order under section 47 between the parties to a suit, an appeal lies at the instance of either party, where such an appeal does not affect orders in favour of third parties such as other decree-holders. **SI VENKATAKRISHNA PATTAR v. VENKATAKRISHNA PATTAR**, 31 M. L. J. 820; 20 M. L. T. 538; 5 L. W. 354 900

Ss. 47, 102, 115—*Small Cause decree—Execution proceedings—Claim by exonerated defendant, allowed by first Court, but dismissed on appeal—Appeal or revision to High Court, whether lies.*

A defendant who is exonerated from liability to the plaintiff under a Small Cause decree, does not cease to be a party to the suit unless his name is actually removed.

An enquiry, therefore, into a claim presented by a defendant, thus exonerated, to property attached in execution against a co-defendant, against whom the suit was decreed, is a proceeding under section 47, Civil Procedure Code, and an appeal lies against the

CIVIL PROCEDURE CODE—1908—contd.

order passed therein. There is no further appeal to the High Court under section 102, Civil Procedure Code, against the order of the Appellate Court, nor does a petition lie in revision under section 115, Civil Procedure Code, inasmuch as the Appellate Court does not act without jurisdiction in entertaining the appeal. **M ABDUL KASIM v. THAMBUSAMI PILLAI**, (1917) M. W. N. 93 **673**

— Ss. 48 (1) (a), (b), 11—*Mortgage decree—Composite decree for sale of mortgaged property with provision for recovery of balance outstanding from other properties of mortgagor—Execution for balance due after appropriation of sale-proceeds—Limitation—Question of law—Res judicata—'Certain date', meaning of.*

A combined decree in a mortgage suit for sale of the mortgaged properties and, if the sale-proceeds are insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor, though irregular, is not illegal.

The proper procedure in such a case is to pass a decree for sale of the mortgaged properties in the first instance, and if the mortgaged properties are found, on sale, insufficient to satisfy the decree, a separate decree or order should then be made for realization of the balance from the person and other properties of the judgment-debtor.

Per **Abdur Rahim**, *Offg. C. J.*, and **Seshagiri Aiyar**, *J.* (**Phillips**, *J.* dissenting.) The starting point of limitation for execution of the portion of the decree relating to the unsatisfied balance under section 48, Civil Procedure Code, is the date when, after the remedy against the mortgaged property has been exhausted, it is ascertained that there is a balance due to be recovered from the defendant and his other properties.

Per **Abdur Rahim**, *Offg. C. J.*, and **Phillips**, *J.*—Such an application is not covered by clause (b) of section 48, Civil Procedure Code, for the decree does not direct payment on a 'certain date'. For that clause to apply, the date should be fixed in the decree or at least should be ascertainable from its terms. The expression 'certain date' cannot be construed to mean a date which can be made certain, and there is no authority for applying the maxim 'whatever can be made certain is to be treated as certain' to the construction of a Statute of Limitation.

Per **Abdur Rahim**, *Offg. C. J.*—The application however, falls under clause (a) of the section. The date of the decree sought to be executed need not necessarily be the date put down at the time it was drawn up. The words 'sought to be executed' in the clause indicate that the date is to be ascertained with reference to the time when the decree becomes capable of and ripe for execution according to its terms, and not always the date which it bears on its face.

Per **Seshagiri Aiyar**, *J.*—The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's rights. But where the party is unable to seek his remedies, it cannot be said that he has failed to avail himself of the cause of action that has accrued to him.

CIVIL PROCEDURE CODE—1908—contd.

Per **Phillips**, *J.*—Such an application falls neither under clause (a) nor under clause (b) of section 48, Civil Procedure Code. The Legislature has laid down a period of twelve years as the maximum period within which a decree can be executed (save in the case of fraud) and presumably this period has been fixed to avoid a prolonged harassing of the judgment-debtor, and consequently the section must be construed strictly.

It is open to the decree-holder in the case of such a composite decree, to apply for amendment by omission of the personal decree, in which case, if a personal decree is subsequently given, twelve years' time will run from the date of the latter decree. The words of section 48 should be interpreted as they stand, viz., the date of the decree must be one date alone and from that date twelve years must be calculated.

Per **Sadasiva Aiyar**, *J.* (in the referring order):—The decision on a question of law in one proceeding is not *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. **M AIYASAMIE v. VENKATACHELA MUDALI**, 31 M. L. J. 513; (1916) 2 M. W. N. 296; 20 M. L. T. 391; 4 L. W. 507 **741**

— S. 51, O. XXI, R. 10—*Execution of decree—Stranger benefited under compromise filed in suit, position of—Compromise, from what time enforceable—Presumption—Court, duty of—Court-fee to be charged.*

Section 51 and Order XXI, rule 10, of the Code of Civil Procedure contemplate that an application for execution can only be made by the holder of a decree.

A decree was passed in the terms of a compromise which granted certain monthly allowances to some of the parties to the suit as well as to 'a stranger', and provided that if its terms were not complied with in favour of the parties to the suit to whom the allowances were granted, they would be entitled to take proper proceedings as regards such non-compliance. Subsequently, these persons, including the stranger, applied to the Court in which the suit had been instituted to recover their monthly allowances from the date of the compromise by execution of the compromise-decree. The Court allowed execution to proceed in favour of each of the applicants for the allowances claimed from the date of the decree, on the finding that they were not entitled to claim the same from the date of the compromise.

Held, (1) that the stranger applicant, who was no party to the suit or the decree, had no right to apply for execution, though he was entitled to bring a separate suit based on the portion of the compromise relating to him;

(2) that, in the absence of anything to the contrary appearing in the compromise, the presumption was that such of the applicants as were parties to the suit, were entitled to claim their allowances from the date of the compromise.

CIVIL PROCEDURE CODE—1903—contd.

No Court can sanction an irregularity the effect of which is to perpetrate a fraud on the Government revenue and to deprive the State of the Court-fee that is legitimately its due. **O DIL AFZA BEGAM v. DEPUTY COMMISSIONER, BAHRAICH, 3 O. L. J. 570 133**

— Ss. 64, 47—*Auction-sale, invalidity of—Estoppel, plea of, available to decree-holder, whether enures to auction-purchaser—Evidence Act (I of 1872), s. 115.*

A judgment-debtor or any one deriving title from him, who is estopped from questioning the validity of an auction-sale as against the decree-holder, is equally estopped from contesting it as against the auction-purchaser at the execution sale, for the decree-holder has a legal right to bring the property to sale and that right would enure for the benefit of the purchaser so far as the judgment-debtor and his representatives are concerned.

The principle that the auction-purchaser is not the representative of the decree-holder is restricted to cases under section 47, Civil Procedure Code, and does not apply to the plea of estoppel under section 115 of the Evidence Act. **M SWAMINATHA VELLALA v. DARMALINGA CHETTIAR, (1617) M. W. N. 88 825**

— S. 66, O. XXI, Rr. 98 to 103—*Execution sale, purchase at, benami—Resistance to certified purchaser by person deriving title from judgment-debtor—Suit for possession by benamidar purchaser, whether lies.*

A certified *benami* purchaser at an execution sale who has been obstructed in securing possession by a person deriving title from the judgment-debtor cannot maintain an action in ejectment against the latter. There is no distinction between ordinary suits for ejectment and suits by *benami* purchasers at Court sales.

There is nothing in section 66 of the Civil Procedure Code which confers such a right. That section is designed to protect the person who has obtained a sale-certificate and has acquired possession under it. It has no application to a purchaser who seeks to oust another from possession. **M GULLA-PALLI VENKATRAMAYYA v. KOONAPARJU VENKATRAJU, 4 L. W. 609; 31 M. L. J. 577 497**

— S. 66—*Hindu Law—Joint Hindu family, separated members of, suit between—Applicability of s. 66—Appeal, plea of law, whether can be taken for first time in—Law prohibiting institution of certain suits.*

The terms of section 66, Civil Procedure Code, do not apply to the case of a suit brought by one member of a joint Hindu family against another, inasmuch as such members are entitled, by operation of law and not by virtue of any private agreement or understanding, to treat as part of common property an acquisition made out of joint family funds.

But the section applies to a suit between the separated members of a joint Hindu family, irrespective of the fact that when separation took place, certain property belonging to the joint family was not actually divided. **O RAMADHIN v. BISHESHER PAYAL, 3 O. L. J. 508 111**

CIVIL PROCEDURE CODE—1903—contd.

— S. 70—Rules framed by U. P. Government under section 70, r. 3 **78**
— S. 73 **900**

— S. 83—*Alien enemy, suit by—Lease granted by alien enemy as agent of non-enemy subject, enforceability of—Contracts with alien enemies, principles affecting, validity of.*

The prohibition as regards intercourse between hostile aliens is confined only to commercial dealings and does not render illegal all contracts whatever be their nature. It extends to contracts which tend to increase the enemy's resources and every kind of trading or commercial dealing, but does not prevent an agreement made in enemy territory to pay money there out of funds accruing there.

A lease granted, after the commencement of hostilities, by an alien enemy in British India on behalf of one who is not shown to be an enemy subject, the rent whereof is intended to be used in this country and by persons who are not enemies, is enforceable.

In any event, there is no objection to an action being laid on the lease when it is brought by an agent, who is not an enemy subject.

Enemy subjects resident in British Territory who are permitted to remain are not alien enemies and can contract like subjects, whether such permission is express or implied. The permission should be presumed in the case of aliens who were residing in British Territory before the outbreak of war and who continue to remain after such outbreak, unless they are ordered to remove themselves within a certain time and they do not.

Principles relative to intercourse between the subjects of belligerents after commencement of hostilities discussed. **M WETHRIK v. DAVID, 31 M. L. J. 860; (1917) M. W. N. 73; 5 L. W. 275 957**

— S. 89, O. XXIII, R. 3, Sch. II—*Arbitration without intervention of Court—Award, filing of—Procedure—Arbitration Act (IX of 1899).*

Under section 89 of the Civil Procedure Code, 1908, the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court is not excluded and, therefore, comes under the provisions which deal with arbitration without the intervention of the Court.

A party applying to a Court for a decree on an award is bound, if the case does not come within the provisions of the Indian Arbitration Act, 1899, to apply under the Second Schedule of the Civil Procedure Code. There is no other law in force under which such an application can be made.

Order XXIII, rule 3, of the Civil Procedure Code, 1908, only refers to the adjustment of suits wholly or in part by any lawful agreement or compromise and no application can be made to obtain a decree on an award under that Order. **B SHAYAKSUA DINSHA DAYAR v. TYAB HAJI AYUB, 18 Bom. L. R. 559; 40 B. 386 140**

CIVIL PROCEDURE CODE—1908—contd.

S. 92, object of—*Suit for private purposes—Abuse of process of Court—Legal Remembrancer, duty of—Good faith—Permission, when to be granted.*

The institution of a suit, under section 92 of the Civil Procedure Code, 1908, for the private purposes of some individual or individuals is an abuse of the process of the Court. The section is intended to enable suits to be brought for the benefit of persons interested in a trust, and is not intended to enable persons to gain private ends by putting forward men of straw to institute suits to put their adversaries or the trust funds to wholly unnecessary and improper costs.

When an application is made to the Legal Remembrancer for permission to bring a suit under section 92, the applicants ought with the utmost good faith to set forth and specify in their petition the reason for and the object of the intended suit, and before granting permission the Legal Remembrancer should satisfy himself that the proposed suit is *prima facie bona fide* and that the applicants are interested in the trust. **A NARAYAN DAS v. KHUNNI LAL 897**

S. 92 and Religious Endowments Act (XX of 1863), s. 14, scope of—*Public Trusts—Suit for removal of trustee of temple—Sanction under latter Act, if necessary—Alienees from trustees, joinder of—Alienations, decision as to nature of, whether necessary in scheme suit—Decree, form of—Public or private temple, question as to—Onus of proof—Decision that temple public, whether binding on alienees.*

Sub-clause (2) of section 92, Civil Procedure Code (Act V of 1908), is intended to set at rest the doubts that were entertained in the construction of the old Code of 1882, whether a trustee could be removed and whether persons who had any special interest in the trust of a public charity could institute suits and ask for the reliefs specified in the section without sanction or whether persons interested in charities could bring representative suits under section 30 of the old Code in the ordinary Courts.

Sub-clause (2) of section 92 is added to make it clear that the terms of the section are mandatory and that no suit could be brought for any of the reliefs specified in the section except under the conditions laid down therein; at the same time the special jurisdiction of the District Courts under the Religious Endowments Act was saved, so that a person desirous of suing for the removal of a trustee or for such other specific relief as can be given to him under that Act is at liberty to do so, and is not bound to comply with the provisions of section 92, Civil Procedure Code.

No sanction, therefore, is required under section 14 of the Religious Endowments Act for the institution of a suit to remove a trustee or for any other relief comprised under section 92, Civil Procedure Code.

The joinder of alienees from the trustees of a temple in a suit to remove the latter from office under section 92, Civil Procedure Code, will not entail the dismissal of the whole suit because, in the suit as framed, no relief could be given against the alienees. The jurisdiction of a Court does not depend on its decision whether it can or will allow some of the reliefs asked for.

CIVIL PROCEDURE CODE—1908—contd.

In a suit under section 92, Civil Procedure Code, the Courts cannot decide the question whether alienations by the trustee sought to be removed are binding on the institution and give appropriate reliefs against the alienees.

A decree, however, declaring the temple, whose trustee it is sought to remove, to be a public one is binding on the alienees, who will not be permitted to agitate that question in future proceedings where the binding nature of the alienations on the institution may be in question. The decree should make it clear that this declaration is binding on them also.

The onus of proving that a temple is a public one, in respect of which the reliefs are claimable under section 92, Civil Procedure Code, is on the plaintiffs. The fact that a predecessor of the trustee defendant made a statement that it was a public temple is not enough to shift the burden on to the defendant.

Where a temple is proved to be an ancient one with hereditary offices and emoluments fixed for services therein and the *utsavams* and *ubayams* are performed by public subscriptions and oaths are taken there under the Oaths Act and the public have a right to worship the temple deity, the temple must be regarded as a public one. **M SUBRAMANIA Aiyar v. VENKATACHALA VADEYAR, (1916) 2 M. W. N 351; 4 L. W. 444 688**

S. 92—*Suit against minor—Guardian not named, effect of—Bombay Court of Wards Act (Bom. Act I of 1905), ss. 31, 32, applicability of.*

A suit under section 92 of the Civil Procedure Code, 1908, properly instituted in relation to a public charitable or religious trust against a Government ward is not one directly affecting, at all events, the property of the ward and, therefore, is not bad on the ground that the statutory notice provided for by section 31 of the Bombay Court of Wards Act has not been given, nor is it bad under section 32 on the ground that the Court of Wards was not named as guardian from the commencement of the suit.

Where an omission to name the guardian of a ward in no way affects the merits of the case, it should be treated as a mere defect or irregularity in procedure. **B AMIN SAHEB v. MASLEUDIN, 18 Bom. L. R. 563; 40 B. 541 186**

S. 99 964

S. 99—*Misjoinder of parties—Second appeal, whether competent.*

A second appeal is not competent on the ground of misjoinder of parties if it has not affected the merits of the case or the jurisdiction of the Court. **P SHAH NAWAZ v. SHAH NAWAZ, 118 P. L. R. 1916 197**

S. 100 666

S. 100—*Appeal, second—Decision on issue by what law parties governed, whether decision on 'usage having the force of law'.*

A decision on an issue in a suit that the parties are governed by one system of law and not by another, is not a decision on a 'usage having the force of law' within the meaning of section 100 (a), Civil Procedure Code, which the High Court can interfere with in second appeal.

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The expression 'usage having the force of law' in the section means an usage set up in derogation of the ordinary law, and the decision which can be taken up in second appeal under clause (a) of the section is not only on the existence of the usage but also on its having the force of law. **M MAHAMAD MEERAN BIBI v. MAHAMAD ROWTHER**, (1917) M. W. N. 98 **879**

— S. 102 **673**
 — S. 102—Rent, suit for—Appeal, second, whether lies **980**

— S. 105 **844**

— S. 107 **414**

— S. 109—*Appeal to Privy Council—Final order passed in appeal—Order rejecting application for restoration of appeal dismissed for default—Decree.*

An order of a High Court rejecting an application for restoration of an appeal dismissed for default is not appealable to His Majesty in Council, inasmuch as it is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court. **A BISMILLAH BEGAN v. HIRA LAL** **832**

— S. 110—*Appeal to Privy Council—Claim for legacy under Rs. 10,000—Interest decreed, addition of, for purposes of appeal—Decision affecting future claims of other legatees, whether within clause (2) of the section.*

Where the subject-matter of a claim is less than Rs. 10,000, there is no right of appeal to the Privy Council merely by reason of the decree amount exceeding the said sum at the date of application for leave to appeal by the addition of subsequent interest allowed by the decree.

Where, in a claim based on a legacy under a Will, the value whereof is below Rs. 10,000, a decision is given as to the source from which the legacy is payable, the aggrieved party has no right of appeal to the Privy Council under section 110 (2), Civil Procedure Code, on the ground that the decision would affect, though not conclude, future claims by other legatees which may exceed that amount.

The second clause of the section refers to a decree involving a larger claim, i.e., there must be something in the decree which affects the larger subject-matter. In effect, the smaller decree must have the effect of estopping either by the rule of *res judicata* or otherwise a party from claiming rights under a larger claim. **M CHINNAM RAJAMANNARU v. LINGAMALLU RADHAKRISHNIAH**, 32 M. L. J. 400 **502**

— S. 110—*Appeal to Privy Council—Subject-matter of suit, value of—Suit for injunction and declaration—Fiscal valuation—Real value, if can be shown.*

In the Bombay Presidency it is open to a plaintiff to sue in a second class Subordinate Judge's Court for a declaration and injunction, even though the immoveable property referred to or affected by the injunction exceeds the pecuniary limit of that Judge, i. e., Rs. 5,000;

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Therefore, a plaintiff by suing for a declaration and injunction in a second class Subordinate Judge's Court makes neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allows him to do, he places upon the relief which he is seeking. **B MOHANLAL NAGJI v. BAI KASHI**, 18 Bom. L. R. 469; 40 B. 477 **371**

— S. 113, O. XLVI, R. 1—*Reference to High Court, when competent.*

Section 113, Civil Procedure Code, should be read in conjunction with Order XLVI, rule 1, and only those cases should be referred to the High Court under the section which are not open to further appeal. **P NIAZ ALI v. MUHAMMAD RAMZAN**, 130 P. R. 1916 **227**

— S. 115 **900, 872, 673, 348**

— S. 115—*Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Provincial Small Cause Courts Act (IX of 1887), s. 25—High Court, power of, to interfere in revision or in superintendence—Jurisdiction—Discretion of lower Court, when to be interfered with.*

Under section 115 of the Civil Procedure Code, a High Court can only interfere if the question be one of jurisdiction. A High Court's powers under the Charter Act are ordinarily exercised only in cases where jurisdiction has been exceeded or a Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law, and this power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right.

Where a discretion is vested in a Court, it is not open to interference by the High Court unless it has been exercised ignorantly or perversely. **PAT GANGA PRASAD v. NANDU RAM**, 20 C. W. N. 1080; 1 P. L. J. 465 **129**

— S. 115—*Jurisdiction—Small Cause suit tried on Original Side—Defendant not objecting in first instance—Revision—High Court, power of, to interfere.*

Where a Small Cause suit is tried on the Original Side, the parties not raising any question of jurisdiction in the Trial Court, and an appeal from the decree of the latter Court is heard and decided by the District Judge, it is open to the High Court to look into the merits of the case and either to interfere or not to interfere with the decree of the lower Courts as the justice of the case may require. **PAT JADUNANDAN SAHAY v. JUNG BAHADUR SAHAY**, 1 P. L. W. 232 **991**

— S. 115—*Material irregularity—Revision* **400**

— S. 115—*Revision* **131**

— S. 115—*Revision—Error of law.*

An error of law committed by the lower Court does not furnish any ground for interference in revision under section 115, Civil Procedure Code. **O DIWAN SINGH v. BALDEO SINGH**, 3 O. L. J. 459 **19**

— S. 144—*Restitution, principles governing—Property, sale of, not covered by proclamation—Sale certificate, cancellation of, in appeal—Application for restitution—Auction-purchaser, rights of.*

CIVIL PROCEDURE CODE—1908—contd.

On an application for restitution under section 144, Civil Procedure Code, the Courts should not only restore parties to the positions which they held before the erroneous order was made, but should also make restitution from party to party, as nearly as possible, simultaneous.

Where a sale of property not covered by the proclamation is afterwards set aside, the judgment-debtor can claim restitution only on payment to the purchaser of the purchase-money. The purchaser cannot be forced to seek his remedy against the decree-holder or required to vacate, till restitution is made of the sum paid by him for the property erroneously offered for sale.

Courts acting under section 144, Civil Procedure Code, will only re-place parties in the position which they actually occupied at the time of the order reversed and will not consider all the various subsequent positions voluntarily taken up by the parties as the remote consequences of that order. **PAT KEDAR NATH v. JAI BERHMA** 863

— S. 149—*Plaint insufficiently stamped—Court-fee, deficiency in, made up after expiry of period of limitation—Suit, date of institution of—Limitation.* The plaint in a suit was filed within limitation but was insufficiently stamped. The deficiency in the Court-fee was made up after the expiry of the period of limitation, but was accepted by the Court:

Held, that the suit must, under section 149 of the Civil Procedure Code, be taken to have been instituted on the date on which the plaint was originally filed. **PAT GAYA LOAN OFFICE, LTD. v. AWADH BEHARI LAL, I. P. L. J. 420** 507

— Ss. 151, 152—*Amendment of judgment and decree—Error in judgment.*

When by some oversight or otherwise a Judge in writing his judgment commits a mistake which injuriously affects either party to the case he can, and should, exercise his power under sections 151 and 152 of the Civil Procedure Code, 1908, to correct the mistake and amend the decree accordingly. **P JHANDA MAL v. SARDAR BEGAM, 169 P. W. R. 1916** 378

— S. 151—*Decree, amendment of—Power of Court.*

In a partition suit a preliminary decree was made and a commissioner was appointed to make an allotment. While the case was before the commissioner one K, whose name was not in the decree, applied for amendment of the decree so as to include his name in it and also asked for the allotment of a separate share to him. The Court made the amendment and ordered the case to proceed *de novo*:

Held, that the Court had no power under section 151 of the Civil Procedure Code to make such order. Under that section it had power only to amend the decree so as to bring it into conformity with the pleadings and should have acted accordingly. **PAT NANOO THAKUR v. KULDIP THAKUR** 352

— S. 151—*Order passed without notice—Remedy of party aggrieved.*

Every litigant is entitled to be heard before an order is made to his prejudice, and the proper remedy of a party against whom an order has been

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made without hearing him is to apply to the same authority for a re-hearing.

Apart from the provisions of section 151 of the Code of Civil Procedure, a Court has an inherent power to rectify any inadvertent mistakes made by it and when a party can have a mistake corrected by the Court which made the mistake, he should adopt that course rather than resort to the Appellate Court. **M RAGHUNADA DOSS v. MAHARAJA OF JEYPORE, 31 M. L. J. 319; (1916) 2 M. W. N. 203; 4 L. W. 240** 385

— Ss. 151, 152—*Reductio ad absurdum—Defective judgment and decree.*

Section 152 of the Civil Procedure Code is wide enough to enable a Judge to avoid a *reductio ad absurdum*. **P SARDAR BEGAM v. JHANDA MAL, 129 P. R. 1916** 382

— O. I, R. 3 976

— O. I, R. 8 977

— O. I, R. 8—*Ejectment, suit for—Necessary parties—Co-owner, maintainability of suit by.*

Where a number of persons hold a joint interest in a cause of action and where the extent of the interest of each is an unspecified interest, it is open to any one of those persons to maintain on behalf of the whole body of interested persons a suit to establish the cause of action set forth and in the event of success of that one person all persons interested will enjoy the fruits of the litigation, unless there is some specific law forbidding such a procedure.

Therefore, one of several co-owners can, on behalf of the whole body, maintain a suit for the recovery of the land against trespassers. **PAT RAGHUBAJ SINGH v. BISHEN TEWARY** 384

— O. II, Rr. 1, 2 (1) 642

— O. II, R. 2—*Cause of action, meaning of—Suit for possession, after suit for declaration dismissed, whether barred.*

A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief or some part of the relief prayed for, and is to be sought for within the four corners of the plaint.

A plaintiff whose suit for a declaration of title to land has been dismissed on the ground that he was not in possession at the time of filing the suit, is not debarred by Order II, rule 2 (3), Civil Procedure Code, from bringing a subsequent suit on the same title for recovery of possession of the same land. **L B MAUNG BA THAUNG v. MA SHIN MIN** 15

— O. II, R. 2—*"Intentionally relinquishes a portion of his claim," meaning of.*

A right which a litigant possesses without knowing or ever having known that he possess it, can hardly be regarded as "a portion of his claim" which can be "intentionally relinquished" within the meaning of Order II, rule 2, Civil Procedure Code. **P AISHAN v. MUHAMMAD DIN, 94 P. R. 1916** 119

— O. II, R. 17—*Plaint, amendment of, grounds for—Alteration necessitated by recent decision—Limitation—Discretion of Court.*

The sanctioning of leave to amend a plaint is a matter within the discretion of the Court.

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In certain circumstances, where no substantial change is made in the plaint averments and the claim was not barred on the day when the plaint was filed, leave to amend should not necessarily be refused on the ground that the plaint as amended would be barred by limitation.

Ordinarily, however, delay in asking for leave to amend and the resulting argument from limitation are not to be disregarded, when the Court is called on to exercise its discretion in the matter. Each case must be dealt with on its merits.

Leave to amend a plaint on the ground that an alteration is necessitated in consequence of a recent judicial decision and that there was a pardonable mistake regarding it in the plaint, will not be granted after a long delay and where the decision has effected no change in the existing law. **M. GATIGANTI SUBBARAYULU v. ARUMILLI SRANYA** 914

O. III, R. 4—Pleader, delegation of duty by, to another—Appearance by Pleader not duly appointed, effect of—Appeal, proper presentation of, what constitutes—Power of attorney, name of Pleader omitted from body of, effect of—Objection taken at late stage, effect of.

The provisions of Order III, rule 4, of the Civil Procedure Code, 1908, are clear and imperative, and the Courts have no power to relax them.

A Pleader whose name is omitted from the body of a vakalatnamah is not a duly appointed Pleader, and an appeal presented by him is not properly presented, even though the omission might be only due to an oversight.

The fact that no objection is taken till a very late stage, does not validate the appointment of a Pleader which was not duly made.

An act or appearance by any Pleader, not duly appointed by the person for whom he is to act, is no act or appearance in law.

Where a Pleader, expressly empowered to employ a colleague to act for or with him, makes such appointment, he must strictly comply with the provisions of Order III, rule 4 (1), Civil Procedure Code, unless exempted by clause (3) of the same rule. **N. DHANOOALAL v. RAJI**, 12 N. L. R. 189 103

O. VII, R. 7—Further relief 161

O. VII, R. 14, 18, O. XIII, r. 1—Documentary evidence, permission to file at late stage, application for—Court, duty of.

Where a party to a suit applies on the first hearing for permission to file certain documentary evidence at a subsequent stage, the Court ought to decide the application at once. **O. PIYARI v. JAGANNATH KURAR**, 3 O. L. J. 538; 19 O. C. 314 84

O. VII, R. 18 84

O. VIII, R. 6 (1)—Set-off, legal and equitable—Landlord and tenant—Rent, suit for—Liability to defendant on accounts—'Ascertained sum', meaning of—Set-off, right to, in claims arising in respect of same matter.

The expression 'ascertained sum' in Order VIII, rule 6 (1), Civil Procedure Code, means an amount which is beyond challenge and beyond dispute, concluded and conclusive.

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A set-off can be claimed on the basis of a contractual relation between the parties.

In the absence of such a contract, there is a right to an equitable set-off when the set-off arises out of the same transaction out of which the claim springs. If it is found that the set-off is foreign to the original claim, the set-off will not be allowed.

In a claim for rent due by a tenant under a lease, it is not open to the latter to plead a set-off of amounts due to him by the plaintiff on accounts in respect of payments made on the plaintiff's behalf in respect of other properties which are not the subject-matter of the suit. The defendant can, however, claim a set-off in respect of payments made on the plaintiff's behalf *qua* the property which he holds under him. **PAT DILTOR KOER v. HARKHOOSINGH** 367

O. IX, R. 9 229

O. IX, R. 13—Decree, *ex parte*, application to set aside—Minor—Guardian *ad litem*, father, whether proper—Hindu Law—Joint family.

A father is fully competent to be the guardian *ad litem* of his minor son and to protect his interests.

A mortgagee sued his mortgagors, members of a joint Hindu family one of whom was a minor, on the mortgage. The minor's father, who was himself a defendant, was appointed guardian *ad litem* of his son, but he failed to put in any defence and an *ex parte* decree was passed against the minor. The latter applied to set aside the decree:

Held, that the minor was fully represented in the case by his father, and that the decree was, therefore, binding on him. **PAT INDRA DEO NARAYAN SINGH v. MATUKDHARI SINGH** 389

O. IX, R. 13—Order rejecting application to set aside *ex parte* decree, whether appealable—Appeal.

An appeal lies from an order rejecting an application to set aside an *ex parte* decree made under Order IX, rule 13, Civil Procedure Code, for default of the applicant to appear in support of the application. **C. PAKARI PARAMANIK v. SARAT SUNDARI DEBYA** 835

O. XIII, R. 1 84

O. XIV, R. 1 857

O. XX—Decree—Court, cognizance by, of events happening after institution of suit or appeal—Jurisdiction.

In exceptional cases Courts can take cognizance of events since the institution of a suit or appeal where the adoption of such a course tends to shorten litigation and best subserve the ends of justice.

A plaintiff, therefore, is entitled to a decree for *khas* possession of a land on declaration of title in a suit brought for the purpose, where it is found that the defendant was holding the land under an *ijara* lease subsisting at the time of the institution of the suit but which expired before the date of the decree. **C. CHINTA HARARAN DAS v. RADHA CHARAN PODDAR** 962

O. XX, R. 4, 5 304

O. XX, R. 5, 6, 7, S. 11—Decree, construction of, principles applicable to—Order contingent on certain information called for, whether final—Review of order, dismissal of, effect of—Appeal, dismissal of, as premature—Enunciation of principles obiter—

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Appeal, subsequent, against final order—Res judicata
—Compromise decree disallowing interest—Execution
—Interest, claim for, legality of.

Where a compromise decree for mesne profits, which reserved the determination of the amount in execution, expressly disallowed interest thereon, an order passed in execution on the application of the decree-holder allowing interest, on the ground that under the Code of Civil Procedure the term 'mesne profits' includes interest on mesne profits, is illegal.

Where a decree is ambiguous or not clear it should be read in the light of the judgment, as the decree states only the final relief granted or other determination of the suit and does not afford any information as to the matters which were in issue or have been decided.

An order passed by a Court contingent on certain information which the parties are directed to furnish is not a final decision, and the dismissal of an appeal against such order on the ground of its being premature, is not an affirmance of that order so as to operate as *res judicata* in a subsequent appeal against the final order passed after the information was furnished in respect of the matters in controversy. The decision in the earlier appeal is only an affirmance of the order directing the parties to furnish further information, and the discussion of some principles of law by the Appellate Court which were intended to help the parties and the Court below to arrive at the final order and to save the necessity of a further appeal, is only to be understood as *obiter dicta* and is not *res judicata* in an appeal against the final order. When no appeal lies, the Appellate Court has no jurisdiction to affirm, reverse or modify the decree or order of the Court below.

The rejection of an application for review of a preliminary order does not give it any finality or make it *res judicata* in a subsequent proceeding.

Per *Walsh, J.*—No Court should construe a decree without looking at the issues and ascertaining what was really determined with the help of the judgment. Similarly, no satisfactory conclusion can be arrived at as to what was determined by an appellate decree without looking at the grounds raised in appeal and in some way or another ascertaining what issues were actually discussed and decided. An executing Court cannot go behind a decree in the sense that it cannot alter, modify or amend its terms. But it can go behind it to ascertain what the decree operates upon.

A compromise decree was passed in favour of S for possession of certain property and mesne profits, the amount of the latter being left to be determined in execution. The decree specifically disallowed interest on the mesne profits. The mesne profits having been determined, S applied for execution and claimed interest on the amount. The Subordinate Judge considered that, though the decree was silent as to interest, the same was legally awardable and he concluded his order by saying that S. was entitled to recover from T and others "Rs. 7,460-4-0 mesne profits up to date of plaint. This set of defendants are liable to pay the amount of mesne profits with

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interest and proportionate costs." No final orders were, however, passed but the decree-holders were required to state what amounts were due by each party of judgment-debtors and what sum was realized from T's share and what amount T was liable to pay. The defendants applied for a review of this order, which was rejected. Without furnishing the information and awaiting final decision, the defendants appealed to the High Court against the said order which was dismissed as premature. The High Court proceeded, however, to discuss some principles of law. The final order having been passed allowing interest on the mesne profits, the defendants again appealed against it. It was contended for the plaintiffs that the dismissal of the earlier appeal operated as *res judicata*:

Held, (1) that the first order of the lower Court was not a final order;

(2) that the rejection of the application for its review did not place it on a better footing;

(3) that the dismissal of the appeal preferred against that order did not operate as *res judicata* in the present appeal;

(3) that it was competent to the High Court to construe the decree unaffected by its earlier order in appeal and to regard the matter as now open to appeal for the first time;

(4) that, on the construction of the decree, interest could not be awarded on the mesne profits. **A** *TAR*
BEGAN v. SARVI BEGAN, 14 A. L. J. 1171 **674**

— O. XX, R. 6, 7 **671**

— O. XX, R. 11 **836**

— O. XX, R. 12—*Mesne profits, ascertainment of, application for—Decree directing ascertainment in execution, legality of—Dismissal for default, effect of—Subsequent application barred—Decree for possession and mesne profits, form of.*

Under the terms of Order XX, rule 12, Civil Procedure Code, mesne profits are assessed by an enquiry in the suit itself and not in execution, and the mesne profits so assessed form part of the money recoverable under the decree.

A Court, therefore, acts in excess of its powers under the new Civil Procedure Code of 1908, if it passes a decree directing that mesne profits should be ascertained in execution.

The dismissal for default of an application for ascertainment of mesne profits bars subsequent applications even though the decree in terms directed its ascertainment in execution.

Per *Richardson, J.*—The proper way or ways of drawing up a decree for mesne profits are indicated in Mulla's Edition of the Civil Procedure Code in the notes to rule 12, Order XX. **C** *GANGA PRASAD DUTT v. HEMANGINI DEBI* **997**

— O. XX, R. 14—*Pre-emption—Decree based on compromise, compliance with.*

Plaintiff in a pre-emption suit was given a decree in terms of a compromise, according to which he was *inter alia* to separate off and give to defendant a certain area of land within one month from the date of the decree. Before the expiration of that period plaintiff ceased to cultivate the area mentioned in the decree, with the intention to let the defendant have possession of the land;

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Held, (1) that inasmuch as the decree was based upon a compromise, it was not a decree in a pre-emption suit to which the provisions of rule 14, Order XX, of the Civil Procedure Code could apply;

(2) that even if it was a decree in a pre-emption suit, plaintiff had substantially complied with its terms. **P JAM HAMID ALI v. KAIM DIN** 806

— O. XXI, R. 2, O. XX, R. 11, S. 47—*Civil Procedure Code (Act XIV of 1882), s. 244—Agreement for stay of execution before decree, whether adjustment of decree—Execution—Agreement, plea of, in bar.*

Per *Curiam*.—Order XXI, rule 2, Civil Procedure Code, which speaks of a decree being adjusted in whole or in part, assumes the existence of the decree at the time of adjustment. It has no application to cases in which the alleged adjustment was by virtue of an agreement entered into between the parties before the passing of the decree.

Per *Abdur Rahim, Offg. C. J. (Seshagiri Aiyar, J., dubitante and Phillips, J., dissenting)*.—An agreement between the parties to a suit made before the passing of a decree, by which the decree is not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court within the meaning of section 47, Civil Procedure Code.

Authorities reviewed.

Per *Abdur Rahim, Offg. C. J.*—The Court which can postpone execution of a decree under Order XX, rule 11, Civil Procedure Code, is the Court which passed the decree and the section does not define the powers of the executing Court. The power of the executing Court to grant postponement is derived from the language of section 47, which is very wide.

The omission of the words 'stay of execution' in section 47 of the Code of 1908, which were embodied in section 244 of the Code of 1882, was not intended to exclude questions relating to stay of execution from the powers of the executing Court. The language of section 47 is comprehensive enough to include such questions. Under this section, questions relating to execution are not necessarily confined to those arising subsequent to the decree.

Per *Seshagiri Aiyar, J.*—In matters of procedure, the principle of consistency and adherence to established practice will conduce to justice more than a strict adherence to logic. On a question of substantive law, the existence of a course of decisions may not be as effective an answer as in the case of procedural law. In the latter class of cases, litigants should be enabled to rely on a settled practice.

Per *Phillips, J.*—It is very doubtful whether a question relating to the stay of execution of a decree can be said to be a question relating to its execution. The omission of the words 'stay of execution' in section 47, of the Civil Procedure Code of 1908, must have been deliberate and consequently importance should be attached to it.

An agreement for stay of execution made before the passing of a decree which was not brought to the notice of the Court when it passed the decree, is not a question which can be gone into by the executing Court

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for it impeaches the validity of the decree. The decree must be executed as it stands and the executing Court cannot go behind its terms. A further ground for excluding such an agreement from consideration is that the conduct of the parties amounts to an abuse of process of the Court, for they have collusively induced the Court to pass a decree which, according to their agreement, was never to have effect. **M CHIDAMBARAM CHETTIAR v. KRISHNA VATHIYAR**, 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13 836

— O. XXI, R. 10

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— O. XXI, R. 17, SUB-R. (1)—Execution, application for, rejected as not in accordance with law, whether saves limitation 916

— O. XXI, RR. 54 (g), 89, 90, 91, 92, S. 99—*Execution of decree—Sale, order for, without prior attachment—Irregularity—Appeal, sale held during pendency of—Loss or prejudice to party, absence of—Appellate Court, duty of.*

Attachment is only a step to be taken by the executing Court in bringing to sale the property of a judgment-debtor. If such a step is omitted and sale of the property is ordered, the sale can be set aside only if it has resulted in substantial loss to the party and once the sale is confirmed, the objection as to invalidity of attachment can no longer be urged. The absence of attachment is a mere irregularity, which does not affect the jurisdiction of the executing Court to sell immoveable property.

Section 99, Civil Procedure Code, shows the principle to be adopted in appeals. An Appellate Court should not reverse the order of the first Court on a point which is of no importance and which does not affect the merits of the case.

Where a sale has actually taken place and been confirmed during the pendency of an appeal against an order for sale without a subsisting attachment, the Appellate Court should not set aside the sale where no loss or prejudice is shown to have resulted thereby to a party. **M SIVAKOLUNDU PILLAI v. GANAPATHY IYER**, (1917) M. W. N. 89 964

— O. XXI, R. 58

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— O. XXI, RR. 58 to 62—*Operative order—Investigation, however little, sufficient—Second appeal Findings of mixed law and fact.*

The findings that there was no proper investigation of a claim preferred under Order XXI, rule 58, Civil Procedure Code, and that, therefore, no operative order could be passed against the claimant under Order XXI, rule 61, Civil Procedure Code, are findings of mixed law and fact, which can be questioned in second appeal.

An order passed under Order XXI, rules 60 to 63, Civil Procedure Code, is not an operative order only if there has been no investigation whatever under Order XXI, rule 58, Civil Procedure Code, but it is an operative order if there has been some investigation, whether perfunctory or satisfactory. For example, an order passed to the effect that a deed produced by a claimant or objector is not genuine, although it may be open to criticism on the ground that it is based upon the mere examination of the deed, without a fair opportunity of proving it having

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been given to the claimant, is nevertheless an operative order. **O** BAL MAKAND v. MAQSUD ALI, 3 O. L. J. 519; 19 O. C. 357 **92**

— O. XXI, Rr. 60, 61, 62, 63 **887**

— O. XXI, Rr. 62, 63, S. 70—*Rules framed under s. 70, r. 3—Execution—Objections to sale of property—Court, power of, to amend application—Date of application—Construction of document—Decree, interpretation of—Res judicata—Burden of proof—Costs—Mortgagor and mortgagee.*

Objections were taken to the sale of proprietary rights in certain plots in execution of a decree, on the ground that the judgment-debtor had no proprietary title to the plots but simply a right to collect and appropriate their revenue. The Court took action under rule 3 framed by the U. P. Government under section 70, Civil Procedure Code, and notified in

Notification No. ¹⁸⁸⁷₁₋₃₈, dated 7th October 1911,

and referred to in paragraph 181 of the Oudh Civil Digest, Volume I. It considered the objections, without waiting for the result of a petition taking certain objections to the sale that appeared to have in the meantime been sent by one of the objectors to the Local Government, and found that the objections were sound and amended the decree-holder's application so as to confine it to the sale of the right to receive revenue and to omit all reference to full proprietary title:

Held, (1) that the Court was right in not waiting for the result of the petition sent to the Local Government;

(2) that the Court had authority to amend the application under the provisions of the above-mentioned rule 3;

(3) that the date of the application must be taken to be the one on which it had been originally presented to the Court, and not the one on which the Court subsequently amended it, inasmuch as there was no new application, but simply an application made for the whole was reduced to an application for a part.

A mortgagee got a decree on the basis of a mortgage-deed which described the mortgaged property as a "rent-free jagir" in a village. It appeared that the mortgagor held a settlement decree in his favour, which did not clearly describe his rights in the village. But the entries in the revenue papers showed that these rights were confined to the assignment of land revenue, so that he obtained no land in the village except the right to collect a portion of the land revenue from the *zemindars*:

Held, that the mortgagor must be taken to have mortgaged all the rights that he possessed under the settlement decree, and that, therefore, the right to receive land revenue, although not mentioned in the deed as having been mortgaged, was affected by the decree obtained by the mortgagee.

The subsequent mortgagees got a decree for sale of the mortgaged property against the mortgagor alone. Later on the prior mortgagee obtained a similar decree against both the mortgagor and the subsequent mortgagee. In execution of the former

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decree the prior mortgagee applied under section 282, Civil Procedure Code, (1882), [— Order XXI, rule 62, Civil Procedure Code (1908)] for a declaration of his mortgage encumbrance. The Court dismissed the application, holding that the prior mortgage and the decree obtained on its basis did not relate to the same property as was covered by the subsequent mortgage:

Held, that the above finding that the prior and the subsequent mortgages did not include one and the same property, did not operate as *res judicata* between the prior and the subsequent mortgagees, inasmuch as the point was not one that could be decided under the provisions of section 282, Civil Procedure Code (1882) [— Order XXI, rule 62, Civil Procedure Code (1908)]; and that, therefore, the prior mortgagee was under no disability under the provisions of section 283, Civil Procedure Code, (1882), [= Order XXI, rule 63, Civil Procedure Code, (1908)].

The burden of proving that a purchase of the subsequent mortgagee's rights under a decree obtained by him against the mortgagor alone, was made prior to a later decree obtained by the prior mortgagee against both the mortgagor and the subsequent mortgagees, lies on the purchaser asserting that he is not bound by the latter decree.

An objector who impugns the decree-holder's title to the whole property cannot, in case his objections are disallowed, avoid payment of full costs incurred by the decree-holder, on the ground that he claimed only half the property. **O** SARFARAZ HUSAIN v. AMAR CHAND PAL, 3 O. L. J. 529 **78**

— O. XXI, R. 63 **78, 348**

— O. XXI, R. 63—*Evidence Act (I of 1872), ss. 102, 110—Suit, regular, to set aside attachment—Burden of proof—Possession, proof of—Order—Appeal.*

The initial burden of proof in a regular suit under Order XXI, rule 63, Civil Procedure Code, lies on the person who fails to get the attachment removed. On proving possession, however, the burden is shifted on to the person out of possession under section 110 of the Evidence Act and the finding that he has failed to discharge it is not open to appeal. **L B MAUNG PO HNIN v. MA HNYEN** **767**

— O. XXI, R. 66, S. 115—*Civil Procedure Code (Act XIV of 1882), s. 287—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—Execution—Sale proclamation—Value of property to be sold, ascertainment of—Court, duty of—High Court, interference by—Jurisdiction—Administrative act.*

Order XXI, rule 66, of the Civil Procedure Code, 1908, differs from section 287 of the Code of 1882, in that it requires a Court to draw up a proclamation of sale, after notice to the decree-holder and the judgment-debtor.

The action of a Court in settling the terms of a proclamation under Order XXI, rule 66, is a judicial act.

It is the duty of a Court in preparing a proclamation of sale to state as fairly and accurately as possible in the proclamation the value of the property. It is absurd to enter in a proclamation two greatly varying estimates of the value of the property.

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Obiter dictum.—The jurisdiction of a High Court to interfere under section 107 of the Government of India Act, 1915, extends not only to judicial but also to administrative acts of the lower Courts. **PAT RAGHUNATH SINGH v. HAZARI SAHU**, 1 P. L. W. 111; 2 P. L. J. 130 **872**

— O. XXI, R. 66, S. 2—Proclamation of sale—Order fixing upset price—Decree—Appeal **897**

— O. XXI, R. 71, applicability of—Insolvent's estate, sale of, by Receiver—Purchaser failing to deposit one-fourth of purchase-money, liability of—Proceeding, meaning of **830**

— O. XXI, R. 79 **666**

— O. XXI, R. 89 **964**

— O. XXI, R. 89, object of—Auction-sale, application to set aside, by judgment-debtor after transferring property, if maintainable—Transferee of property, right of, to apply to set aside sale.

A judgment-debtor who has transferred his interest in the property to a third person after the Court-sale has still a right to make an application to have the sale set aside under Order XXI, rule 89, of the Civil Procedure Code, 1908, being in the eye of the law the person owning the property.

The object of rule 89 of Order XXI of the Civil Procedure Code, 1908, is not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable property shall not at Court-sales be sold at inadequate prices.

Per *Batchelor, J.*—The change brought about by rule 89 of Order XXI of the Civil Procedure Code, 1908, may be understood as embodying the desire of the Legislature to make it clear that a purchaser acquiring title before the auction-sale is competent to apply under this provision of the law. **B PANDURANG LAXMAN UPHADE v. GOVINDA DADA UPHADE**, 18 Bom. L. R. 571; 40 B. 557 **211**

— O. XXI, R. 90 **964, 827**

— O. XXI, R. 90—Sale without notice to judgment-debtor, validity of—Auction-purchaser, extent of protection to, under irregular sale—Notice, absence of—Burden of proof.

A Court auction-sale held without notice to the judgment-debtor, whose interests are to be directly affected by the sale, is vitiated by such a grave and material irregularity that it is liable to be set aside on that sole ground, unless it is proved that the judgment-debtor had knowledge of the execution proceedings or wilfully kept himself in the background or there are other valid defences to his claim.

A *bona fide* auction-purchaser is protected as against an irregular sale where the decree in execution of which the sale is held, was passed by a Court having jurisdiction, though the decree was vitiated by illegality or was afterwards set aside. But irregularity in the conduct of the sale itself which vitiated it can be urged against the Court auction-purchaser also in proper proceedings by way of application or of suit within the time prescribed by law.

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Where a sale is sought to be set aside for want of notice to the judgment-debtor and that the same was not in fact issued through Court, it is for the Court auction-purchaser to prove that the judgment-debtor was otherwise aware of the sale and to set up appropriate defences. **M TANGUTURI JAGANNADHAM v. SESHAGIRI RAO**, 20 M. L. T. 479 **387**

— O. XXI, Rr. 91, 92 **964**

— O. XXI, R. 93 **763**

— O. XXI, R. 93—Auction sale—Return of purchase-money when allowed.

Under the provisions of the Civil Procedure Code, 1908, it is only when an execution sale has been set aside that the purchase-money can be returned to the purchaser. **A NANNU LAL v. BHAGWAN DAS**, 14 A. L. J. 1216 **9**

— O. XXI, Rr. 98 to 103 Execution sale, purchase at, *benami*—Resistance to certified purchaser by person deriving title from judgment-debtor—Suit for possession by *benami* purchaser, whether lies **497**

— O. XXI, Rr. 99 to 103 **497**

— O. XXII, R. 3—Suit for ejectment and arrears of rent—Death of co-plaintiff—Legal representative, failure to bring, on record—Abatement of suit.

Two brothers, B and N, who were not members of a joint Hindu family, sued for ejectment of defendant from a house and for arrears of rent due from him. During the pendency of the suit B died and his legal representatives were not brought on record within the statutory period.

Held, that inasmuch as the suit could proceed in the absence of B's legal representatives, it abated only in respect of his share, and not in respect of the share of N. **P NIRANJAN NATH v. AFZAL HUSSAIN** **777**

— O. XXII, R. 10 **998**

— O. XXII, R. 11 **414**

— O. XXIII, R. 1 **414, 940**

— O. XXIII, R. 1—Appeal, withdrawal of, without express permission to bring fresh suit—Subsequent suit, whether barred.

In order to satisfy the provisions of Order XXIII, rule 1, the permission given by the Court to bring a fresh suit must be in express terms and cannot be implied.

Plaintiff sued for a declaration that a mortgage executed by the widow of a collateral of his should not affect his reversionary rights. His suit was dismissed, and he appealed to the Divisional Judge. During the pendency of the appeal the widow died, and the plaintiff prayed to be allowed to withdraw the appeal, as he was now entitled to sue for possession. The Divisional Judge granted his request and dismissed the appeal. He brought a suit for possession based on the same allegations as the previous suit.

Held, that the suit was barred by Order XXIII, rule 1, as express permission to bring a fresh suit had not been given in the order dismissing plaintiff's appeal and the claim was based on the same cause of

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action as in the prior suit. **P** JITA SINGH *v.* HARI SINGH, 27 P. R. 1916 128

O. XXIII, Rr. 1, 3, *difference between proceedings under—Withdrawal of suit on compromise—Duty of Court.*

The difference between proceedings under rules 1 and 3, of Order XXIII, of the Civil Procedure Code, lies in the fact that under rule 1 a Court is dealing with the plaintiff only and under rule 3 a Court is dealing with the plaintiff and defendant together, and is considering whether there has been any agreement made between the plaintiff and defendant for an adjustment of the claim. As soon as a suit is instituted and a summons served upon the defendant, the defendant is entitled to claim any costs that he incurs by entering appearance. If by any agreement outside the Court a concession is made by the plaintiff on the one hand with regard to his claim and a concession made by the defendant on the other with regard to his costs, then there are present all the elements of a compromise. **PAT** MUHAMMAD ABDUL GHANI *v.* BALMOKUND SUKUL 421

O. XXIII, R. 1 (2), S. 115—*Court, whether can order withdrawal of suit without permission to institute fresh suit—Revision.*

Where the plaintiff makes an application to withdraw from a suit with liberty to bring a fresh suit and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application and then proceed with the trial of the suit. In such a case it is not competent to the Court to make an order allowing the application for withdrawal without permission to institute a fresh suit on the same cause of action. **C** SURADHANI DEBYA *v.* CHANDRA NATH, 20 C. W. N. 1011 131

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Order XXIII, rule 3, of the Civil Procedure Code read with section 83 of the Probate and Administration Act, do not say that it is competent to the Courts to allow the parties to divide the testator's property without proving the Will. **PAT** JANAK-BATI THAKURAIN *v.* GAJANAND THAKUR, 20 C. W. N. 986; 1 P. L. J. 377; 1 P. L. W. 41 12

O. XXIV, R. 3—Deposit and tender, distinction between 444

O. XXXII, R. 7—*Civil Procedure Code (Act XIV of 1882), s. 462—Compromise for minor by Court of Wards—Leave of Court, whether necessary—Court of Wards Act (IX B. C. of 1879), ss. 18, 57.*

Order XXXII, rule 7, Civil Procedure Code, 1908, or section 462, Civil Procedure Code, 1882, does not apply when a suit is compromised by the Court of Wards on behalf of a minor ward. Such compromise is binding without leave of the Civil Court. **C** NAKYMO DEWANI *v.* JERANG DEWAN 971

O. XXXIII, R. 5 (e)—*Application for leave to sue as pauper—Discretion of Court—"Agreement" and "proposed suit," meaning of.*

An application for leave to sue as a pauper is within the discretion of the Court to grant or reject.

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An agreement, in order to bar an application under Order XXXIII, rule 5 (e), must be one with reference to the subject-matter of the proposed suit, and the word "proposed" indicates that it must have reference to the suit which has been instituted and that the agreement referred to must be a champertous agreement. **A** MANSA PURI *v.* HARRHAGAT PURI 172

O. XXXIV, R. 1—Joint Hindu family—Manager, whether represents other members 833

O. XXXIV, Rr. 2, 3—*Mortgage—Decree for foreclosure—Computation of time for payment—Appellate decree, effect of.*

In a decree for foreclosure the period of time allowed to the mortgagor to redeem runs from the date of the decree of the Court of first instance, unless in an appeal from the decree the Appellate Court enlarges the time.

The Trial Court cannot in the exercise of its discretion under Order XXXIV, rule 3 (2), accept payment after the final decree has been passed. **C** ALI MANUD *v.* MIARISH 779

O. XXXIV, R. 5 (2) 255

O. XXXIV, Rr. 11, 12 343

O. XXXIV, R. 14, S. 47—*Compromise decree—Mortgage—Execution—Mortgaged property, whether can be sold in execution.*

In a suit for recovery of money due on a hand-note a compromise was effected in the following terms:—

"Till the realization of the entire decretal amount with costs and interest, the defendants have given as security the under-mentioned property for which a separate registered bond has been executed. In default of one instalment the petitioner shall be bound to pay the entire amount of the decree with costs and interest, etc. The plaintiffs shall be entitled to realize their dues on all the instalments, firstly, from property given in security and afterwards... from the petitioners' persons and other properties."

A decree was passed in terms of the compromise:

Held, that by virtue of Order XXXIV, rule 1, Civil Procedure Code, the property given in security could not be sold in execution of the consent decree.

PAT GOKUL NATH JHA *v.* PRAN MAL MARWARI, 1 P. L. W. 69 397

O. XXXVIII, Rr. 5 (b), 6 (b)—*Surety, withdrawal of—Order permitting withdrawal without notice to parties, effect of—Rescission of order, legality of—Continuing guarantor, position of.*

A person who stands surety for a judgment-debtor under Order XXXVIII, rule 5 (b), Code of Civil Procedure, cannot withdraw from the guarantee at any time by simply giving notice of his intention not to be a surety any longer.

An order of a Court discharging a surety without notice to the parties can be rescinded on the application of any of the parties.

Obiter.—Where the guarantee is a continuing one the surety may withdraw as to any future transaction, but where a surety has given a guarantee to cover a definite case he cannot simply by a notice to the creditor withdraw the guarantee so as to nullify altogether the effect of the security. **C** ABDUL BARY *v.* BELAYAT ALI 919

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— O. XLI, R. 1, O. XLII, R. 1—*Appeal, right of—Acceptance of benefit under order appealed against—Estoppel—Evidence Act (I of 1872), s. 115.*
When a party has unconditionally accepted and taken advantage of an order, which directs the payment to him of a certain sum of money by the other party, he is precluded from appealing against that order.

A party who has adopted an order of the Court and acted under it cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another.

A suit was dismissed for want of prosecution and on the application of the plaintiff was ordered to be restored to its file, on the plaintiff's paying to the defendants a sum of money towards their costs of and incidental to the application. The defendants accepted the said sum paid by the plaintiff without recording their intention to appeal against the order:

Held, that the defendants, after having accepted the money without protest, were precluded from appealing against the order. **C BANKU CHANDRA BOSE v. MARIUM BEGAM**, 21 C. W. N. 232 **804**

— O. XLI, R. 5, *applicability of—Execution—Application to stay execution, maintainability of.*

The provisions of Order XLI, rule 5, are applicable *mutatis mutandis* to applications on the execution side.

An application made by an appellant to an appeal pending on the execution side in the High Court, asking for an order to restrain the Court of first instance from taking any steps in execution pending the disposal of the appeal, is entertainable under Order XLI, rule 5, of the Civil Procedure Code, 1908. **A BALBIR PRASAD v. KARAN SINGH** **752**

— O. XLI, R. 23—*Preliminary point—Decision on one issue—Remand.*

In a case four issues were framed and the first Court decided an issue and finally disposed of the suit. The lower Appellate Court remanded the suit under Order XLI, rule 23:

Held, that the decision was on a preliminary point within the meaning of Order XLI, rule 23, and the suit was properly remanded. **A KANTA v. PARBHU DAYAL**, 15 A. L. J. 30 **383**

— O. XLI, R. 23—*Remand, order of—Preliminary point* **844**

— O. XLI, R. 25—*High Court, power of, to remit case for trial of fresh issue.*

Even if it be competent to the High Court in second appeal to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, it ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. **P C RAM CHANDRA BHANJ DEO v. SECRETARY OF STATE**, 20 C. W. N. 1245; 20 M. L. T. 235; (1916) 2 M. W. N. 175; 4 L. W. 251; 14 A. L. J. 1009; 18 Bom. L. R. 838; 24 C. L. J. 296; 31 M. L. J. 745; 43 C. 1104 **223**

— O. XLI, R. 27 (b), *interpretation of—Appeal—Evidence, additional, when may be admitted—Court, discretion of.*

Rule 27 (b) of Order XLI of the Civil Procedure Code, 1908, does not mean that in order to enable the

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Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a document. **PAT KALIKA DUTT MANDAR v. TULSI MANDAR**, 1 P. L. J. 435 **1008**

— O. XLI, R. 31—*Judgment of Appellate Court, contents of—Evidence, appreciation of.*

In writing a judgment a Court should not quote the judgment of some other Court nor refer to the opinion of that other Court as its own, but ought to give its own reasons for its finding and to set out in its judgment its appreciation of the evidence which it is bound to consider. **O JAGAN NATH v. BINDESHWARI PRASAD**, 3 O. L. J. 620 **435**

— O. XLI, R. 33—*Appellate Court, power of, to pass decree against co-defendant against whom no appeal has been preferred.*

Under rule 33 of Order XLI of the Civil Procedure Code an Appellate Court has power, in an appeal from a decree passed against one or more co-defendants, to pass a decree against any or all of them. **PAT SURAJNARAIN SINGH v. SUGRA** **842**

— O. XLII, R. 1 **804**

— O. XLIII **348**

— O. XLIII—*Appeal against order refusing documentary evidence, whether lies.*

Obiter dictum.—Order XLIII, Civil Procedure Code, does not contemplate the filing of any appeal against an order refusing or accepting documentary evidence which has been tendered. **O PIYARI v. JAGANNATH KUAR**, 3 O. L. J. 538; 19 O. C. 314 **84**

— O. XLIII, R. 1 (w), O. XLVII, R. 7, O. IX, R. 9—*Execution application, dismissal of, for default—Restoration—Review of restoration order and its cancellation—Subsequent review of order for dismissal for default, whether lies.*

An application for execution of a decree having been dismissed for default, it was, on the application of the decree-holder under Order IX, rule 9, Civil Procedure Code, restored in Execution Petition No. 36 of 1913. In Execution Petition No. 39 of 1913 the judgment-debtors applied for a review of the restoration order on the ground that it was passed without notice to them. The Court granted the review and set aside the order of restoration. The decree-holder then applied in Execution Petition No. 52 of 1913 for review of the original order dismissing the execution petition for default, which was granted:

Held, that Execution Petition No. 52 of 1913 was not in effect for a review of the order in Execution Petition No. 39 of 1913, whose scope could not be enlarged by implication so as to affect the order of dismissal of the original execution petition, which was liable to be reviewed independently. **M KALI SHETTATHI v. SHAMA RAO**, 5 L. W. 124; 21 M. L. T. 257 **229**

O. XLVI, R. 1 **227**

— O. XLVII, R. 4—*Review—Production of new document—Proof, necessity of.*

A party applying for review of judgment on the ground of discovery of a document not produced at

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the trial is required, under rule 4 of Order XLVII, to furnish strict proof of the non-availability of the document at the time of the trial or to satisfy the Court that its non-production was not due to any lack of diligence on his part. **A KARIYA MAHTO KURMI v. RAM SARUP** 399

— O. XLVII, R. 7 229

— SCH. II—Arbitration, reference to, scope of
—Right of arbitrators to rely on custom—Award decreeing allowances on reduction, validity of 271

— SCH. II—Arbitration and award—Award, filing of 140

— SCH. II, PARA. 3, S. 105, O. XII, R. 23—*Arbitration and award—Award made within time fixed by Court but filed beyond it, validity of—Decision on merits, supersession of award, whether affects—Remand, order of—Preliminary point.*

The acceptance or supersession of an award affects the decision on the merits of the case.

There is nothing in the rules in Schedule II of the Civil Procedure Code on arbitration to show that an award would be invalid if not filed on or before the time fixed for the filing of it in Court. All that is required by rule 3 of Schedule II is that the Court must fix a time for the making of the award and an award would be valid if made within the time fixed, though not filed in Court on the date fixed for submitting the award to Court.

A case was referred to arbitration and 19th December was fixed for submitting the award to the Court. On that date the award was not filed, and the Court superseded the reference, and proceeded to hear the case on the merits. The arbitrator signed the award at 7 P. M. on the same day and filed it in Court on 21st December. The Court, nevertheless, decided the case on the evidence. On appeal, the District Judge set aside the decree of the first Court and remanded the case under Order XLI, rule 23, to be tried in accordance with the award:

Held, (1) that the order of supersession of the award was one affecting the merits of the case within the meaning of section 105 of the Civil Procedure Code;

(2) that inasmuch as no particular hour was fixed by the Court for making the award, it must be taken to have been made within the time fixed by the Court, notwithstanding that it was made after the rising of the Court;

(3) that the action of the Court in superseding the award amounted to a decision on a preliminary point within the meaning of rule 23 of Order XLI of the Civil Procedure Code and the order of remand by the District Judge was, therefore, correctly made. **PAT RADHA KANTA MISSEER v. JALADHAR JHA** 844

— SCH. II, PARA. 15—*Arbitration—Award—Arbitrators, authority of—Evidence, insufficiency of, whether ground for refusing to enforce award.*

Unless otherwise restricted by the order of reference, arbitrators are the final judges of matters of fact and so long as they act within the authority conferred on them, with fairness, the parties are bound by their decision and it is not for a Court to say that in its opinion the evidence was not

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sufficient to establish the conclusion at which the arbitrators arrived. The mere fact that the Judge thought that the arbitrators had not given sufficient weight to the provisions of section 110, Evidence Act, is no ground for refusing to enforce an award.

In order to make out a case for impeaching an award on the ground that witnesses were not examined by the arbitrators, there must be evidence to show that witnesses were distinctly tendered to them. **L B MA SEIN MYA v. SWAMI** 807

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COMPANIES ACT (VII of 1913), S. 38—*Rectification of register—Appeal, conditions precedent to—Purchaser of shares at Court sale, rights of—Transfer of shares—Articles of association—Discretion of Directors—Civil Procedure Code (Act V of 1908), s 100, O. XXI, r. 79.*

The proviso to section 38 of the Indian Companies Act, 1913, should not be confined to the last clause, but must be read as a general reservation imposed on all the clauses of the section.

The conditions precedent to the existence of a right of appeal under section 38 are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue.

An appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in section 100, Civil Procedure Code.

The purchaser of certain shares of a limited Company at a Court sale in execution of a decree against the share-holder is not entitled as of right to have the shares transferred by the Company to his name. The position of a purchaser at a Court sale is neither better nor worse than that of a private purchaser.

Per Batchelor, J.—Whether the sale is made by a private individual or by a Court, it is clear that the thing sold and transferred from the seller to the buyer is merely the property in the shares plus a limited, not an absolute, right to have the transfer registered. The Court never has to sell the absolute right of forcing the Directors to register the purchaser's name.

Per Shah, J.—It does not follow from the provisions of Order XXI, rule 79, Civil Procedure Code, that the Directors are compellable to accept the purchaser as the transferee for otherwise the Company would have the benefit of the shares to itself. **B MANILAL BRIJLAL SHAH v. GORDON SPINNING AND MANUFACTURING Co., LTD.** 18 Bom. L. R. 982; 41 B. 76 666

— S. 171—*Jurisdiction—Suit, maintainability of.*

Where, after a Bank had been ordered by a Court to be wound-up, a person sued both the voluntary and the official liquidators of the Bank for recovery of his pay for his employment by the voluntary liquidators for the period prior to the winding up order:

Held, that section 171 of the Companies Act applied to the case and that the suit could not be entertained.

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without the leave of the Court conducting the liquidation proceedings. **O** JIWAN LAL v. RADHA NATH DASS, 3 O. L. J. 641 427

— Ss. 171, 225—*Suit against company after order of winding-up—Permission—Appellate Court, power of—Suit for declaration of non-liability—Jurisdiction.*

An Appellate Court does not ordinarily interfere with the discretion of a Court in the matter of granting leave to continue an action against a company which is being wound up, but where the order of the lower Court is wholly wrong it will not be sustained.

Persons alleged to be contributories of a company which is being wound up cannot, after the order of winding up, be allowed to have recourse to an action for the purpose of having an adjudication upon their liability to pay calls on their shares. Such a matter is peculiarly within the jurisdiction of the Court conducting the liquidation and cannot be decided by any other Court.

Semble.—An order granting permission to proceed with an action against a company, after the winding-up order has been made, does not amount to a permission to institute the suit. **P** ANRITSAR NATIONAL BANKING CO., LTD. v. MOHAN LAL, 13 P. R. 1917; 29 P. L. R. 1917 701

— S. 225 791

CONSIDERATION, *non-receipt of, plea as to—Bond, recital in, as to receipt of consideration, whether evidence of such receipt.*

Ordinarily where a plaintiff sues for the recovery of money due on a bond and proves the execution of that bond, the onus lies on the executant to establish that he executed the bond without receipt of the consideration money.

The recital in a bond as to receipt of the consideration money is admissible in evidence to prove such receipt. **O** LACHMAN PRASAD v. HARDEO BAKHSH, 3 O. L. J. 473 31

— receipt of—Registration, admission at time of—Presumption—Burden of proof 874

CONSTRUCTION OF DOCUMENT—Ambiguity 870

— Charge or mortgage—Redemption 166

— Conditional sale—Option to repurchase—Mortgage—Test.

The test for determining whether a document is a mortgage or a sale is, whether the relation of creditor and debtor subsists between the parties after execution of the document. If it does, the document is a mortgage. **L** B MA SHWE U v. MAUNG PO LU, 9 BUR. L. T. 177 91

— Intention of parties—Deed fifty years old, interpretation of.

In interpreting a document the intention of the parties must be gathered from the document or from the language of the document viewed in the light of the surrounding circumstances.

A Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be. **A** KALPU RAI v. BENI MADHO SAHU 835

— Kabuliya 847

CONSTRUCTION OF DOCUMENT—cont'd.

— Mortgage-deed, interpretation of—Interest, covenant to pay, on default of payment of instalment 442

— Sale or mortgage—Question of fact or of law 297

— Trust, deed of—Property divided into three lots

— Limitation as to one, whether applicable to others

— Intention—Addition of words, whether permissible.

In construing a deed of trust, whereby certain property belonging jointly to three brothers is divided into three lots and one lot is allotted to each of the brothers and a limitation is provided as to the share of the first deceased brother but not as to the others, the limitation regarding each scheduled share should be read alike and if such a reading necessitates the addition of some words to the deed, it is permissible. **B** PRANJIVANDAS KALIDAS v. SHAMKOREBAI, 18 BOM. L. R. 516 263

— Vested interest, transfer of—Will and gift, deeds of, executed simultaneously—Statement in Will as to revocability of gift, effect of—Estoppel.

Where a document, executed on account of natural love and affection and registered as a non-testamentary document relating to immoveable property, stated that, as the executant was "giving" the property to the person named therein to be enjoyed by the latter as owner after the death of the former and his widow, he agreed not to transfer the property by gift, sale, or mortgage, or encumber or hypothecate it:

Held, that the document transferred a vested interest by gift and was not a devise that could be revoked.

Where a deed of gift and a deed of Will are executed simultaneously, the fact that the executant states in the latter deed that he shall have the power to revoke the former on the occurrence of a certain specified contingency, does not detract from the former deed operating as a deed of gift.

Obiter dictum.—Where in consideration of A's withdrawing all claims to properties transferred to B, A is given some property under a deed executed in his favour, B is estopped from questioning the validity of the deed. **O** DIP NARAIN SINGH v. HARGOBIND SINGH, 3 O. L. J. 525 69

CONTRACT—Contract C. I. F. D./A.—Vendor and purchaser—Shipment of goods—Outbreak of hostilities between Governments of shipper and consignee while goods and shipping documents in transitu—King's Proclamation forbidding commercial intercourse with enemies, effect of—Commercial Intercourse with Enemies Ordinance (VI of 1914)—Tender of bill of lading—Liability of buyer—Vessel seized as prize—Acceptance of bill of exchange after announcement of hostilities—Non-payment at maturity—Subsequent delivery of goods—Liability of buyer to pay bill with interest—Seller negotiating with shipper for passing goods on to buyer—Priority of contract—Effect of War Proclamation—Negotiable Instruments Act (XXI of 1881), ss. 32 43—Contract Act (IX of 1872), s. 56

Ordinarily C. I. F. contracts, under which one of the parties is bound to supply the other with shipping documents, before the latter can be compelled to

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repay him his outlay, are regulated by the provisions of sections 32 and 43 of the Negotiable Instruments Act. The consideration for the acceptance of the bill of exchange under C. I. F. contracts D/A, i. e., acceptance against documents, is, according to law and mercantile usage, no more than the tender of good and valid shipping documents to the buyer, and if the buyer accepts the seller's bill, the matter is finally concluded between the seller and the buyer. Any risk thereafter is the buyer's and he is not entitled to refuse payment on maturity, and if he does, he is liable for overdue interest after that date.

Exceptions have, however, been grafted on this rule by war conditions.

A contract of affreightment entered into in time of peace between the subjects of countries which go to war, while part at least of that contract is executory, is thereby immediately and finally avoided.

Where the bill of exchange and shipping documents are presented to and are accepted by the buyer before the commencement of hostilities, the buyer is bound to pay for them at maturity even though the goods were for a time detained *in transitu* as prize if they are subsequently delivered to him and, if he refuses to pay on maturity, he is liable for overdue interest after that date.

Dubitante.—Where the buyer accepts a bill of lading, but neither the goods nor the shipping documents are delivered to the buyer owing to outbreak of war between the Governments of the parties, it must be held, following *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., Theodor Schneider & Co. v. Burgett and Neusam*, (1915) 2 K. B. 379; 84 L. J. K. B. 1673, that, inasmuch as the bill of lading had become void before it was tendered to the buyer, there was at the time a failure of consideration for the acceptance of the bill and the buyer was not bound to pay at maturity.

Semble.—If the matter were *res integra*, it is difficult to see how, if the shipping documents came into the possession of the buyer as good contracts before the declaration of hostilities, the fact that war broke almost immediately afterwards, would absolve the buyer from his obligation to pay the bill which he had accepted against the shipping documents.

Contracts entered into between subjects of countries which were at peace when the contracts were made, are not necessarily abrogated by the breaking out of hostilities between those countries. The general rule appears to be that unless the contracts are of a very special kind, the effect of war is not to avoid them totally but merely to suspend the remedies of one or other of the parties to them. Such contracts would doubtless remain in abeyance during the continuance of hostilities but upon their ceasing no good reason can be shown why the rights still enforceable should not be duly enforced, the Governments of the parties to such contracts having now re-established all peaceful and normal relations.

There are, however, exceptions to be engrafted upon these general rules. If the contract is of a kind requiring continuous performance of mutual

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duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war, and further suspension of such mutual rights and obligations for an indefinite period going much beyond merely placing the contract in abeyance, the result in the eye of the law would be that the original contract is void, inasmuch as taking it up upon cessation of hostilities would be something more than renewing it, would, in fact, be substituting for it an entirely new contract. A like rule would doubtless be applied to the case of partnerships between subjects of belligerent States.

Looking to the spirit of the King's Proclamation and the Commercial Intercourse with Enemies Ordinance, VI of 1914, the words 'forbidding commercial intercourse with enemy subjects' would mean purchasing goods, wares or merchandise of and from the enemy's country. It does not prohibit every kind of intercourse between the King's subjects and the enemy. The scheme of the Proclamation, especially the preamble, rests on the old Common Law and is intended to prohibit actual trading or the institution and maintenance of commercial relations with the enemy on and after the date of the existence of a state of war. It is doubtful, however, whether merely taking over a suspended contract, the completion of which, if it ever could be completed, could not by any means augment the enemy's wealth or increase his efficiency, would be any contravention of the spirit of the Proclamation. It would be otherwise if, in order to effect the completion of such a contract, it were necessary to do anything to the detriment or diminution of His Britannic Majesty's resources and the corresponding increase of those of the enemy.

In cases where the seller gets the shipping documents from the shipper and the insurance company and has completed all that he is bound to do under a C. I. F. contract by forwarding to the buyer valid and legal bills of lading and a valid and legal insurance, he has done all that he is required to do under the contract and is entitled to claim immediate payment, though he cannot have the documents owing to intervening conditions of space and time which prevent their instant transference to the buyer. The contract between the shipper, the insurance company and the buyer cannot be treated in the first instance, as has been done by the Courts in England, as a contract between the shipper, the insurance company and the seller, so that in the event of its becoming void before the goods reach the seller, the resultant loss would fall on the seller and not on the buyer.

Defendants, a Bombay firm, ordered of the plaintiffs, merchants in Glasgow, certain goods to be delivered at Madras C. I. F. terms. The plaintiffs shipped the goods from a German port through two German ships, *Barenfels* and *Kybfels* on 15th July 1914 and 25th July 1914 respectively. The bill of exchange for the first shipment and other shipping documents were presented to defendants and accepted by them on 31st July 1914. The bill of exchange for the second shipment was presented to and accepted by defendants on 10th November 1914. Both bills were not honoured at maturity. War having

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broken out between England and Germany the Barenfels was seized as a prize during voyage, but was allowed later to continue her voyage and the goods were delivered to defendants at Madras on payment of the first bill. The cargo by the Kybfels was never delivered to defendants. Plaintiffs sued for interest on the first bill from the date of maturity to date of payment and for the amount due on the second bill with interest:

Held, (1) that defendants were liable on the first bill for the overdue interest after maturity;

(2) that as the bill of lading for the second shipment had become a void contract before it was tendered to the defendants, defendants were not liable for the amount of the bill or interest. **B. MARSHALL & Co. v. NAGINCHAND PHULCHAND**, 18 Bom. L. R. 915 644

— — — — — Mercantile custom, plea of, in variation of contract, whether sustainable 271
— — — — —, verbal—*Burden of proof*.

A plaintiff suing upon a contract must establish it conclusively to the satisfaction of the Court. **FAT BALDHARI SINGH v. BASAR ALI KALAL** 967

CONTRACT ACT (IX OF 1872), S. 1 241, 271

— — — — — Ss. 7 (2), 3, 119—*Proposal - Counter-proposal - Silence, when amounts to acceptance - Binding contract, when made - Order for goods - Consignment of larger quantity - Refusal to take delivery - Damages*.

Where acceptance of a proposal is not absolute and unqualified, but is subject to reservations, it amounts to a counter-proposal.

Under sections 3 and 7 (2) of the Contract Act read together, a mere failure to reply to a counter-proposal would not *per se* amount to an acceptance of it.

Quære.—Whether the omission to reply to a counter-proposal which conveyed an intimation that silence would be regarded as an acceptance of it, would amount to an acceptance.

The consignment of a larger quantity of goods than that ordered will not entitle the person ordering to refuse to take delivery of the consignment altogether, when the goods ordered can be easily separated from the quantity consigned.

Defendant wrote to plaintiff on 17th October 1909 to send 15 or 20 bags of areca nuts "at once." Plaintiff replied on 28th October 1909 that he would send the goods "within 15 or 20 days." On 1st December 1909 plaintiff, without waiting for a reply, sent 25 bags of areca nuts, which the defendant refused to accept. In a suit for damages for breach of contract:

Held, that under section 119 of the Contract Act, defendant was not justified in refusing to take delivery as the separation of 5 bags from the main consignment was not attended with risk or trouble.

Held, also, that the plaintiff's letter dated 20th October 1909 was in effect a counter-proposal, the defendant's omission to reply to it did not amount to its acceptance and there was no binding contract between the parties. **M. PERALA KRISHNAYYAR CHETTIAR v. PADMANATHAN CHETTIAR**, 5 L. W. 149; (1917) M. W. N. 91 792

CONTRACT ACT—cont'd.

— — — — — S. 45—*Co-contractees—Suit by one co-contractee for his share of the obligation, maintainability of*.

As a general rule all co-contractees ought to be joined as plaintiffs, but a suit by one co-contractee to enforce his share of the obligation would not be bad if the others are joined as defendants and if there is good reason for not joining them as plaintiffs. **C. BHOSAI v. AMINUDDI**, 21 C. W. N. 371 847

— — — — — S. 55 776

— — — — — S. 56 644

— — — — — S. 56 (2) 761

— — — — — Ss. 62, 63 693

— — — — — S. 65—*Contract, void, when becomes*.

In India a contract becomes void when its performance becomes impossible. **S. SANDAY PATRICK & Co. v. BRITISH INDIA STEAM NAVIGATION CO.**, 10 S. L. R. 100 285

— — — — — S. 69 664

— — — — — Ss. 73, 74—*Contract, breach of—Remedy of party wronged—Non-reservation of right to damages, effect of—Deposit, forfeiture of, effect of, on claim for damages*.

In cases of breach of contract, parties have their right to damages under section 73 of the Indian Contract Act, and unless they expressly contract out of that right, under section 74, they are entitled to such compensation as flows from the breach.

The forfeiture of a deposit for failure to perform a contract is not affected by section 74 of the Act, though in estimating the damages, the amount forfeited may be taken into account and may go towards mitigating the claim. **M. SUBRAMANIAM CHETTIAR v. ARJUNA PERUMAL** 377

— — — — — Ss. 73, 74—*Damages for breach of contract—Travelling expenses—Remoteness*.

Travelling expenses of the seller to the place where a breach of contract occurs, to have the goods re-sold under section 107 of the Contract Act, are too remote and cannot be recovered as damages under section 73 of the Contract Act. **S. KARACHI STEAM ROLLER FLOUR MILLS v. INDO-CONTINENTAL AGENCY**, 10 S. L. R. 118 7

— — — — — S. 74 377

— — — — — S. 74—*Compound interest, stipulation for—Penalty—Compensation in lieu of penalty, award of*.

The addition of the words "or if the contract contains any other stipulation by way of penalty" to section 74 of the Contract Act by the Indian Contract (Amendment) Act of 1899 has considerably enlarged the scope of that section and has the effect of getting rid of all subtle technicalities on the application of the equitable principle regulating the duty of the Court to relieve against penalties.

In contracts stipulating for payment of compound interest in default of payment of interest, there are generally two contracts, one primary and the other subsidiary, and wherever the intention of the parties appears to be that the object of the subsidiary stipulation is to enforce or secure the performance of the primary contract, that subsidiary stipulation will be regarded as a penalty.

CONTRACT ACT—contd.

A provision for payment of interest on interest overdue may be a penalty within the meaning of section 74 of the Contract Act. And it makes no difference in principle whether the interest payable on default is a higher rate of interest or the same rate of interest.

Where the parties stipulated for payment of compound interest at 18 per cent. per annum in default of payment of interest each month, the rate on loans secured by an equitable mortgage of properties being also the same:

Held, that the provision for compound interest was penal and should be relieved against.

Per *Seshagiri Aiyar, J.*—There may be cases where enhanced interest is secured in contemplation of a possible loss or damage; in such cases it would not be penal; but where the object of the stipulation is to secure punctual payment the provision would ordinarily be regarded as penal. **M VENKATARAMIAH PILLAI v. SURAMANIA PILLAI** 799

— Ss. 76, 178—*Certificates of shares, whether 'goods' or 'documents of title' to goods.*

Certificates of shares are neither 'goods' nor 'documents of title' to goods within the meaning of section 178 of the Contract Act.

The definition of 'goods' in section 76 of the Contract Act should not be extended to the term as used in section 178 **C LALIT MOHUN NUNDY v. HARIDAS MUKHERJEE**, 24 C. L. J. 335 707

— Ss. 79, 82, 83, 84—*Contract for sale of goods on C. I. F. terms, passing of property to buyer under.*

Where goods are sold on C. I. F. terms, the property in them passes to the buyer upon their shipment by the seller, and any subsequent damage to them must be borne by the former. **S KARACHI STEAM ROLLER FLOUR MILLS v. INDO-CONTINENTAL AGENCY**, 10 S. L. R. 118 7

— Ss. 82, 83, 84, 107 7

— Ss. 108, 178, scope of—*Estoppel—Holding out—Bona fide purchaser for value.*

Sections 108 and 178 of the Contract Act are enacted for the protection of bona fide purchasers and pledgees and are grounded upon principles of estoppel.

If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of and conferring a good title to it, and such a person does dispose of it, the true owner has no good ground of complaint against the bona fide purchaser for value. **B TEHLILRAM GIRDHARIDAS v. LONGIN D'MELLO**, 18 Bom. L. R. 587 231

— Ss. 118, 1—*Contract for sale of goods—Variation in contract—Goods not according to sample—Rescission for breach—Mercantile custom, plea of, in variation of contract, whether sustainable—Evidence Act (I of 1872), s. 92 proviso 5—Arbitration, reference to, scope of—Right of arbitrators to rely on custom—Award decreeing allowance on reduction, legality of—'Delivery,' physical and constructive—Civil Procedure Code (Act V of 1903), Sch. II.*

In a suit to recover goods contracted to be sold, a mercantile custom contradicting the written contract,

CONTRACT ACT—contd.

which will have the effect of entitling the vendor to require the purchaser to accept that which was not in accordance with the description stipulated for, cannot be pleaded.

Evidence as to custom is, however, admissible provided it is not repugnant to the written contract or inconsistent with its expressed terms.

It is permissible for arbitrators, who are experts in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade, and, if it is within the scope of their reference, to award that the buyer should take the goods found not to be according to sample with a reduction of price.

Where, under the terms of a contract for sale of goods, the buyer is to clear the goods on receipt of a delivery order by the seller, the vendor ceases to be liable after the transmission of the said delivery order and is entitled to interest and godown rent from that date. When the seller in possession holds the goods on account of the buyer, this has the same effect as physical delivery.

Per *Heaton, J.*—Variation from the written contract is inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance. **B RUTTONSEY ROWJI v. BOMBAY UNITED SPINNING AND MANUFACTURING CO., LTD.**, 18 Bom. L. R. 532 271

— S. 119—*Order for goods—Consignment of larger quantity—Refusal to take delivery—Damages.*

The consignment of a larger quantity of goods than that ordered will not entitle the person ordering to refuse to take delivery of the consignment altogether, when the goods ordered can be easily separated from the quantity consigned. **M PERALA KRISHNAYAN CHETTIAR v. PADMANATHAN CHETTIAR**, 5 L. W. 149; (1917) M. W. N. 91 792

— Ss. 128, 137, 140—*Surety, liability of—Rights of creditor—Postponement of surety's liability.*

Sections 128, 137 and 140 of the Indian Contract Act make it clear that a creditor has the right to proceed against a surety without exhausting his remedies against the principal debtor. The last section pre-supposes that the surety can be compelled to pay without the creditor resorting to the principal debtor for payment. **M PARTHASARATHY CHETTI v. YELCHOORI NARAYANA CHETTI**, 5 L. W. 161 401

— S. 130 919

— Ss. 137, 140 401

— S. 178 231, 707

— Ss. 211, 215, 216—*Principal and agent—Agent, right of, to trade on his own account in business of agency without knowledge and consent of his principal—Trade usage inconsistent with Contract Act, validity of—Principal, right of, to repudiate transactions made by agent with himself in contravention of instructions of principal—Proof, quantum of.*

In matters touching the agency, an agent must never place himself in a position where it would be possible that his own interests might stand in opposition to his duty towards his principal.

CONTRACT ACT—concl'd.

Where a commission agent, instructed to sell goods for future delivery 'in the market', purchased them himself under a fictitious name, and on the approach of the due date, being asked to fulfil the contract of sale by purchasing like goods of equal quantity 'from the market', purchased the same from himself under the same fictitious name, and concealed on both occasions the fact of himself being the purchaser and the seller respectively, but on the contrary misrepresented to his principal that the transactions were made with outsiders:

Held, that the concealment being dishonest was clearly disadvantageous to the principal, as the contracts being for future delivery, the agent had still several duties to perform for the principal, which almost necessarily came into conflict with the agent's interests, and that the principal was, therefore, entitled to repudiate the transactions under sections 211 and 215 of the Contract Act.

Where, however, a commission agent having purchased goods for future delivery from an outsider, closed the transaction on the due date by selling the same to himself on the market rate, the latter transaction was held binding on the principal, as the transaction was not disadvantageous to the principal and brought about no conflict of interests between the agent's duty to his principal and his own interests as a purchaser. The agent, however, was held not entitled to any commission on such a transaction.

Obiter dictum.—In India, a trade usage inconsistent with the terms of the Contract Act, *e. g.*, permitting an agent to trade on his own account in the business of the agency without the knowledge and consent of the principal, may be valid but it should be specifically pleaded and strictly proved.

According to the law in England such a usage, even if proved, being both illegal and unreasonable, would not be binding on a principal not proved to have known it and agreed to be bound by it. **S JANKIDAS-BANARSIDAS v. DHUMANMAL**, 10 S. L. R. 86 241

— Ss. 215, 216 241

— S. 241 728

COSTS—Land acquisition cases.

Costs in matters under the Land Acquisition Act should be calculated in the same way as in ordinary suits. **P D. A.-V. COLLEGE MANAGEMENT AND TRUST SOCIETY v SECRETARY OF STATE**, 126 P. R. 196 760

COURT OF WARDS ACT (IX B. C. OF 1879), Ss. 18, 57 971

CRIMINAL PROCEDURE CODE (ACT V OF 1898), Ss. 54, 491—Directions of the nature of habeas corpus—Application to be made to Judge on Original Side of High Court—S. 54, scope of Circumstances justifying arrest "Credible information" and "reasonable suspicion", meaning of—Discretion to be exercised by police officer, delegation of.

An application under section 491, Criminal Procedure Code, is to be made to the High Court in its Ordinary Original Criminal Jurisdiction.

CRIMINAL PROCEDURE CODE—cont'd.

The petitioner, who was the managing agent of a certain Provident Company of Calcutta, was arrested by the Calcutta Police under section 54, Criminal Procedure Code, on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police, Calcutta, in which it was stated that on enquiries into complaints against the Company and their local agent in Bombay it appeared, there being *prima facie* evidence to that effect, that the managing agent and the local agent had committed offences under sections 409 and 420, Indian Penal Code. The letter contained a request to cause the arrest of the petitioner and was forwarded by the District Magistrate with a note that the petitioner might be arrested under section 54, Criminal Procedure Code, and sent to the Magistrate, 1st class, of the District, to be tried by him. It was admitted that the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case:

Held, that the arrest of the petitioner under section 54, Criminal Procedure Code, was not proper.

That section 54, Criminal Procedure Code, gives wide powers to a Police Officer to make an arrest without an order from a Magistrate and without a warrant only in certain circumstances limited by the provisions contained in the section and it is necessary in exercising such large powers to be cautious and circumspect.

The section gives a Police Officer personal authority and involves personal responsibility, and the "reasonable suspicion" and "credible information" must be based upon definite facts which the Police Officer must consider for himself before he acts under the section. He cannot delegate his discretion or take shelter under the belief or judgment of another Police officer.

In the circumstances of the case the High Court under section 491, Criminal Procedure Code, directed the release of the petitioner. **C In the matter of CHARU CHANDRA MAJUMDAR**, 20 C. W. N. 1233; 44 C. 76; 18 Cr. L. J. 73 57

— S. 103—Search of gaming house by Police without *mashir*, legality of—Evidence discovered in illegal search, admissibility of 33

— S. 106—Appellate Court, power of, to order security in affirming conviction—Jurisdiction.

An Appellate Court has power, in affirming a conviction and sentence passed on an accused, to pass an order binding down the accused under section 106 of the Criminal Procedure Code, even though the Court convicting in the first instance was not competent to do so. **PAT BRUCHAN SINGH v. EMPEROR**, 2 P. L. J. 21; 18 Cr. L. J. 115 470

— S. 106—Breach of peace 145

— Ss. 107, 145—Concurrent proceedings—Order under s. 145 after passing order under s. 107—Jurisdiction.

Proceedings under sections 107 and 145, Criminal Procedure Code, may go on concurrently between the same parties.

A Magistrate by reason of having passed an order under section 107, Criminal Procedure Code, does not

• CRIMINAL PROCEDURE CODE—contd.

lose his jurisdiction to make an order under section 145 in proceedings pending before him, though the order may be defective on other grounds. **C** NASIRUDDIN SIRCAR v. GOFURUDDIN MOHAMED, 21 C. W. N. 160; 18 Cr. L. J. 129 **481**

— S. 109 **482**

— S. 110, cl. (f)—Evidence of general repute, whether admissible—Proof.

In order to bring a case within clause (f) of section 110 of the Criminal Procedure Code, it is necessary to prove by definite evidence that the accused is so desperate and dangerous a person as to render his being at large without security hazardous to the community.

Evidence of general repute is not admissible in proceedings taken under that clause. **P** NUR MUHAMMAD v. EMPEROR, 8 P. W. R. 1917 Cr.; 18 Cr. L. J. 119 **471**

— Ss. 145, 107—Concurrent proceedings **481**

— Ss. 145, 146—Disputed land under water—Recent possession, determination of, impossible—Procedure.

Where in a proceeding under section 145, Criminal Procedure Code, the Magistrate finds that none of the parties was in undisturbed possession of the land in dispute within two months preceding the date of the proceeding owing to the land remaining under water, the proper order for him to make is one under section 146, Criminal Procedure Code, and not to make an order in favour of the party who was in possession during the previous year. **C** SATYENDRA NATH v. KRISHNADHAN ADHIKARI, 20 C. W. N. 1014; 18 Cr. L. J. 80 **64**

— Ss. 145, 435, 439—Jurisdiction of Magistrate acting under section 145—Preliminary order—Grounds not recorded, effect of Revision—High Court, non-chartered, revisional powers of **308**

— S. 145, possessory order under, recital of claim in—Admissibility in proof of title **911**

— S. 145, proceedings under—Arbitration, reference to—Magistrate, delegation of duties by—Jurisdiction, excess of, effect of.

Section 145 of the Criminal Procedure Code does not give the Magistrate charged with holding the enquiry under that section the right or power to delegate the duties which have been vested in him to any other person. The procedure laid down by the section does not contemplate that the question as to who was in actual possession should be delegated, even by consent of parties, to arbitrators.

Where there has been excess of jurisdiction, the whole proceeding and the result following from that excess of jurisdiction is a nullity. **PAT** HAMIDUL HAQ v. ATAET HOSSAIN, 1 P. L. W. 81; 2 P. L. J. 86; 18 Cr. L. J. 145 **513**

— S. 145—Rent of land, dispute as to—Dispute, whether should be between rival claimants—Jurisdiction.

A dispute as to the right to collect rent is a right concerning "tangible immovable property or land" within the meaning of section 145 of the Code of Criminal Procedure.

To take action under the section it is not necessary that the apprehended breach of the peace should be between the rival claimants.

CRIMINAL PROCEDURE CODE—contd.

The grounds of a Magistrate's belief need not be set out *seriatim* in the notice issued to parties under the section. It is enough if the Magistrate states in his order that he believes the statement of the petitioner which contains such grounds. **M** In re MEDAI DHALAVOY TIRUMALAYAPPA MUDALIAR, 18 Cr. L. J. 156 **524**

— S. 147—Dispute concerning right to collect tolas from hat, whether falls within the section.

The words "concerning the right of use of any land or water" in section 147, Criminal Procedure Code, are wide enough to include the right to go upon a hat for the purpose of collecting gratuities; therefore, a dispute concerning the right to collect tolas (gratuities) from a hat falls within the purview of the section. **C** SARAT CHANDRA MADAK v. MOBARAK MALLIK, 24 C. L. J. 47; 21 C. W. N. 439; 18 Cr. L. J. 113 **465**

— S. 162 **314**

— S. 177 **487**

— Ss. 185, 527—Construction and scope of sections—Jurisdiction—Form of order—Penal Code (Act XLV of 1860), ss. 409, 420.

Per Curiam (Woodroffe, J., dissenting).—Section 185, Criminal Procedure Code, is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but includes cases in which the doubt arises as to the suitability of one Court as compared with another (by which the offence shall be enquired into or tried), from the point of view of convenience or expediency.

Per Sanderson, C. J. and Newbould, J.—The jurisdiction under section 185 should be exercised sparingly by a High Court, when proceedings against an accused residing within the local limits of the Criminal Appellate jurisdiction of that Court have been instituted in a Court of competent jurisdiction subordinate to another High Court.

Per Woodroffe, J.—The "doubt" referred to in section 185 is a doubt as to the competency or jurisdiction of a Court and does not include a doubt whether one or another Court should enquire into or try a case on the ground of convenience or expediency.

Section 185 is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful.

The doubt as to what are the acts which are said to constitute the offence and where they were committed is not the "doubt" which is referred to in section 185, Criminal Procedure Code.

Per Mookerjee, J.—Jurisdiction cannot be conferred by consent of parties where there is an entire absence of jurisdiction.

Scopes of sections 185 and 527 explained.

A narrow construction should not be placed upon section 185.

The High Court has jurisdiction to make an order under section 185 in respect of an enquiry instituted or trial commenced in a Court not subordinate to itself.

Where proceedings against the accused residing within the criminal appellate jurisdiction of the High Court of Calcutta were instituted in respect of alleged offences under sections 409 and 420, Indian Penal Code, in a Court within the Presidency of

CRIMINAL PROCEDURE CODE—contd.

Bombay, on an application by the accused a Full Bench of the Calcutta High Court (*Woodroffe and Neubould, J.*, dissenting), in consideration of the circumstances of the case and the convenience of the parties, made an order under section 185 declaring that the case against the accused should be enquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta.

The form of the order under section 185, Criminal Procedure Code, in such a case laid down. **C** CHARU CHANDRA MAJUMDAR v. EMPEROR, 21 C. W. N. 320; 25 C. L. J. 165; 18 Cr. L. J. 81 **145**

— Ss. 185, 526, 527—Scope of s. 185—Transfer, powers of, of High Court—Conflict of jurisdiction of different High Courts—Transfer from Court subordinate to another High Court—Opinion, expression of, competency of—Practice—Procedure.

Section 185 of the Criminal Procedure Code gives no powers of transfer to the High Court even inferentially. The power to transfer vested in the High Court under the Code is dealt with solely by section 526.

A High Court has no jurisdiction, under section 185, to transfer a case pending in a Court outside its jurisdiction and subject to the superintendence of a different High Court, though it has the power to prevent a Court subordinate to itself from grasping at jurisdiction or trying a case which had better be tried by another Court, whether subordinate to that High Court or not.

The only person who has any jurisdiction to pass orders binding on different High Courts is the Governor-General acting under section 527.

Section 185 cannot be availed of by any High Court even to express a pious opinion that a case pending outside its jurisdiction should be inquired into and tried by a Court subordinate to it.

Per *Sadasiva Aiyar, J.*—Section 185 was intended only to apply to and provide for the following two sets of circumstances: (1) Where two cases 'are pending' in two Courts within the jurisdiction respectively of two separate High Courts on the same set of facts, the High Court within which the offender is found has the deciding voice 'whether the Court within its own jurisdiction' shall or shall not proceed against the accused. If it decides in the affirmative, the outside Court cannot proceed further, as the High Court has full powers to prevent a person who is within its jurisdiction from being taken out of that jurisdiction till the case in its subordinate Court is concluded; (2) Where only one case has been instituted in a Court subordinate to the High Court in whose jurisdiction the offender is, that High Court can decide whether the case should be enquired into and tried by its own subordinate Court or should be tried in a Court within the jurisdiction of some other High Court. **M** MAHOMED GHOUSE v. NATHU VALABHJI, 5 L. W. 349; 18 Cr. L. J. 148 **516**

— S. 195 **487 494**

— Ss. 195, 439, 537—Chief Court, power of, to examine record and pass orders—Sanction, application for—Notice to accused, whether necessary—Sanction granted by successor of Munsif before whom alleged offence committed, whether valid—Misdescription of officer granting sanction effect of.

CRIMINAL PROCEDURE CODE—contd.

Under section 439, Criminal Procedure Code, the Chief Court has full powers to examine the record of a case and pass such orders as may be necessary.

Before granting sanction under section 195 it is advisable to give notice to the accused, although the issue of such a notice is not provided for in the Code.

There is no Court of a Munsif of the 1st class as a permanent Court with a perpetual succession of Judges, and on the transfer of a Munsif from a District, the Court of the Munsif who takes over the pending work is not identical with the Court of the Munsif who has been transferred. Therefore, a Munsif before whom an offence has not been committed cannot grant sanction to prosecute under section 195, merely because he has succeeded a Munsif in that particular place or district.

A misdescription in the order of sanction of the officer granting sanction to prosecute a person does not vitiate the sanction accorded, and section 537, Criminal Procedure Code, covers the irregularity.

Where the officer who granted sanction had a dual capacity, being both a 1st class Munsif and a 1st class Magistrate, and he erroneously described himself as 'Magistrate' when he should have written 'Munsif':

Held, that it was only an irregularity which was cured by section 537, Criminal Procedure Code. **P** MAULA BAKHSH v. LAL CHAND, 23 P. R. 1916 Cr.; 18 Cr. L. J. 121 **473**

— Ss. 195, 109, 439—Sanction—Magistrate exercising jurisdiction in one district, whether can delegate powers to Magistrate in another district—False statements made in ultra vires proceedings—Penal Code (Act XLV of 1860), s. 193.

A Magistrate exercising jurisdiction in one district has no jurisdiction to make an enquiry into the sufficiency of security required under section 109, Criminal Procedure Code, by a Magistrate of another district. Therefore, persons making false statements in the course of such enquiry cannot be prosecuted for perjury under section 195, Criminal Procedure Code.

Obiter.—The inquiry by the former Magistrate would be illegal even if the latter were to authorise it. **P** KHUDA BAKHSH v. EMPEROR, 52 P. W. R. 1916 Cr.; 18 Cr. L. J. 130 **482**

— S. 195—Penal Code (Act XLV of 1860), s. 193—Sanction—Order granting sanction, form of.

An order granting sanction to prosecute for giving false evidence ought to specify the statement alleged to be false. **L B** NG A PO YIN v. EMPEROR, 9 BUR. L. T. 203; 18 Cr. L. J. 98 **306**

— S. 195—Sanction, proper Court to apply to for—Notice—Order granting sanction.

Ordinarily an application for sanction to prosecute for giving false evidence should be made to the Court in which the alleged false evidence was given. When application is made to another Court, it is incumbent on such Court to send notice to the opposite party to show cause.

An order granting sanction to prosecute should show reasons why the sanction is granted. **L B** NG AUNG GYI v. EMPEROR, 9 BUR. L. T. 202; 18 Cr. L. J. 97 **305**

CRIMINAL PROCEDURE CODE—contd.

— — — Ss. 195, 476—*Penal Code (Act XLV of 1860), s. 225B—Sending persons to Magistrate for abetting escape from custody—Omission to make preliminary enquiry—Jurisdiction.*

A Court has no power to accord sanction for prosecution of a person under section 225B, Indian Penal Code, for snatching away a judgment-debtor from the custody of one of its process peons, as section 225B, Indian Penal Code, is not mentioned in section 195, Criminal Procedure Code.

A Court acts without jurisdiction under section 476, Criminal Procedure Code, in sending a person to take his trial, for an alleged offence, without making a preliminary enquiry as to the circumstances constituting the alleged offence. The enquiry may be unnecessary when the Court is already in possession of the material facts from the evidence recorded at the trial, but where the incident constituting the alleged offence took place outside the Court as to which the Judge himself has no knowledge, it is incumbent on the Court to make an enquiry preliminary to passing orders under the section. **C** TARU BABU *v.* EMPEROR, 21 C. W. N. 125; 18 Cr. L. J. 117 **469**

— — — Ss. 195 (6), 439—*Sanction to prosecute—Revision—Delay in applying to High Court, effect of.*

The revisional jurisdiction of the High Court is discretionary and it will not interfere in revision at the instance of applicants who do not shew reasonable diligence in prosecuting their cases. **PAT** AVADH BEHARI MISRA *v.* DWARKA PRASAD SINGH, 1 P. L. J. 165; 18 Cr. L. J. 271 **639**

— — — S. 195, cls. (b), (c)—*Sanction, grant of—Case committed to Sessions Court—Statement before Committing Magistrate, sanction by Sessions Judge in respect of, legality of—'In relation to any proceeding in any Court,' meaning of—Penal Code (Act XLV of 1860), s. 193—Perjury—Contradictory statements, when indictable.*

A Sessions Judge has power to grant sanction for perjury in respect of statements made by a witness before a Committing Magistrate, though appeals do not lie to him from the latter's Court within the meaning of clauses (6) and (7) of section 195, Criminal Procedure Code.

Such statements which are brought to the notice of the Sessions Court trying the case are made in relation to the proceedings of the latter Court within the meaning of section 195 (1) (b), Criminal Procedure Code.

Sanction should not be accorded for prosecution on the ground of contradictory statements, unless there is a direct contradiction, especially when they are immediately corrected and explained. **M** NARAYANA NADAN *v.* PALANIAPPA NADAN, (1917) M. W. N. 141; 18 Cr. L. J. 143 **495**

— — — S. 197—*Sanction to prosecute—Public servant, member of notified area Committee, whether is—Penal Code (Act XLV of 1860), ss. 323, 504.*

All members of notified area Committees are not public servants within the meaning of section 197 of the Criminal Procedure Code. **P** NATHU KHAN *v.* MUHAMMAD BAKSH, 48 P. W. R. 1916 Cr.; 18 Cr. L. J. 106 **514**

CRIMINAL PROCEDURE CODE—contd.

— — — Ss. 202, 203—*Complaint, delay in passing orders on—Magistrate, duty of.*

Orders should be passed expeditiously by Magistrates on complaints presented to them. It is, in the highest degree, improper to delay orders for months. **A** SALIMULLAH *v.* BIRJHAN SINGH, 18 Cr. L. J. 271 **639**

— — — S. 203 **639**

— — — Ss. 221 (7), 537—*Charge, omission to set forth previous conviction in—Irregularity, whether curable—Form to be used.*

Magistrates should be careful to comply with the provisions of section 221 (7), Criminal Procedure Code. An omission to do so is an irregularity curable by section 537, if it has not actually prejudiced the accused.

Where it is intended to prove a previous conviction against an accused for the purpose of affecting the punishment which a Court is competent to award, Criminal Form 79 should invariably be used. **L B** NGA HUA *v.* EMPEROR, 8 L. B. R. 461; 18 Cr. L. J. 79 **63**

— — — S. 233—*Penal Code (Act XLV of 1860), ss. 457, 411—Joint trial—Conviction of some accused under ss. 457 and of others under 411, legality of.*

In one and the same trial there cannot be convictions against some accused under section 457 and against others under section 411 of the Penal Code. **P** MUHAMMAD *v.* EMPEROR, 49 P. W. R. 1916 Cr.; 18 Cr. L. J. 112 **320**

— — — S. 247, *whether applies, when complainant is absent from Court to which his case is transferred.*

Section 247 of the Criminal Procedure Code does not apply where the complainant is present in Court with his witnesses on the date fixed for trial, but being unaware that his case has been transferred to another Court fails to appear in that Court when the case is called on for hearing later on in the day. **C** ETIM HAJI *v.* HAMID, 24 C. L. J. 444; 18 Cr. L. J. 104 **312**

— — — Ss. 247, 438—*Death of complainant in course of trial—Application by son to continue the case—Acquittal, legality of—High Court—Revision—Practice—Case affecting public tranquillity.*

The complainant having died in the course of the trial, his son applied for permission to continue the proceedings. The Magistrate declined to do so and acquitted the accused, holding that under section 247, Criminal Procedure Code, he had no option but to acquit. On a reference by the District Magistrate, who stated that the matter was one which affected the tranquillity of the district:

Held, (1) that section 247, Criminal Procedure Code, applies primarily to the case of a complainant who is alive but does not appear, and not to the case of a complainant dying before trial, and that the order of acquittal was wrong in law;

(2) that, though it is the settled practice of the High Court not to interfere in revision with acquittals, the order of acquittal in this case which involved the peace of the district should be set aside, especially as the Magistrate had not exercised his discretion but acted on an erroneous view of the law. **RAT** JITAN DUSADH *v.* DOMOO SAHOO, 1 P. L. J. 264; 20 C. W. N. 862; 18 Cr. L. J. 151 **519**

CRIMINAL PROCEDURE CODE—contd.

— Ss. 248, 345—*Withdrawal of complaint, petition of—Compromise—Warrant case—Penal Code (Act XLV of 1860), s. 342—Wrongful confinement.*

The Police submitted a charge-sheet against the accused under section 342, Indian Penal Code. On the day fixed for the hearing of the case the complainant filed a petition in the following terms:

"This case.....by the intervention of arbitrators has been compromised. Hence the petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed and it is prayed that the case may be struck off without hearing." The Magistrate examined the complainant and found that there had been no compromise:

Held, (1) that it was the duty of the Magistrate to examine the complainant in order to satisfy himself that the petition was really one of compromise;

(2) that the petition was one of withdrawal under section 248, and not one of compromise under section 345, Criminal Procedure Code, and, therefore, the trial did not come to an end on its presentation.

PAT BAYAN ALI v. EMPEROR, 20 C. W. N. 1209; 1 P. L. W. 21; 18 CR. L. J. 107 **315**

— S. 256, *applicability of, to inquiries into cases triable by Sessions Court—Accused, right of, to cross-examine prosecution witnesses after framing of charge.*

Section 256 of the Criminal Procedure Code provides, in the trial of warrant cases, for the re-call of witnesses for the prosecution for cross-examination, after the charge has been framed. The section does not apply to enquiries into cases triable by the Sessions Court. In such cases the evidence of each witness will ordinarily be concluded as each witness is examined and the accused has no right to have his cross-examination conducted after the charge has been framed. **O BALDEO PRASADA v. EMPEROR**, 19 O. C. 239; 18 CR. L. J. 105 **313**

— Ss. 269, 526—"Trial...shall be by Jury in any district", meaning of—High Court, power of, to transfer a Sessions case from a Jury district to a non-Jury district.

In section 269, Criminal Procedure Code, the words "trial...shall be by Jury in any district" mean that the trial shall be by Jury in any district when so ordered by a Notification and not that the trial shall be by Jury of offences 'committed' in any district.

There being no legal prohibition against the trial being otherwise than by Jury if held in any other district not affected by a Notification under section 269, the High Court has power under section 526 to transfer a Sessions case from a Jury district to a non-Jury district. **S EMPEROR v. JYNO**, 10 S. L. R. 154; 18 CR. L. J. 51 **35**

— S. 341—*Deaf and dumb accused, trial of—Procedure—Conviction.*

The law in England as well as in India with regard to the trial of a deaf and dumb person is that though great caution and diligence are necessary in the trial of such a person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment. **B EMPEROR v. A DEAF & DUMB ACCUSED**, 18 BOM. L. R. 553; 40 B. 698; 18 CR. L. J. 143 **495**

— S. 345

CRIMINAL PROCEDURE CODE—contd.

— S. 350—*Magistrates, Bench of, case tried by—Decision after hearing part of evidence, legality of.*

Section 350, Criminal Procedure Code, does not apply to cases tried by Benches of Magistrates.

There is no provision of law which provides for a change in the constitution of Benches of Magistrates, and, therefore, only those Magistrates who have heard the whole of the evidence in a case can decide the case. **L B ITALIA v. EMPEROR**, 9 BUR. L. T. 203; 8 L. B. R. 463; 18 CR. L. J. 96 **160**

— Ss. 413, 435, 438, *construction of—Appeal, right of, when appealable and non-appealable sentences passed in one judgment—Remedy where conviction set aside on appeal—Reference to High Court.*

Section 413 of the Criminal Procedure Code declares in quite unambiguous terms that in those cases in which a Court passes only a light sentence the convicted person shall have no right of appeal. The words used in the section cannot bear the construction that no appeal lies at the instance of a convicted person, against a judgment in which no other sentence than one not exceeding one month has been passed.

Consequently, where at a joint trial some accused persons are sentenced to appealable sentences and some to non-appealable sentences, the former alone can appeal. This strict interpretation might on occasions lead to apparent injustice, *e. g.*, where on appeal by those having right of appeal, the conviction is set aside. Under the existing practice such injustice can be removed by the procedure of a reference for revision to the High Court under section 435 or 438, Criminal Procedure Code. **S UNAR GOOL v. EMPEROR**, 10 S. L. R. 156; 18 CR. L. J. 72 **56**

— S. 435 **56, 607**

— Ss. 435, 439, 145, *scope of—Revision—High Court, non-chartered, revisional powers of—Jurisdiction of Magistrate acting under s. 145—Preliminary order—Grounds not recorded, effect of.*

Section 439, Criminal Procedure Code, simply sets out the revisional powers of a High Court. It does not purport to qualify, add to, or detract from, any of the provisions of section 435, Criminal Procedure Code, and has to be read along with that section in order to find whether certain proceedings are open to revision by the High Court. The words in section 439, Criminal Procedure Code, "the record of which has been called for by itself", are not used in contradistinction to "which otherwise comes to its knowledge", and these latter words cannot be read so as to have reference to a petition.

The essential requisite to give a Magistrate jurisdiction under section 145 of the Code of Criminal Procedure is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water, or the boundaries thereof, within his jurisdiction.

There is nothing in section 435 (3), Criminal Procedure Code, to prevent a non-chartered High Court interfering in proceedings which purport to be proceedings under Chapter XII, in a case where the Magistrate has initiated those proceedings without jurisdiction to do so.

CRIMINAL PROCEDURE CODE—contd.

The mere mention of an order as being made under section 145, Criminal Procedure Code, will not of itself make that order an order under Chapter XII, Criminal Procedure Code.

But it is to be presumed that the work of a Court is done decently and in order, and if a Magistrate has jurisdiction he can enter the ring-fence of Chapter XII, Criminal Procedure Code, and he cannot be followed nor his procedure examined.

Hence, a non-chartered High Court (which cannot avail of the general powers of superintendence conferred by section 15 of the Indian High Courts Act) cannot entertain an application for revision of proceedings purporting to be under Chapter XII, Criminal Procedure Code, unless such High Court can ascertain without calling for the record of the lower Court, *e. g.*, by copies of the proceedings or by the affidavit of the applicant, that the lower Court initiated those proceedings without jurisdiction to do so, that is to say, that the Magistrate in question was not such as could have exercised jurisdiction in the matter or that there was no information upon which the proceedings could be started.

An omission to record grounds in the preliminary order made by a Magistrate under section 145, Criminal Procedure Code, does not affect his jurisdiction. **O** UDAI BHAN PARTAB SINGH *v.* RAM SANAJH, 3 O. L. J. 546; 19 O. C. 136; 18 Cr. L. J. 100

— S. 438

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— S. 439

56, 519

— Ss. 439, 476—Order by Civil Court under s. 476—Revision.

Section 439 of the Criminal Procedure Code does not confer jurisdiction on the High Court exercising criminal jurisdiction to revise an order made by a District Court under section 476. **L B** KO MAUNG GYI *v.* MA MA, 10 BUR. L. T. 13; 18 Cr. L. J. 121

— Ss. 439—Revision, grounds for—Inferences not warranted by evidence.

Inferences not warranted by the evidence, drawn to the prejudice of the accused, are good grounds for a criminal revision **L B** NGA SHWE KYAW *v.* EMPEROR, 18 Cr. L. J. 116

— S. 439 Revision—High Court, non-chartered, revisional powers of

— S. 476

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— Ss. 476, 177, 195—"Brought to its notice in the course of a judicial proceeding," meaning of—S. 476, scope of—Offence committed in another province—Jurisdiction—Penal Code (Act XLV of 1860), ss. 209, 210.

Per *Chamier, C. J.*—Section 476 of the Code of Criminal Procedure does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated.

Per *Sharfuddin, J.* Section 476, Criminal Procedure Code, is a self-contained section and the reference made to section 195 of the Code is only for the purpose of avoiding the enumeration of the sections mentioned in section 195. The most important element in section 476 is that the offences

CRIMINAL PROCEDURE CODE—contd.

referred to in section 195 should either be committed before the prosecuting Court or brought under its notice in the course of a judicial proceeding, when that Court may proceed as provided by section 476.

If an offence has been committed, no matter where, and if in the course of a judicial proceeding it is brought to the notice of a Court that such an offence has been committed, that Court has jurisdiction to proceed under section 476.

Petitioner instituted a suit at Bilaspur against a resident of Arrah and obtaining a decree, sought to execute it at Arrah by means of a transfer. The judgment-debtor then instituted a suit at Arrah to have the decree of the Bilaspur Court set aside, on the ground that it had been obtained by fraud. The suit was decreed, and petitioner's appeal to the District Judge, Arrah, was dismissed. The District Judge, finding that the petitioner had brought a false suit and had obtained a decree by fraud and by tampering with the service of summonses, etc., directed his prosecution under sections 209, 210, Indian Penal Code:

Held, that the District Judge had jurisdiction to take action against petitioner under section 476, Criminal Procedure Code, as the offences alleged to have been committed by him were brought to the notice of the District Judge in the course of a judicial proceeding. **PAT** RAJKUMAR SINGH *v.* EMPEROR, 1 P. L. J. 296; 18 Cr. L. J. 135

— Ss. 476, 537—Enquiry, order directing—Delay—Jurisdiction—Procedure—Irregularity, effect of—Penal Code (Act XLV of 1860), ss. 182, 211.

Accused lodged a complaint against certain Police Officers before a Magistrate who, after examining the accused, recorded that the complaint was false and ordered the latter to show cause why he should not be prosecuted under section 182, Indian Penal Code. The Magistrate was then transferred and his successor sent the case to another Magistrate for enquiry. Subsequently, on 6th December, the complaint was dismissed under section 203, Criminal Procedure Code. On the 4th of February following, the Magistrate, on the application of a Police Officer, ordered the prosecution of the accused under section 211, Indian Penal Code:

Held, (1) that the delay which occurred in making an order under section 476 did not deprive the Magistrate of jurisdiction to proceed under the section;

(2) that if the procedure adopted by the Magistrate in sending the case to another Magistrate for enquiry and report was irregular, the irregularity was cured under section 537, Criminal Procedure Code.

Per *Atkinson, J.*—If in a criminal proceeding an irregularity takes place and is allowed to pass unheeded and unnoticed, and fresh prosecution follows founded upon the irregularity and conviction follows, then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction. **PAT** BAIJ NATH SINGH *v.* EMPEROR, 1 P. L. J. 553; 18 Cr. L. J. 52

CRIMINAL PROCEDURE CODE—contd.

— S. 476—*Order directing prosecution on result of findings in civil proceeding—Appeal, pendency of, against findings—Stay of criminal proceedings, expediency of.*

Proceedings in a Criminal Court initiated as the result of an order by a Court under section 476, Criminal Procedure Code, should be stayed pending the disposal of an appeal against the order or decree in respect of which the order was passed under the section.

The Court to which the application for stay of proceedings is presented, should not prejudge the appeal by making any declaration as to the correctness or otherwise of the order appealed against to determine whether the prosecution should be postponed or not, but should leave it to the Court which has cognizance of the appeal, staying proceedings meantime. **PAT DEBI MAHTO v. EMPEROR**, 20 C. W. N. 1116; 18 Cr. L. J. 125 477

— Ss. 476, 195—*Prosecution under s. 476, order for—Jurisdiction—Offence 'brought to notice in the course of a judicial proceeding.'*

L. instituted a suit in the Small Cause Court in the District of Darbhanga for recovery of a sum of money against B. and obtained an *ex parte* decree. He got the decree transferred for execution to the Chapra District. B. brought a suit in the Munsif's Court at Chapra to set aside the decree, on the ground of fraud. The Munsif decreed the suit. B. then applied to the Munsif for sanction to prosecute L. The Munsif refused sanction. On appeal the District Judge at Chapra directed the prosecution of L. under section 476 of the Criminal Procedure Code:

Held, that as offences in respect of which sanction was sought under section 195 were brought to the notice of the District Judge at Chapra in the course of a judicial proceeding, he had jurisdiction to direct the prosecution. **PAT LAXMI SINGH v. BAI MOHAN LAL**, 1 P. L. J. 586; 18 Cr. L. J. 142 494

— Ss. 488, 489—*Maintenance—Arrears, execution of order for—Alteration of amount.*

In an application for execution of an order for maintenance for wife and son, a Magistrate can under section 489, Criminal Procedure Code, go into the question whether the son has become able to maintain himself subsequently to the order under section 488 and whether the son was in fact able to maintain himself during the period for which arrears of maintenance are applied for.

Where the original order made no specific allotment for the wife separately, it is not competent for a Magistrate to do so in enforcement of an order under section 489. **L. B. THUMBUSWAMY PILLAY v. MA LONE**, 18 Cr. L. J. 103 311

— S. 489
— S. 491—*Directions of the nature of habeas corpus—Application to be made to Judge on Original Side of High Court.*

An application under section 491, Criminal Procedure Code, is to be made to the High Court in its Ordinary Original Criminal Jurisdiction. **C. CHABU CHANDRA MAJUMDAR**, *In the matter of*, 20 C. W. N. 1233; 18 Cr. L. J. 73 57

— S. 526 516

CRIMINAL PROCEDURE CODE—concl.

— S. 526—*High Court, power of, to transfer Sessions case from Jury district to non-Jury district* 35

— S. 526—*Transfer of criminal case, grounds for—Opinion of Judge on evidence in prior counter-case.*

It is not a sufficient ground for the transfer of a criminal case that the Judge, in a former proceeding arising out of a counter-case, expressed certain views upon the evidence as to which of two versions was correct. Judges must be presumed to be upright men, who will approach a case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. **PAT ANKIT MONDAL v. EMPEROR**, 1 P. L. J. 399; 18 Cr. L. J. 95 159

— S. 527 516

— S. 527, construction and scope of 145

— S. 528—*Transfer of case by Magistrates of co-ordinate jurisdiction—Procedure.*

Where a Magistrate acts on his own initiative in transferring a case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority had refused it; but if he examines the reasons given by the co-ordinate authority and finds that that authority is wrong, his interference must be deemed to be by way of appeal which he has no jurisdiction to entertain, and the order of transfer must be set aside. **M. NARAYANASAMY AIYAR v. KUPPUSAMY AIYAR**, 5 L. W. 372; 18 Cr. L. J. 57 41

— S. 537 473

— S. 537—*Charge, omission to set forth previous conviction in—Irregularity, whether curable—Form to be used* 63

— S. 537—*Irregularity—Objection.*

Per *Atkinson, J.*—If in a criminal proceeding an irregularity takes place and is allowed to pass unheeded and unnoticed, and fresh prosecution follows founded upon the irregularity and conviction follows, then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction. **PAT BALI NATH SINGH v. EMPEROR**, 1 P. L. J. 553; 18 Cr. L. J. 52 36

CUSTOM. See MUHAMMADAN LAW.

—, essentials of.

Custom, in order to prevail against the general law, must be proved to be immemorial, reasonable, certain and continued without interruption since its immemorial origin. **PAT PUNCHA v. BINDESWARI** 960

— ALIENATION—*Gift by sonless proprietor of ancestral land to sister's son in presence of collaterals—Gujars of Jhelum Tahsil—Burden of proof.*

Among *Gujars* of the Jhelum Tahsil a childless proprietor cannot make a valid gift of ancestral property in favour of his sister's son in presence of collaterals.

The burden of proving the validity of such a gift is on the donee. **P. MUHAMMAD ALAM v. MUHAMMAD HAYAT**, 127 P. R. 1916 762

CUSTOM—conclld.

—ALIENATION by male proprietor—Suit by reversioners—Adverse possession—Limitation 412

—KHANADAMADI—Gujars of Gujrat District. Among Gujars of Gujrat District the custom of *khanadamadi* is very prevalent. P AISHAN v. MUHAMMAD DIN, 24 P. R. 1916 119

—PRE-EMPTION—Co-sharer, refusal of, to purchase, effect of—Waiver 511

—SUCCESSION, collateral—Distribution among sons according to number of their mothers, effect of.

In a case governed by custom, where property is distributed among the sons of a person according to the number of their mothers, the descendants of the sons of one of them cannot succeed collaterally to the property left by the descendants of another of them so long as other descendants, though lower in degree, of the same stock are alive.

The effect of such a custom is to constitute brothers by the same father and mother and their descendants persons of one stock for purposes of inheritance, and as a logical result of the custom, persons who are descended from a different mother, though nearer in degree, are not entitled to preference over descendants of the same mother. O LACHHMAN PRASAD v. DURGA PRASAD, 19 O. C. 165; 3 O. L. J. 727 14

—, collateral—Pichhlag son succeeding stepfather without objection, whether acquires right of collateral succession—Adoption—Alienation.

Where the members of a family make no objection to a man's being succeeded by his *pichhlag* son, the latter does not thereby acquire the right to succeed collaterally in the family generally.

In matters of adoption and alienation a *pichhlag* son is in no better position than a stranger. P RAM PARSHAD v. HARNAN, 116 P. L. R. 1916 137

DECKEE, construction of—Decree conditional upon payment of an amount within 30 days of decree becoming final—Payment, validity of, after 30 days but before expiry of time of appeal.

A decree was obtained conditional upon the plaintiff's paying into Court a certain sum of money within "thirty days of the decree becoming final." The plaintiff deposited the money after thirty days but before the expiry of the appeal time:

Held, that the money was paid within 30 days of the decree becoming final. A BHAGELU SAHAI v. RAM AUTRA SHUKUL, 15 A. L. J. 38 144

—, construction of—Order, incorrect—Party, duty of 414

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879), S. 15 (b) (1)—Instalments, payment of, default in—Mortgaged property, sale of portion of—Final decree, whether required—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2).

A holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under section 15 (b) (1) of the Dekkhan Agriculturists' Relief Act is not required to apply under Order XXXIV, rule 5 (2), of the Civil Procedure Code, 1908, to make the decree final before he can apply for sale of the necessary portion of the property under section 65 (b) (2) of the Dekkhan Agriculturists' Relief Act. B KASHINATH VINAYAK BHAVE v. RAMA DAJI KALE, 18 Bom. L. R. 475; 40 B. 492 255

S. 65 (b) (2) 255

DIVORCE ACT (IV of 1869), S. 37—Decree nisi for divorce—Alimony—Wife living with co-respondent—Discretion of Court.

The grant of alimony to a wife against whom the husband has obtained a decree nisi for divorce on the ground of adultery is a matter of discretion.

Where there was no suggestion that the husband's conduct led to the wife's misconduct, and the wife was living with the co-respondent, the Court refused to exercise its discretion. A MCGOWAN, IV. E. v. J. D. MCGOWAN, 14 A. L. J. 786; 38 A. 688 143

—S. 43—Divorce, decree nisi for, in suit by husband—Costs of appeal, wife's right to get from husband—Custody of children of marriage on decree for divorce.

In a proper case, on the application of a wife who prefers an appeal against a decree nisi for divorce, the Appellate Court may, in its discretion, make an order directing the husband to provide for the costs of the wife's appeal.

On making a decree for dissolution of marriage it should be the duty of the Court to look to the interests of the children of the marriage and carefully to weigh the comparative advantages and disadvantages of giving the custody of all or any of them to the one parent or to the other, but no general rule on the subject can be laid down.

Per Mookerjee, J.—The Court, though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children.

The doctrine that the husband who brings a suit for divorce should provide costs to the wife, to enable her to make her defence and to prosecute her appeal when a decree is passed against her, should be very cautiously scrutinised, as such a doctrine is an encroachment upon the ordinary rule that costs follow the event.

In a suit for divorce brought by a husband for the adultery of his wife, the wife did not deny the charge of adultery but pleaded condonation, connivance and collusion on the part of the husband and the Judge, having decided against the defences, made a decree nisi and gave the custody of the children of the marriage, two daughters, aged respectively 10 and 20, to the husband. The wife then preferred an appeal and made an application to the Appellate Court asking that the Court should make an order restraining the husband from sending the two daughters out of the jurisdiction of the Court until the disposal of her appeal and directing him to pay to her Solicitors such sum as might be fixed by the Court for and towards the costs of her appeal:

Held, that under the circumstances of the case it would be wrong to interfere with the discretion which the law vests in the father who is the proper and legitimate guardian of the children, and that the facts of the case were not of such a nature as to justify an order that the husband should make provision for his wife's costs of the appeal. C CROIX, B. A. DE STE. A. CROIX, PHILLIP DE STE, 24 C. L. J. 226; 44 C. 35 216

EJECTMENT, suit for—Plaintiff to prove his title—Burden of proof.

In a suit for ejectment a plaintiff must succeed on the strength of his own title and cannot rely upon the weakness of the defendant's title. **PAT GHASITA SINGH v. BHAGMANI KOER** 924

—, suit for, by tenant against trespasser—Landlord supporting trespasser, effect of.

A tenant is entitled to eject a trespasser from property in possession of the former, and the mere fact that the latter is supported in his defence by the landlord does not give him any right to retain the property as against the tenant. **PAT KARTIC REWANI v. THE CENTRAL KARKEND COAL CO., LTD.,** 1 P. L. J. 430 1004

EMERGENCY LEGISLATION CONTINUANCE ACT (I of 1915), whether ultra vires—Ordinances III and V of 1914—Governor-General-in-Council, power of, to pass Act embodying provisions of Ordinances—Ordinance III of 1914, s. 11, effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act—Indian Councils Act, 1861 (24 & 25 Vict. c. 67), ss. 22, 23.

Under section 23 of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), no Ordinance can have any force of law for more than six months from its promulgation, but the power of the Governor-General-in-Council to pass an Act embodying the provisions of an Ordinance is in no matter controlled or taken away by that section. The Governor-General-in-Council has power to pass an Act like the Emergency Legislation Continuance Act (I of 1915) which embodies the provisions of Ordinances 3 and 5 of 1914:

Held (as to the contention that inasmuch as section 11 of Ordinance No. III of 1914 which is embodied in the Emergency Legislation Continuance Act of 1915 seeks to oust the jurisdiction of the Courts, it offends against section 22 of the Indian Councils Act, 1861), that the Emergency Legislation Continuance Act of 1915 is not *ultra vires* of the Governor-General-in-Council and the High Court has not power to call in question orders passed thereunder. It is for the Governor-General-in-Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them.

In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests no intention that the first shall continue repealed, the repeal of the second Act revives the first, does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them. The same principle or rule of law applies to this country. Section 3 of the General Clauses Act (I of 1868) expressly provided that for the purpose of reviving either wholly or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose, and the same is the effect of sections 6 and 7 of the General Clauses Act (X of 1897). **C. JEWANATHOO, In the matter of,** 20 G. W. N. 1827 48

ESTOPPEL—Holding out—Bona fide purchaser for value 231

—, whether can validate invalid transfer.

Where a transfer is contrary to public policy, neither party can make it legal by creating estoppel. **PAT PUNCHA v. BINDESWARI** 960

—Will and gift, deeds of, executed simultaneously—Statement in Will as to revocability of gift, effect of 69

EVIDENCE—Batwara papers, admissibility of 895

—Batwara papers, admissibility of—Ejectment, suit for.

Batwara papers are not admissible in evidence against persons who were not parties to the batwara proceedings. **PAT KUDRA NARAIN SINGH v. RAMESHWAR SINGH** 829

—Kabuliyat, when and against whom admissible.

Where there is a *kabuliyat* but no lease, the executant of the *kabuliyat* cannot utilise the contents of that document against the owner of the land for his own benefit. But the owner of the land can utilise the contents of the *kabuliyat* to prove what the executant of the *kabuliyat* has undertaken to do. **A. BIJAI NARAIN SINGH v. PARBHU NARAIN SINGH** 395

—Local inspection—Remarks by presiding officer, value of.

Where in a case before a Court the presiding officer makes a local inspection and puts on the record some remarks about his observations, they cannot be considered as evidence in the case. **O. HEARSEY v. KARAM SINGH,** 3 O. L. J. 59; 19 O. C. 374 115

EVIDENCE ACT (I of 1872)—Estoppel—Appeal—Acceptance of benefit under order appealed against 804

—Ss. 13, 35, 67—Criminal Procedure Code (Act V of 1898), s. 143, possessory order under, recital of claim in—Admissibility in proof of title.

Recitals of the claims of parties contained in possessory orders passed under section 143 of the Criminal Procedure Code, whether *inter partes* or not, are not admissible in evidence to prove title under section 13 of the Evidence Act or on general principles.

Neither are they admissible under section 63 as an account of the contents of a document, not being oral, nor as entries in a public record under section 35. **C. RAM SUNDER GOPE SIKDAR v. HARIBALA DHURI** 911

—Ss. 21, 31—Admissions as to non-existing right, value of—Title.

A mere admission cannot create a title which was non-existent, though it would have been binding upon the person making it if the title admitted had really existed. **C. HARI MOHAN PAL v. KAILASH CHANDRA DHUR** 983

—Ss. 24, 25, 26, 27—Criminal Procedure Code (Act V of 1898), s. 162—Incriminating statements to Police officers and Headman, admissibility of—Statement of one accused against another.

Incriminating statements made to a Police officer while in custody are inadmissible in evidence.

EVIDENCE ACT—contd.

Sections 25 and 26 of the Evidence Act preclude admission of a statement by one accused against another and also of a confirming statement by another accused in reply to questions put by Police Constables in the Headman's presence.

An inculpatory statement by an accused to a Headman, in consequence of the latter telling him it was better he spoke the truth because if the other side called witnesses, the truth against him would come out, is inadmissible under section 24. **L B ZERA v. EMPEROR** 314

— Ss. 24, 25, 28—'Person in authority', meaning of—Zemindar, whether is 'person in authority.'

Section 24 of the Evidence Act refers not to a person whom the accused may regard as being in authority but to a person who actually is in authority.

The main test as to when a person is deemed to be a 'person in authority' within the meaning of the section is, whether he stands in such relations to the accused as imply some power of control or interference in regard to his prosecution.

Zemindars qua zemindars are not necessarily 'persons in authority'. The question must be decided in each case upon its particular circumstances; but whenever *zemindars* are directly concerned in an investigation by the direction of the Police then they clearly are 'persons in authority' within the meaning of section 24 of the Evidence Act.

Co-villagers of an accused person cannot be regarded as 'persons in authority' from the mere fact of their being the principal residents of the village. **S LOUNG v. EMPEROR**, 10 S. L. R. 140 42

— S. 25 42, 314

— Ss. 26, 27 314

— S. 28 42

— S. 31 983

— S. 32—Account books, entries in, admissibility of.

Entries in an account book are inadmissible in evidence under section 32 of the Evidence Act, if it is not proved that the person who made them is dead.

Semble.—Entries of payments of money made through named persons in an account book kept by a deceased servant in the ordinary course of his business are admissible in evidence to prove the payments under section 32 of the Evidence Act; but persons through whom the payments were made must be called to prove that the payments were in fact made. **PAT SEW PRASAD v. RADHA MOHAN SAHAY** 877

— S. 32 (2) 424

— S. 32 (5)—Pedigree—Admissibility in evidence—Settlement, genealogical table put in at time of, value of.

Some papers were put in at the time of the settlement of a village. The first of them was a genealogical table. At the end of the papers were the names of some of the persons whose names appeared in the said table. None of them affixed their signatures. It was stated that the village *patwari* signed on behalf of the majority and that certain other persons signed on behalf of the remainder. The Settlement Officer in charge affixed at the end a statement that the owners of the village had verified the correctness of the statements. This verification took place after

EVIDENCE ACT—contd.

the *khewat* of the village had been prepared, so that the entries in the genealogical table could not be deemed to have been utilised in any way for the preparation of the *khewat*. It was not clear whether the attached names were placed at the end of the papers to record acceptance of the correctness of all or of only the last of the papers. Nor was this fact made clear by the Settlement Officer's order recording the verification:

Held, that under the above circumstances the genealogical table was not admissible in evidence. **O KASHI SINGH v. RAM NARAIN**, 3 O. L. J. 560; 19 O. C. 321 138

— S. 35 911

— S. 65 (a)—Secondary evidence—Original document in possession of defendant.

Semble.—Where an original document is in the possession of the defendant who knows from the plaint that he would be required to produce it but does not produce it, and the plaintiff's evidence that he searched for it remains uncontradicted, the latter is entitled to give secondary evidence of the contents of the document under section 65 (a) of the Evidence Act. **A MUHAMMAD KAMIL v. HABIBULLAH** 794

— S. 67 911

— S. 91—Evidence of payment of money—Proof.

Obiter dictum.—Where a receipt for earnest-money is not admissible in evidence, payment of the amount can be proved *aliunde* by virtue of section 91 of the Evidence Act. **P CHUTTAN LAL v. MUL CHAND**, 18 P. R. 1917 822

— S. 91—Oral evidence to prove payment of earnest-money, admissibility of 132

— S. 92—Landlord and tenant—Covenant in *kabuliyat* on assurance by landlord that it would not be enforced, whether binding.

Semble.—The enumeration in the first proviso to section 92 of the Evidence Act of the circumstances which may invalidate a document or entitle a person to a decree or order relating thereto is not exhaustive. **C NADIR CHAND SANA v. BIRENDRA NATH DUTT**, 20 C. W. N. 1067 126

— S. 92—Mortgage-deed, separate arrangement in contravention of terms of, whether can be proved.

In view of section 92 of the Evidence Act, proof of a separate arrangement in direct contravention of the terms of a mortgage-deed is inadmissible. **O MUHAMMAD HUSSAIN v. MUHAMMAD ASGHAR**, 3 O. L. J. 462; 19 O. C. 328 23

— S. 102 767

— S. 106—Matters within the special knowledge of a party.

In order to lay the burden of proving a particular matter on a party on the ground that he has special knowledge thereof, it must be shown that the knowledge is in the nature of something peculiar. **PAT LACHMI NARAIN MARWARI v. CHAITEMAN OF THE RANCHI MUNICIPALITY**, 1 P. L. J. 168 269

— S. 110 767

EVIDENCE ACT—concl'd.

— S. 114, ILL. (g)—*Defendant, failure of, to produce account-books, effect of.*

Where the plaintiff has failed to prove his case, the omission by the defendant to produce his account-books does not give rise to a presumption that, if produced, they would have lent support to the plaintiff's case. **PAT BALDHARI SINGH v. BASAR ALI KALAI** 967

— S. 115 825

— S. 123—*Complaint on oath forming basis of warrant, right of accused to inspection of.*

Non-production by a Court of the complaint on oath which forms the foundation of a warrant issued under section 6, is not improper, if the object of the production is to ascertain merely the name of the informer.

Per *Fawcett, A. J. C.*—The Court should decline to sanction any step which would in practice almost necessarily result in the disclosure of the name of the informer, contrary to the provisions of section 123 of the Evidence Act. **S BAGHUMAL WADHUMAL v. EMPEROR**, 10 S. L. R. 134; 18 CR. L. J. 70 54

— S. 125 54

— Ss. 157, 159, 32 (2) — *Chaukidar's diary, entries of births and deaths in, made by third persons at the request of chaukidar, admissibility of.*

A *chaukidar* who was an illiterate person got other people to make entries in his diary for him relating to the birth and death of a certain person. The persons who made these entries were called at the trial and deposed that they had made the entries at the request of the *chaukidar*. The *chaukidar* was dead at the time of the trial.

Held, that the entries were not admissible in evidence under section 32 (2) but were admissible under section 157 and possibly also under section 159 of the Evidence Act. **PAT NAINA KOER v. GOBARDHAN SINGH**, 2 P. L. J. 42 424

— S. 159 424

EXECUTION—*Consent decree—Ambiguity—Court, power of, to look into petition of compromise.*

An executing Court can go behind a consent decree and look at the terms of the compromise in accordance with which the decree was passed, in order properly to understand what the decree was. **C JOYANUDDIN KHAN v. JAMIRUDDIN SARKAR** 916

— *Decree, splitting up of—Acceptance of portions of decretal debt from different judgment-debtors.*

The acceptance by a decree-holder of sums tendered by different judgment-debtors under the same decree from time to time with an undertaking not to proceed with execution against those judgment-debtors, without, however, releasing them from liability under the decree, does not split up the decree so as to make the decree-holder bound to pursue his remedy against each judgment-debtor only to the extent of his separated liability. **C JOGENDRA PRASAD MITRA v. ASUTOSH GOSWAMI**, 24 C. L. J. 462 738

— *Instalment decree—Default—Option of decree-holder to claim execution of whole amount.*

When, under a decree payable by instalments the whole decretal amount becomes due on default in

EXECUTION—concl'd.

the payment of one instalment, the decree-holder has not the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments. **C JOYANUDDIN KHAN v. JAMIRUDDIN SARKAR** 916

— *Sale proclamation—Value of property to be sold, ascertainment of—Court, duty of* 872

— *Uncertified payment, power of executing Court to recognise.*

It is not competent to an execution Court to allow credit for uncertified payments even where the omission on the part of the decree-holder to give credit for them amounts to an act of fraud. **C JOGENDRA PRASAD MITRA v. ASUTOSH GOSWAMI**, 24 C. L. J. 462 738

— PROCEEDINGS—*Connected suits for partition, decrees in—Identity of subject-matter and parties—Execution application, dismissal of, on ground that relief was granted on previous application in connected suit—Subsequent application for division of specific omitted properties—Patent mistake of Court, effect of—Res judicata* 354

EXPLOSIVES ACT (IV of 1884), *rules under—Clove-crackers, possession of, without license, whether legal—“Toy fire-works.”*

Clove-crackers or *lavangi-crackers* are “toy fire-works” within the meaning of rule 3 issued under the Explosives Act and are, therefore, exempt from rule 35 imposing the necessity of a license for possessing them. **B EMPEROR v. RACHAPA GURAPPA HATTARVAT**, 18 BOM. L. R. 556 491

GANJAM AND VIZAGAPATAM AGENCY RULES, RR. 10 (4), 18, 20—*Review of order passed ex parte—Jurisdiction of Governor's Agent—Civil Procedure Code (Act V of 1908), s. 151—Order passed without notice—Remedy of party aggrieved.*

Every litigant is entitled to be heard before an order is made to be his prejudice, and the proper remedy of a party, against whom an order has been made without hearing him is to apply to the same authority for a re-hearing.

Apart from the provisions of section 151 of the Code of Civil Procedure, a Court has an inherent power to rectify any inadvertent mistakes made by it and when a party can have a mistake corrected by the Court which made the mistakes, he should adopt that course rather than resort to the Appellate Court.

Where the Agent to the Governor, Vizagapatam, set aside, after hearing the parties, an *ex parte* order previously made by himself without notice to the parties and without hearing them, and passed a final order correcting the mistake:

Held, that though the Agency Rules did not in express terms invest the Agent with the power to review his own order, the Agent had inherent power to rectify a mistake committed by him without hearing the parties and the High Court would not, on technical grounds, interfere with a decision that was correct on the merits. **M RAGHUNADA DOSS v. MAHARAJA OF JEYPORE**, 31 M. L. J. 319; (1916) 2 M. W. N. 208; 4 L. W. 240 385

— RR. 18, 20 385

GAYA MUNICIPAL RULES, R. 1, whether *ultra vires* 854

GENERAL CLAUSES ACT (X OF 1897, S. 6—'Right' or 'privilege' 292

GIFT—Will—Deeds executed simultaneously—Statement in Will as to revocability of gift, effect of 69

GOVERNMENT OF INDIA ACT (5 & 6 GEO. V, C. 61), S. 65 575

— S. 106 607

— S. 107 129, 607

— S. 107—High Court, power of interference of—Judicial and administrative acts.

Obiter dictum.—The jurisdiction of a High Court to interfere under section 107 of the Government of India Act, 1915, extends not only to judicial but also to administrative acts of the lower Courts. **PAT RAGHUNATH SINGH v. HAZARI SAHU**, 1 P. L. W. 111; 2 P. L. J. 130 872

— S. 107—"Superintendence," meaning of.

Per *Atkinson, J.*—The 'general superintendence' vested in the High Court under section 107 of the Government of India Act applies only to cases where a subordinate officer, be he a Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. When a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an enquiry, the High Court will not interfere under the Statute unless he has grossly abused his powers. **PAT JANAK KISORE, In the matter of**, 1 P. L. J. 576 484

GOVERNOR-GENERAL-IN-COUNCIL, power of, to pass Act embodying provisions of Ordinances—Ordinance III of 1914, s. 11, effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act 48

GUARDIANS AND WARDS ACT (VIII OF 1890)—Father not having care or custody of son, remedy of—Suit, maintainability of—District Court, jurisdiction of.

A father who has never had the care or custody of his infant child can file a regular suit for the custody of his son, but cannot successfully call upon a Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over to the father.

The dictum of the Privy Council in *Mrs. Annie Besant v. Narayaniah*, 24 Ind. Cas. 290; 16 Bom. L. R. 625; 18 O. W. N. 1089; 27 M. L. J. 30; (1914) M. W. N. 585; 16 M. L. T. 165; 20 O. L. J. 253; 12 A. L. J. 1155; 1 L. W. 520; 88 M. 807, to the effect that a suit *inter partes* is not the proper proceeding is not intended to be of such general application as virtually to overrule the decision in *Sharifa v. Mune Khan*, 25 B. 574; 3 Bom. L. R. 167.

The jurisdiction of the District Court in the matter of minors is defined by the Guardians and Wards Act and it has no inherent power to make orders with reference to minors which are not expressly conferred upon it by that Act. **B. ACHRATLAL JEKISENDAS v. CHIMANTAL PARBHUDAS**, 18 Bom. L. R. 582; 40 B. 600 215

— Ss. 7, 34—Guardian, conditional appointment of, when takes effect—Interim acts of natural guardian, validity of

Where a guardian is appointed under the Guardians and Wards Act unconditionally the order takes effect at once, although under section 34 of the Guardians

GUARDIANS AND WARDS ACT—concl'd.

and Wards Act he may be required to furnish security subsequently; but where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished.

There is nothing in section 34 of the Guardians and Wards Act taking away the general power possessed by the Court of imposing conditions upon persons who are appointed guardians, and any rule which makes the appointment of a guardian to take effect only on furnishing security is not *ultra vires*.

Where a guardian is appointed conditionally on his furnishing security, all *bona fide* acts done by the natural guardian of the minor before the security is actually furnished by the Court's nominee are valid.

WM. SUBBA NAIK v. RAMA AIYAR, 5 L. W. 261 892

— Ss. 27, 32—Minor—Guardian, appointment of—Trust—Mutawalli, minor entitled to be appointed—Court, power of.

A guardian of the property of a minor interested in a trust can be appointed in respect of his interest under the trust, in order that the interest may be protected and the benefits thereof secured for the minor.

Where under the terms of a trust deed the *mutawalli*-ship devolves upon a minor in respect of whom a guardianship application is made, the District Judge is entitled to pass orders for the performance of the duties of the *mutawalli* pending either the coming of age of the minor or the institution of a regular suit by some person or persons interested in the endowment to contest the arrangement made by him. **A. KHATUN BEGAM v. EJAZ AHMAD**, 15 A. L. J. 132 885

— S. 30—Mortgage by certificated guardian without Court's sanction—Minor's right to avoid—Burden of proof—Interest on mortgage of minor's property.

A mortgage of a minor's property executed by his certificated guardian without sanction by the District Judge can be avoided by the minor only on restoration of the benefit actually received by him under the transaction. But it is for the mortgagee to show to what extent the money raised by the mortgage was applied for the benefit of the minor's estate.

Where in a mortgage-bond executed by a certificated guardian of a minor the rate of interest was Rs. 7-8-0 with annual rests, which rate was not sanctioned by the Court nor placed before it:

Held, that the mortgagee should not get more than 12 per cent simple interest. **C. MANSARAM DAS v. AH-MAD HOSAIN**, 21 C. W. N. 63 880

— S. 32 885

— S. 34 892

HIGH COURTS ACT, 1861, (24 & 25 VIC., C. 104), Ss. 8, 9, 11, 15 699

HIGHWAYS, public—Dedication to class, legality of—Right of user by any member of public—Procession, obstruction to—Cause of action—Burden of proof—Pleadings—Civil Procedure Code (Act V of 1908), O. I, r. 8—Specific Relief Act (I of 1877), s. 42.

Public highways cannot be dedicated to a class or to a limited section of the public and such dedication is no dedication at all.

HIGHWAYS—concl'd.

All other rights over other persons' property are private, whether they belong to a class or to an individual and whether they arise by grant, license, easement, customary right or any other origin.

It is settled law in India that every member or class of the public is entitled to use a public highway for conducting a religious or ceremonial procession without interference by any other member or class.

Even if there is no evidence of user for the particular purpose by the persons claiming the right, the right so to use them at any time is legally vested in them.

Where the ownership of a road is unknown, dedication of it to the public will be presumed from proof of its user by the public.

Semble.—Mere obstruction to a procession without proof of loss of property or personal injury may give rise to a cause of action.

But the obstruction must be specifically alleged in the plaint, and where it is found against, the suit is liable to be dismissed. A plaintiff cannot be allowed to prosecute his claim on the ground of a denial of his right by the defendant, which was not averred in the plaint. **M. SUBBAYA NADAN v. AIVAVOO REDDI**, (1917) M. W. N. 70 **977**

HINDU LAW, applicability of—'Hindu', who is.

In order that Hindu Law should apply to a person it is not necessary that he should have been born a Hindu.

The word 'Hindu' in section 13 of the Burma Laws Act bears the same meaning as it does in section 331 of the Succession Act and section 2 of the Probate and Administration Act and does not necessarily mean an orthodox Hindu or one who is a member of one of the four castes.

Hindu Law is applicable to a Hindu until he definitely renounces or abandons his religion.

Per *Ormond, J.*—Where an enactment speaks only of the three communities, viz, Hindu, Muhammadan and Buddhist, it is intended to embrace all communities which have a religion which is an offshoot of any one of those three religions. Thus the term "Hindu" includes all who are called Hindus in common parlance.

Per *Twomey, J.*—It is not within the province of Civil Courts to determine questions of orthodoxy.

In order to determine whether a certain person is a Hindu, it is immaterial whether he is recognised as a Hindu by the orthodox caste Hindus, the only question being whether he himself adheres to some form of Brahminical worship and belief.

Caste regulations do not constitute Hinduism though they flourish among Hindus. **L. B. MAUNG CHIT MAUNG v. MA YAIT** **780**

—Caste regulations, force of.

Caste regulations do not constitute Hinduism though they flourish among Hindus. **L. B. MAUNG CHIT MAUNG v. MA YAIT** **780**

—Muhammadan Law—*Kutchi Memons*, law applicable to **72**

—ADOPTION, validity of—Implied prohibition **40**

HINDU LAW—cont'd.

—ALIENATION—Widow, relinquishment by—*Reversioners—Acceleration of estate, what amounts to—Alienation by widow—Consent of nearest reversioner, effect of.*

In order to accelerate the vesting of an estate in the nearest reversioner there must be complete surrender of the widow's estate.

The rule that a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner is applicable only to cases of transfers for consideration, and should not be extended to a case where a transfer has been made by way of gift. **A. KHAWANI SINGH v. CHET RAM**, 14 A. L. J. 972; 89 A. 1 **86**

—by widow—*Reversioners, remote, right of, to question—Lapse of time—Legal necessity, proof of—Recitals in documents—Adequacy of proof—Torts of widow, expenses for, whether can be charged on estate—Maintenance and kist, debt incurred for payment of, when legal—Burden of proof.*

The fact that the next reversioner is time-barred from claiming a widow's estate is no ground for allowing a remoter reversioner to do so, when the reversion has fallen in.

Mere recitals in a sale-deed as to the existence of legal necessity for an alienation are not of themselves any evidence of necessity; there must be evidence *abundant*.

In the case of alienations by a Hindu widow made a long time ago, Courts should not insist on as strict proof of legal necessity as in the case of recent transactions. In such cases, though the burden of proof which lies on the purchaser is not shifted on to the reversioner, the Courts should approach the evidence with a much more indulgent mind than when the alienation took place a few years before suit. But where evidence as to the purposes for which the debts were incurred which led to the alienation is actually before the Court, it must be satisfied that such purposes amount to legal necessity before the alienation is upheld.

The private expenses of the widow are not a legal necessity and expenses incurred by her in litigation that arose out of her own tortious acts cannot legally be charged on her husband's estate.

Prima facie the conversion of a charge payable from the income to a charge on the *corpus* is an improper act on the part of the widow.

Maintenance charges and *kist* should be paid, where possible, from the current income of the estate, and, in the absence of good reason why they should not be so paid, a debt borrowed for this purpose is not a proper charge on the estate in the widow's hands. **M. BHUVARAGHA IYENGAR v. NATESA IYER**, 5 L. W. 127; (1917) M. W. N. 40 **768**

—CUSTOM, essentials of—*Temple, ancient—Intention of founder—Presumption—Transfer of right to receive offerings made to temple, validity of—Public policy.*

Where the origin of a foundation is lost in antiquity, then unless a custom to the contrary is established, it must be presumed that the original founder intended, in making his delegation of the powers of worship to certain persons, that these powers should remain in their hands for the good of the

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temple and the convenience of the public, and that it is against public policy that persons to whom those powers of worship have been delegated should of their own free will make a delegation of those powers to a third party.

In the case of such a foundation a custom permitting alienation is not established by six undisputed transfers.

A transfer of the right to receive offerings made to a temple is, therefore, void as against public policy. **PAT PUNCHA v. BINDESWARI** 960

—**JOINT FAMILY**—*Alienec from co-parcener, whether entitled to joint possession—His position and rights.*

The alienee from a co-parcener in a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by partition the share to which his alienor was entitled. **M KOTA BALABHADRA PATRO v. KHETRA DOSS**, 4 L. W. 99; 31 M. L. J. 275; (1917) M. W. N. 149 168

—**Ancestral trade—Debts—Liability of co-parceners.**

In the case of an ancestral business of a Hindu family all the members of the family, including the minors, are liable for debts incurred in the course of the business and such liability is not confined to their shares in the assets of the business but extends to their shares in the family property. **M MUTHAYA PILLAI v. TINNEVELLY SOUTH INDIA BANK, LTD**, 5 L. W. 341 230

—**Mitakshara—Charge by one member, whether survives him.**

One member of a Mitakshara joint family cannot deal with his share in the property of the joint family so as to create a charge which will survive him. On his death the charge created by him is extinguished and every member of the joint family, whether born before or after the creation of the charge, is entitled to plead that no charge subsists upon the joint family estate. **PAT JOWALA PRASAD v. PRATAP UDAI NATH SARI DEO**, 1 P. L. J. 497 184

—**Co-parcener, one, sale by, how far binding on other co-parceners—Legal necessity—Purchaser, rights of.**

A sale of joint property by a co-parcener, though made without legal necessity, is valid to the extent of the vendor's share.

If a vendee wishes to stand by a sale which is valid only partially, he must be content with the vendor's share, but if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. **N BHOJRAJ v. NATHURAM**, 12 N. L. R. 161 498

—**estate—Mitakshara—Partition—Intention of one member to separate, whether sufficient.**

Under the Mitakshara Law a definite and unambiguous indication by one member of a joint undivided family of his intention to separate himself and to enjoy his share in severalty will amount to

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partition, if the intention is unequivocal and clearly expressed; and it must depend upon the facts of each case whether partition is effected thereby.

The intention to separate may be evinced either by explicit declaration or by conduct, and if it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit.

A separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural result from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or, on failure of that, by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither can the co-sharers question it nor can the Court examine his conscience to find out whether his reasons for separation are well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

It is a mistake to suppose that severance of status can take place only by agreement. The agreement only recognises existing rights in each individual member which he is entitled to assert at any time he likes.

Appellant's husband served a registered notice on the manager of the Mitakshara joint family of which he was a member, saying in explicit terms that his desire was to get his share partitioned and asking the manager to partition the joint estate without delay. A few days after he instituted the suit for partition but died during the pendency of the suit:

Held, that nothing could be more unequivocal or more clearly expressed than the conduct of the appellant's husband in indicating his intention to separate himself and enjoy his share in severalty by the said notice coupled with the suit; that these acts amounted to a separation with all its legal consequences; and that on the death of the appellant's husband during the pendency of the suit the appellant inherited his share and was entitled to continue the suit. **P C GIRJA RAI v. SADASHIV DHUNDIRAJ**, 20 M. L. T. 78; 20 C. W. N. 1085; 14 A. L. J. 822; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 485; 43 C. 1031 321

—**JOINT FAMILY, liability of, for debts—Mortgage decree—Manager, whether represents other members—One member not party to suit—Redemption—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.**

The interests of all members of a joint Hindu family are liable for payment of money borrowed for the purpose of paying Government revenue.

HINDU LAW—contd.

Where all members of a joint Hindu family are effectively represented in a mortgage suit in which the family property is sold, one of them cannot afterwards maintain a suit for redemption on the ground that he was no party to the suit. **PAT RANJIT PRASAD TEWARI v. RAMJATAN PANDEY**, 1 P. L. W. 197 **833**

— **JOINT FAMILY**—Minor—Guardian *ad litem*, father, whether proper **389**

— *Partition, what constitutes.*

A division of rights between the members of a joint Hindu family is sufficient to constitute a partition without actual physical division of the property itself. **O RAMADHIN v. BISHESHAH DAYAL**, 3 O. L. J. 603 **111**

— , separated members of, suit between—Applicability of section 66, Civil Procedure Code. **111**

— **PARTITION**—*Mitakshara*—Mother's share—Stridhan, mother in possession of, effect of—"Estoppel against estoppel setteth the matter at large," meaning of—Arbitration and award.

On a partition between her sons and step-sons, a mother is, according to the *Mitakshara*, entitled to a share equal to that of her son.

The maxim 'estoppel against estoppel setteth the matter at large' explained.

Plaintiff, acting as guardian of her infant son, agreed with defendant her step-son to partition the family property and an arbitrator was appointed to effect the partition. The plaintiff applied to the arbitrator to allot her a maintenance allowance, which he did in the award. Plaintiff then applied on behalf of her son and of herself to have the award filed in Court. On defendant's objection, however, the award was modified, and plaintiff's maintenance was disallowed as against the defendant. Plaintiff thereupon filed a suit for a partition of her one-third share:

Held, that the plaintiff was entitled to a one-third share in the family property:

(2) that the effect of setting aside of the award in regard to her maintenance was to restore the *status quo ante* and to justify the plaintiff in claiming her share in the family property.

Obiter dictum.—There may be cases where the possession of separate property by a mother might have the effect of reducing *pro tanto* the share which she may be entitled to on partition. **O SARUP CHAND v. PANI**, 19 O. C. 240 **198**

— **SUCCESSION**—Reversioners, nature of, rights of—Adverse possession—Possession adverse to daughter, whether adverse to reversioners **733**

— **WIDOW**—*Mortgage by widow*—Legal necessity—Sale in execution of mortgage decree, whether passes husband's estate.

Where a widow is forced to mortgage not only her life-interest but also the estate itself for a legal necessity, the enforcement of that mortgage must be considered to be of equal legal necessity with the actual mortgage itself, and the sale of the property in execution of a decree based on the mortgage would pass not only the life-interest of the widow but also the estate of the husband. **PAT JAGERNATH PRASAD SHAH DEO v. KURARA KURAR**, 1 P. L. W. 77 **403**

HINDU LAW—contd.

— **WIDOW**—*Surrender of estate to reversioners*—Acceleration, when valid—Alienation and acceleration, distinction between—Legal necessity—Adoption—Adopted son, rights of, to question alienations before adoption—Maxim 'a man cannot take advantage of his own fraud,' applicability of.

There are only two ways in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has, the one is by acceleration, the other by alienation for legal necessity.

The notions conveyed by the said two terms are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration.

The true doctrine of acceleration, which has been incorporated with the general body of Hindu Law by the decision of the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal*, 19 I. A. 30; 19 C. 23G; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603, is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this, that a Hindu widow enjoying the normal Hindu widow's life-estate may, if she please, surrender it in favour of the next reversioner, and, if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life-estate should be entirely withdrawn and not merely a fractional part of it.

For the purposes of an alienation, if the widow is to convey more than her life-interest, it must be for purposes of legal necessity.

The consent of the reversioners to a Hindu widow's alienation is no more than a factor in the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but *per se* it will not be sufficient to do away with all other proof.

The maxim that 'a man shall not take advantage of his own fraud' is quite distinct from the doctrine of estoppel. Two things have to be looked at in applying the maxim, (1) whether the person against whom this maxim is sought to be used has ever committed any fraud at all; (2) whether assuming that he has committed constructive fraud, that has given him any advantage in the particular issue he is contesting. The maxim applies to a great number of cases in which there need be no estoppel at all.

An adoption will not divest estates vested before it was made. The adopted son can, however, question an alienation as void and not binding on him as and from the date of his adoption, as an alienation requires for its validation legal necessity.

One B, a Hindu widow, having mortgaged her husband's estate in 1893 to 1st defendant, the plaintiffs as next reversioners sued in 1893 for cancellation of the mortgage. The matter was referred to arbitrators, who in December 1894 drew up an award whereby (1) plaintiffs were to redeem the mortgage on payment of Rs. 1,700 to 1st defendant and the latter was to reconvey the properties to them; (2) out of the properties so reconveyed, the plaintiffs were to give to the widow a house and 18 *bighas* of land for

HINDU LAW—contd.

her maintenance. Nothing, however, was done upon the award for many years, nor did the parties get it made a rule of Court. The 1st defendant, mortgagee, sub-mortgaged the property for Rs 1,000 to one D and under that mortgage he attorned to the latter. In 1906 the widow sued to redeem the mortgage, ignoring the award. That suit was dismissed on the ground that by the award there was no right of redemption in the widow. About this time, plaintiffs obtained a conveyance of the properties from 1st defendant which they got compulsorily registered. Under its terms they redeemed the sub-mortgage to D, but the 1st defendant refused to deliver the properties to the plaintiffs. In 1909, the widow adopted the 2nd defendant, the son of 1st defendant, and the properties were delivered to him by the latter. Plaintiffs instituted the present suit for possession, alleging that the effect of the award was an acceleration of their rights and that the subsequent adoption of 2nd defendant could not defeat the estate already vested in them. They also alleged that the adoption was a fraudulent act of defendants acting in concert to defeat plaintiffs and that 2nd defendant could not be permitted to take advantage of his own fraud:

Held, (1) that the award of 1893 was in no sense an acceleration as the entire interest of the widow did not pass to the plaintiffs, but there was provision for the immediate restitution to her of a substantial portion of the property, which violated the fundamental basis of the theoretical doctrine of acceleration;

(2) that the transaction could only be regarded as an alienation by the widow, to validate which the plaintiffs were bound to show legal necessity;

(3) that the 2nd defendant, as adopted son of the last male owner, was entitled to question the alienation as being void against him as from the date of his adoption;

(4) that as the adoption was legal *per se*, the resort to it as a means of asserting one's rights did not amount to fraud and the Court could not consider the meanness about the line of conduct pursued by the 1st defendant to get his son adopted by the widow. **B MOTI RAJJI v. LALDAS JIBHAI**, 18 Bom. L. R. 954; 41 B. 93 **945**

— **WIDOW—Widow's estate—Acquisition of occupancy rights during lifetime of widow—Eviction by reversioners, validity of.**

Occupancy rights acquired during the time when an estate was in the hands of a Hindu widow cannot be questioned by the reversioners after her death. **PAT HARMANOGI NARAIN SINGH v. GANOUR SINGH** **260**

— **Widow's estate, nature of—Reversionary heirs, position of—Suit to restrain waste—Waste not proved—Specific Relief Act (I of 1877), s. 42—Declaration of reversioner's right—Form of decree—Decree awarding declaration while dismissing substantial claim, utility of—Civil Procedure Code (Act V of 1908), O. VII, r. 7—Further relief.**

A Hindu widow's right with respect to the estate of her deceased husband is of the nature of a right of property; her position is that of owner; her

HINDU LAW—contd.

powers in that character are, however, limited but so long as she is alive, no one has any vested interest in the succession.

A reversionary heir, although only having a contingent interest, is recognised by the Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life; but such heir thus appealing to the Court does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion.

A Court should not entertain a suit for a mere declaration that plaintiff is the reversioner of a Hindu widow, as such a declaration would be premature and be subject to being rendered valueless by the development of events.

In a suit by a reversioner for an injunction to restrain waste and for appointment of a receiver, it is not competent to the Court, after dismissing the claim for these reliefs, to make a declaration that plaintiff is the nearest reversioner to defendant, even to prevent future litigation between the parties. It is not legitimate to give a plaintiff, under cover of a request for 'further relief,' after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims. **P C JANAKI AMMAL v. NARAYANASAMI AITAR**, 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 39 M. 634; 13 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530 **161**

HOME RULE, or self-government for India on Colonial lines, agitation for, whether lawful—Methods of advocacy—Legitimate discussion and propaganda, rules governing **525**

INDIAN COUNCILS ACT, 1861 (24 & 25 Vic. C. 67), Ss. 22, 23 **48**

INSOLVENCY—Infant, whether can be adjudged insolvent.

The law does not contemplate that an infant should be adjudged an insolvent, under any circumstances even in respect of judgment-debts or necessities. **C SITAL PRASAD, In re**, 20 C. W. N. 1065; 43 C. 1157 **663**

INSOLVENCY PROCEEDINGS—Creditor setting up debtor's joint family—Debtor denying creditor's assertion—Order based merely on debtor's statement, bad—Practice.

Where a debtor applied to be declared an insolvent and one of the creditors objected, asserting that the debtor and his sons formed a joint Hindu family owning considerable property not notified in the schedule:

Held, that an order of adjudication should not be passed in favour of the debtor merely on his statement as to the non-existence of the joint family, without giving an opportunity to the creditor of proving his assertion. **O PRAG v. RAM LAL**, 3 O. L. J. 507 **199**

INTERNATIONAL LAW, Private—Foreign judgment
—Judgment in personam, enforcement of, re title to or possession of foreign land Domicile of parties within jurisdiction of foreign Courts, effect of—Judgment declaring status of parties, recognition of, by forum rei sitae—Judgment of French Indian Court removing trustees and appointing new trustees, enforceability of, in British Indian Court where trust property is situate—Will, construction of—Adoption, validity of—Implied prohibition.

Per *Abdur Rahim, Offg. C. J. Phillips, J.* dissenting).—The Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country or generally to give redress for any injury to any immoveable not situate therein. In the case of immoveables the judgment pronounced of the *forum rei sitae* is absolutely conclusive. It makes no difference that the parties affected by the judgment are domiciled in foreign territory and its Court has, therefore, jurisdiction over them *in personam*. The judgment of the foreign court will, however, be recognized by the *forum situs* only to the extent of carrying out any obligations on the parties arising out of contracts or of trusts.

A judgment of a French Indian Court removing trustees appointed by the Will of a testator and substituting others in their stead cannot be enforced by an action in a British Court for possession from the discharged trustees of some immoveable properties covered by the Will and situated within the jurisdiction of the latter court, especially when Letters of Administration have been granted to the defendants by the law in force in British India. The British Courts will not remove defendants from the trusteeship solely by virtue of the judgment of the French Court unless the plaintiffs have them removed and get themselves appointed by means of a suit in the Court having jurisdiction over the trust property in British India.

Per *Phillips, J.*—The principle on which a suit can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action cannot be re-investigated, if the judgment was pronounced by a competent tribunal having jurisdiction. This principle applies alike to a judgment *in personam*, to a judgment *in rem*, and to a judgment or sentence of divorce or any other judgment having reference to status.

A judgment, therefore, of a French Indian Court, removing trustees appointed by the Will of a testator for the administration of charities in respect of properties, the bulk of which is situate within its jurisdiction, and appointing others in their stead is a judgment virtually regulating the administration of a trust and conferring a status on the persons appointed as trustees. Such persons can sue for possession from the discharged trustees of trust property situate in British India in a Court having jurisdiction over it solely by virtue of the judgment of the French Court. The suit cannot be treated as one for the removal of trustees who are already removed by a competent Court but a suit based on a foreign judgment which has recognised plaintiffs' title to administer the trust and to recover trust properties.

INTERNATIONAL LAW—concl.

The prohibition to adopt a son may be express or implied. Where a testator by his Will provided for the contingency of his having a son in these words, viz, "if by divine favour I have a child of the male sex", they mean only a natural son and do not even impliedly confer an authority to adopt.

One S., a resident of Pondicherry, left a Will *inter alia* bequeathing large properties for charities, the bulk of which was situate in Pondicherry and the rest in Madras. Defendants Nos. 1 to 3 and two others, who were executors under the Will, having obtained Probate in the Pondicherry Court, obtained Letters of Administration in the Madras High Court in respect of the property situate in Madras. After they had administered the estate, defendants Nos. 1 to 3 were removed from their office by a decree of the Pondicherry Court which appointed plaintiffs in their stead. The fourth defendant was the widow of the testator who adopted the 5th defendant and the 6th defendant was the natural mother of the 5th, all of whom were alleged to be in possession of the Madras properties. Plaintiffs instituted the present suit on the original side of the High Court for possession of the trust properties situate in Madras from defendants. Mr. Justice Wallis decreed the suit, holding that the judgment of the Pondicherry Court was binding on him. On appeal,

Held, per Abdur Rahim, Offg. C. J., (Phillips, J., dissenting), that the suit was not maintainable by reason *per se* of the judgment of Pondicherry Court, whose authority could not extend to immoveables outside its jurisdiction. **M SHYALI SUBRAYA CHETTY v. CALVE SUBRAYA CHETTIAR** 404

INTERPRETATION OF STATUTES—Madras Estates Land Act explicit—Principles of general law, if applicable

The Madras Estates Land Act is a comprehensive Tenancy Code and wherever it is explicit, a discussion of the general law is irrelevant. **M MUTHU REDDI v. MUTHU VENKATAPATHI REDDI**, 4 L. W. 168; 31 M. L. J. 354; (1916) 2 M. W. N. 180 1

—Press Act (I of 1910) 525

JURISDICTION—Magistrate, sweeping prohibitory order of Closing burial place—Omission to record provision of law—Ultra vires.

A District Magistrate acts without jurisdiction in issuing a sweeping public prohibitory order without referring to any provision of law as authorising such an order. **B MUKUNDRAI ATMARAM DESAI, In re**, 18 BOM. L. R. 554; 18 CR. L. J. 137 489

—Small Cause Court—Suit by executor for possession of moveable property belonging to the deceased.

A suit by an executor or administrator for possession of moveable property belonging to the estate of the deceased is cognizable by a Court of Small Causes. **L B MA PU v. MA SU**, 9 BUR. L. T. 101 75

—Small Cause suit heard as regular suit—Appeal—Revision 92

JURISDICTION OF CIVIL COURTS—Suit for recovery of service *inam* lands 918

JURISDICTION OF CIVIL OR REVENUE COURT—

• Mortgage by co-sharer—Mortgagor tenant of mortgagee—Sale of mortgaged property to third person—Consideration, portion of, left with vendee to pay off arrears of rent—Rent, suit for arrears of, by mortgagee—Proper parties 65

Suit for declaration of invalidity of lease.

A suit for a declaration that a certain lease is invalid does not lie in a Civil Court. **A POORAN SINGH v. HAIDRI** 358

Suit by landlord against mukhtar—Rent of shops *Bazar dues* 84

KABULIYAT executed at Permanent Settlement, construction of—Undertaking to continue *sardars* and *paiks* in Pergunnah, meaning of—Right to determine employment of *paik* on service tenure—Resumption of land 223

KHOTI LANDS—Kolaba District—Transfer without permission of khot—Forfeiture—Transjeree, liability of.

An alienation by a *khoti* tenant of his *khoti* lands without the permission of his *khot* in the Kolaba District works as a forfeiture and the *khot* is entitled upon such transfer to enter upon the land to the prejudice of the transferee. **B HARI GANU BHAGADE v. GANGADHAR VITHAL GULAVNI**, 18 Bom. L. R. 446 299

KUTCHI MEMONS, law applicable to—Hindu Law—Muhammadan Law.

Kutchi Memons are governed by the Hindu Law in matters relating to succession and kindred questions and by the Muhammadan Law in matters of guardianship. **M SIDDICK v. MAHAMED HUSSAIN**, (1916) 2 M. W. N. 341; 4 L. W. 521 728

LAND ACQUISITION ACT (I OF 1894), S. 3 (b)—‘Person interested,’ who is.

A person who has entered into a valid agreement for the purchase of land is a “person interested” within the meaning of section 3 (b) of the Land Acquisition Act. **P CHUTTAN LAL v. MUL HANDB**, 18 P. R. 19.7 822

—Ss. 11, 12—Acquisition of land by Government—Compensation, right to—Adverse possession, claimant by.

Where the question was whether compensation for land compulsorily acquired by Government should be awarded to the collateral heir of the last male owner, or to a person who had been in possession of the land for more than twelve years prior to the acquisition proceedings without payment of rent:

Held, that the latter was the person entitled to receive the compensation. **PAT RAJBANS SANYAL v. MAHABIR PRASAD**, 20 C. W. N. 828; 1 P. L. J. 258 464

—S. 12 464

—Ss. 49 (1), 54—House, godowns used as servants’ quarters whether form part of—Award—Appeal.

Godowns attached to a house which are used as servants’ residence, form part and parcel of the house within the meaning of section 49 (1) of the Land Acquisition Act.

An appeal lies against an order passed under that section. **C DALCHAND SINGHI v. SECRETARY OF STATE**, 43 C. 665 11

—S. 54 11

LANDLORD AND-TENANT—Abandonment of holding—Waiver of abandonment, suit for rent, whether amounts to 942

—Amalgamation of tenancies, whether changes their incidents—Enhancement of rent—Pleadings 862

—Covenant in *kabuliyat* on assurance by landlord that it would not be enforced, whether binding.

Where a tenant executes a *kabuliyat* containing a stipulation, which the landlord has told him will not be enforced, the tenant cannot be held to have assented to it and the *kabuliyat* is not the real agreement between parties. **C NADIR HANU SAHA v. BIRENDRA NATH DUTT**, 20 C. W. N. 1067 126

—Ejectment—Assignee from tenant, resistance by, to landlord’s entry—Right to resist, proof of, by defendant—Burden of proof.

Where in a suit in ejectment the defendant acknowledges the landlord’s title but pleads that the defendant is the assignee from the tenant and is not bound to quit, the onus is on him to show that he had a right to resist the landlord’s entry. The mere fact that the plaintiff has failed to prove a special case set up by him, though it may be a point in defendant’s favour, does not relieve the Court from finding affirmatively on the evidence whether the defendant has a right to resist the landlord’s entry. **PAT KARU SINGH v. BIBI NASIBAN** 357

Ejectment—Forfeiture—Denial of landlord’s title, what amounts to 935

—Evidence of title—*Batwara papers*, admissibility of.

Batwara papers are admissible in evidence to prove a landlord’s title against the tenants who were parties to the *Batwara* proceedings. **PAT AKLU ABIR v. RAM LAKSHAN SAHU** 895

—*Ghattuthumulu*, levy of, finding as to, whether *res judicata* in subsequent suit between same parties 857

—Holding declared *kabil lagan*—Rent assessed—Suit by landlord for damages for use and occupation previous to assessment of rent, nature of—Small Cause Court, jurisdiction of 909

—Joint tenancy—Rent, suit for—Parties, necessary—Tenant, liability of, to pay whole rent.

Ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. There is no presumption in Bihar that in every joint tenancy there is also a several promise by which each joint tenant agrees to be bound for the whole rent.

Plaintiff brought a suit for arrears of rent against three joint tenants of an occupancy holding, two of whom filed a compromise petition admitting the rate claimed, and a decree was accordingly passed. The third defendant got the decree set aside as against himself, on the ground that he had not been properly served. In a subsequent suit for arrears of rent against the same persons, he was again not served.

• *Held*, (1) that the admission of the rate of rent claimed by the two defendants did not amount to a promise to pay the whole of the rent themselves; () that as the third defendant had not been properly served the suit must be dismissed. **PAT JAGESWAR RAI v. KESHO PERSAD SINGH**, 1 P. L. J. 190 262

LANDLORD AND TENANT—contd.

— *Lease by trespasser—Good faith—Rights of parties.*

A person taking a settlement of land from a trespasser in *de facto* possession is not entitled to remain in possession as a tenant as against the rightful owner, unless it is found not only that he acted *bona fide* in taking the settlement but also that the person from whom the settlement was taken was acting *bona fide* in making the settlement with him. **C** HIRANMOY KUMAR SAHA v. BANKA BEHARI GHOSE 852

— *Non-occupancy raiyat's interest, whether heritable—Custom.*

In the absence of custom a non-occupancy raiyat's interest is heritable. **PAT** KALRU GARHI v. JANGLI CHOUDHRI, 1 P. L. J. 273 438

— *Non-payment of rent after expiry of term, effect of.*

Mere non-payment of rent by the tenant after the expiry of the stipulated term will not make his possession adverse as from that date. The presumption is that the tenant continues to retain physical possession as he retained it before. **A** BIJAI NARAIN SINGH v. PARBHU NARAIN SINGH 395

— *Occupancy tenancy—Co-sharer landlord, rent decree obtained by—Purchase of holding in execution—Mortgagee in possession, ouster of—Suit by mortgagee—Non-transferable holding, plea of, validity of—Estoppel.*

It is not open to a fractional co-sharer, who purchases a holding in execution of a rent decree which only amounts to a money decree, to raise the question of non-transferability of the holding, as a defence to an action by a mortgagee whom he has ousted from possession, especially when the mortgagee has long been in possession and no objection has been taken by any of the landlords. **PAT** RADHA KISHUNJI THAKUR v. LALJI SAHA 821

— *'Rent-decree', decree in suit for rent against some only of several joint tenants, whether is—Auction-purchaser, position of.*

Where all the persons entitled to a holding are not made parties to a suit for recovery of rent, the decree obtained in such a suit is not a 'rent-decree' and the auction-purchaser in execution of such a decree would at the most be entitled only to the right, title and interest of the judgment-debtors. **PAT** MUHAMMAD MAHBOOB v. BHAGOO MAHTO, 1 P. L. W. 48 913

— *Suit for rent by co-sharer landlord, or in the alternative for refund of excess collected by other sharers, maintainability of—Necessity of distinct averments in plaint—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31.*

A suit is maintainable by one of several joint landlords for recovery of the balance of rent due from a tenant and in the alternative, for recovery of sums which may have been collected by his co-sharers in excess of their legitimate share.

The ground for this alternative claim should be specifically set forth in the plaint and should not be made to rest on the general, superfluous prayer asking for such reliefs as to the Court may seem fit, as such general prayer does not cover a relief arising from a different cause of action.

LANDLORD AND TENANT—concl.

A suit by one of several joint landlords for recovery of sums which may have been collected by his co-sharers from the tenant in excess of their legitimate share is not cognizable by a Court of Small Causes. **C** UZIR v. HARI CHARAN PAL 671

— *Tenant holding over without landlord's assent, right of—Ejectment—Notice to quit, necessity of* 201

LEGAL PRACTITIONER—Counsel engaged for one party whether should be allowed to appear for opposite party—Practice.

It is not desirable, except under very exceptional circumstances, that a Counsel, who has been engaged to conduct a case from start to finish for one party, should be allowed to appear for the opposite party. **O** ALI MUHAMMAD, *In re*, 19 O. C. 237 142

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 4, proviso, s. 27, construction of, whether contains a legislative prohibition of audience to Vakils.

The proviso to section 4 of the Legal Practitioners Act (XVIII of 1879) cannot be construed as a variation by the Indian Legislature, under clause 44 of the Letters Patent, of the rule giving to Vakils the rights of audience on the Original Side, or as, by implication, preventing a Vakild from appearing on the Original Side. The words in the proviso 'under this section' govern the whole section.

Nor can such a prohibition be inferred from the absence in section 27 of any reference to the fees payable to Vakils appearing on the Original Side.

Act XVIII of 1879, which was passed after the privilege of audience on the Original Side had been enjoyed by the Vakils for 16 years, cannot be construed as taking it away, unless it says so in plain terms or by necessary implication.

History of the legislation on the subject traced and reviewed. **M** NAMBARUMAL CHETTY v. NARASIMHACHARI, 31 M. L. J. 698; (1916) 2 M. W. N. 529 699

— *Ss. 13, 14—Receiving mukhtarnama without enquiry and from unauthorised person—Gross negligence—Misconduct.*

A legal practitioner is bound to take instructions directly from clients, or from their agents duly empowered to act in their behalf.

A mukhtear who receives his mukhtarnama from an unauthorised person without making adequate enquiry as to the person who is giving him the same and who acts upon the same, is guilty of gross negligence which amounts to misconduct. **PAT** *In the matter of* EMPEROR v. LEAKUT HUSAIN, 18 Cr. L. J. 140 492

— *S. 14* 492

— *S. 14, proceedings under, nature of—Transfer of proceedings—Jurisdiction of High Court—Civil Procedure Code (Act V of 1903), s. 24—Government of India Act, 1915 (5 & 6 Geo. V. C. 61), s. 107—'Superintendence,' meaning of.*

The enquiry contemplated under section 14 of the Legal Practitioners Act is of an administrative nature and is not a civil proceeding, the intention of the Act being to provide a procedure or remedy of a disciplinary character for practitioners practising in subordinate Courts without giving the Courts the power to inflict a penalty for abuse of discipline but

LEGAL PRACTITIONER ACT—concl'd.

only to recommend to the High Court the course to be taken. It is neither civil nor criminal, but purely designed for the purpose of discipline.

Proceedings under section 14 of the Act cannot be transferred under section 24, Civil Procedure Code, read with section 141 of the Code or by virtue of the powers of superintendence vested in the High Courts under section 107 of the Government of India Act.

Neither section 24 nor section 141, Civil Procedure Code, applies to the Legal Practitioners Act, because the proceedings under the latter Act are not civil proceedings in a Court of civil jurisdiction to which alone the Civil Procedure Code is applicable.

Section 141, Civil Procedure Code, is controlled in its operation and effect by the concluding words of the section, which limit its application to proceedings in any Court exercising civil jurisdiction. The procedure under the Legal Practitioners Act is self-contained.

Per *Mullick, J.*—The terms of section 14 of the Legal Practitioners Act make it incumbent that the inquiry under the section should be made by the presiding officer of the Court. It cannot be delegated or transferred to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed.

Without expressing any opinion as to the applicability of section 107 of the Government of India Act, it is sufficient to say that the High Court should not interfere with the progress of an enquiry in which nothing final can be done by the presiding officer.

Per *Atkinson, J.*—The 'general superintendent' vested in the High Court under section 107 of the Government of India Act applies only to cases where a subordinate officer, be he a Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. When a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an enquiry, the High Court will not interfere under the Statute unless he has grossly abused his powers. *PAT JANAK KISHORE, In the matter of*, 1 P. L. J. 576; 18 Cr. L. J. 132 484

— S. 27, construction of, whether contains a legislative prohibition of audience to *Vakils* 699

LETTERS PATENT (MAD.), 1863, Ss. 9, 10, 37, 41 699

LIMITATION, commencement of—Plaint, amendment of 914

— Pauper-plaintiff paying Court-fee pending enquiry.

Where a plaintiff applies in good faith for leave to sue as a pauper but, on his application being opposed, pays in the necessary Court-fee pending an enquiry into his pauperism, limitation runs against him only up to the date of filing the application and not up to the date of paying in the Court-fee. *O WALI MUHAMMAD v. DAULAT-UN-NISSA*, 3 O. L. J. 617 921

— Plaintiff insufficiently stamped—Court-fee, deficiency in, made up after expiry of period of limitation 507

— Principal and surety—Claim against principal debtor barred—Surety, whether liable 184

LIMITATION ACT (IX OF 1871), ARTS. 142, 145 733

LIMITATION ACT (XV OF 1877), S. 7—Minor—Cause of action accruing during minority—Death within three years of attaining majority—Legal representative, right of, to sue 221

— SCH. II, ART. 144 733

LIMITATION ACT (IX OF 1908), S. 2 (7) 828

— Ss. 5, 2 (7)—Appeal, delay in presenting—'Sufficient cause'—Appellant, duty of—"Good faith," meaning of.

In order to be entitled to the benefit of section 5 of the Limitation Act, an appellant must act in good faith, i.e., with due care and attention.

Where an appellant relied upon an unauthorised publication known as the "Legal Diary" and being misled as to the duration of the vacation of the Chief Court, presented his appeal beyond the period of limitation:

Held, that he had not acted with due care and attention and that the cause shown was not sufficient to entitle him to an extension of time under section 5 of the Limitation Act. *P JAIDIAL MAL v. AMAR NATH* 828

— S. 5—Appeal, delay in presenting—Sufficient cause—Discretion—High Court, interference by—Pleader, bona fide mistake of.

A Judge has a discretion in admitting an appeal under section 5 of the Limitation Act, but the discretion must be judicially exercised and must be based on materials judicially cognizable.

High Courts are loth to interfere with the exercise of a discretion given by law to a lower Court, but if the discretion has been exercised without appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and without the application of the right principle to those facts, interference is called for.

A bona fide mistake of a Pleader, in order to afford sufficient cause for admitting an appeal after time, should be one made in spite of due care and attention having been exercised. *L B MA MAI GATE v. MAUNG TUN WIN* 815

— Ss. 5, 12—Appeal, delay in presenting—Sufficient cause—Stamp not procurable—Copies, time spent in obtaining, exclusion of.

Appellant applied for copies of the judgment appealed against on 12th June, and on the same day filed some folios and stamps. On the 13th he was informed that some more folios would be required which were supplied on the 15th. Copies were delivered on the 18th. On the last day of limitation stamps were not procurable and the next day being a holiday the appeal was presented on the next following day on which the Court was open:

Held, (1) that the appellant was entitled to the exclusion of the whole of the time from 2th to 18th June from the computation of the period of limitation under section 12 of the Limitation Act, and

(2) that the delay caused by appellant's inability to get stamps on the last day of limitation should be excused under section 5 of the Limitation Act. *PAT KESHO PRASAD SINGH v. HARBANS RAUT*, 1 P. L. J. 163 211

LIMITATION ACT—1908—contd.

— S. 5—*Letters Patent Appeal—Delay in filing—Sufficient cause—Limitation.*

Plaintiff sued defendants for resumption of a rent-free grant in the Court of the Settlement Officer. The suit was decreed and the defendants appealed to the District Judge, who set aside the decree of the Settlement Officer and dismissed the suit. On an appeal by the plaintiff the High Court held that the District Judge had no jurisdiction to hear the appeal and directed that the memorandum of appeal to that Court be returned to the defendants for presentation to the proper Court. The Commissioner, before whom the appeal was next preferred, held that appeal lay to the District Judge. Defendants then applied to the High Court for review of its judgment, but their application was rejected. They then preferred a Letters Patent Appeal against the original order of the High Court, which was considerably beyond time:

Held, that there was sufficient cause for the delay in presenting the appeal, and that the appellants were entitled to the benefit of section 5 of the Limitation Act. **A MAHABAT RAI v. BHARADDWAJ DAMODAR DAS, 15 A. L. J. -00 818**

— S. 5—*Sufficient cause for delay in presenting appeal—Negligence—Appeal.*

An appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time. **N KEDARNATH v. ZUMBERLAL, 12 N. L. R. 171 503**

— S. 6, *Sch. I, Art. 164—Application to set aside ex parte decree—Minority, whether extends limitation General Clauses Act (X of 1897), s. 6.*

Section 6 of the Limitation Act of 1908, which replaces section 7 of the Act of 1877, confines the operation of the plea of minority to suits and only one kind of applications, namely, those for execution of decrees. Therefore, an application to set aside an *ex parte* decree does not come within the exception created by section 6 of that Act.

An *ex parte* decree was passed against the defendants, some of whom were minors, on 20th August 1908. On 1st May 1914, some of the defendants applied to set aside the *ex parte* decree:

Held, that the application was governed by the provisions of the Limitation Act of 1908 and not by those of the Act of 1877; that section 6 of the Limitation Act of 1908 did not apply to the application and the period of limitation prescribed by Article 164 of the Act for such applications could not, therefore, be extended on the ground of minority.

It is doubtful whether an application to set aside an *ex parte* decree can be deemed to be a 'right' or 'privilege' within the purview of section 6 of the General Clauses Act. If it is a right, it is acquired, not under the Limitation Act, which merely regulates the period within which the remedy must be sought, but under the Civil Procedure Code. **P MANOHAR LAL v. SADIQA BEGAM, 101 P. R. 1916 292**

LIMITATION ACT—1908—contd.

— S. 6—*Minor—Cause of action arising during minority—Death within three years of attaining majority—Personal representative, right of, to sue.*

Where a minor acquired a cause of action to sue for possession of property and died after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representative can, although twelve years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the lifetime of the deceased. **B ARJUN RAMJI MHANKAI v. RAMABAI RAOJI VITHOBA, 18 Bom. L. R. 579; 40 B. 564 221**

— S. 12—*Time spent in obtaining copies, exclusion of* 211— S. 19—*Acknowledgment—Execution—Application for adjournment of sale.*

Where a judgment-debtor stated in an application for adjournment of an execution sale that, in case of his failure to pay up the decretal money on the date to be fixed for sale in the month following, he would not take any objection to the validity of the sale:

Held, that the application contained an acknowledgment within the meaning of section 19 of the Limitation Act. **C JOGENDRA PRASAD MITRA v. ASUTOSH GOSWAMI, 24 C. L. J. 462 738**

— S. 20—*Appropriation of rents due by mortgagee towards interest due by mortgagor, whether saves limitation* 756— S. 26—*Easement, acquisition of—Water-mill, right to work—"As of right," meaning of.*

In order that the enjoyment of a right should ripen into an easement, it should be peaceable, open and as of right.

If the servient owner can, whether the dominant owner likes it or not, put a stop to the enjoyment, there is really no easement, because the very idea of right, which necessarily underlies an easement, is negated.

User as of right means a user claimed against the will of the person over whose property it is sought to be exercised.

Plaintiffs had worked a water-mill on the land of the defendants for over fifty years, paying Re. 1 annually to the latter for the use of the mill:

Held, that the fact of the payment proved that the plaintiffs' user was at the will and pleasure of the defendants and was not as of right, and, therefore, could not ripen into an easement. **P SUNDAR v. NAG, 4 P. R. 1917 788**

— S. 28 277

SCH. I, ARTS. 57, 85—*Accounts, suit on—Proof—Evidence, value of balance as—Suit on advances in cash and grain—Limitation.*

Article 85 of Schedule I of the Limitation Act does not apply to a case where the plaintiff alone has been the banker, making advances and receiving part-payments from time to time, there being no mutual account or reciprocal demands, and the balance being always in his favour.

LIMITATION ACT—1908—contd.

A suit to recover advances made both in kind and in cash is not governed by Article 75, Schedule I, of the Limitation Act.

There is no general rule that a defendant in a suit on accounts cannot go behind a balance struck by him. In such a suit the plaintiff must prove what is due to him on the accounts. The striking of a balance is merely a piece of evidence the value of which must depend on the circumstances of each case. **P. BUDH RAM v. RALLI RAM, 103 P. W. R. 1916 300**

SCH. I, ART. 62—*Money paid to one for use of another, suit for—Limitation.*

Money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Article 62 of Schedule I of the Limitation Act, paid to that party for the use of the actual person in whom the right to receive it vests and, therefore, a suit to recover such money must be brought within three years of the date of its payment. **PAT HARIHAR MISSIR v. SYED MOHAMMAD, 20 C. W. N. 983; 1 P. L. J. 374 30**

SCH. I, ART. 85, applicability of—*Suit on advances in cash and grain 300*

SCH. I, ARTS. 85, 89—*Principal and agent—Accounts, suit on—Consignment for sale on commission—Advances to consignee—Settlement, periodical, of accounts—Action brought after stoppage of dealings—Open, mutual and current account—Agency, termination of.*

A suit for accounts by the plaintiff, who used to send goods to the defendants for sale on commission, receiving advances therefor from time to time and acknowledging sums due by him at periodical settlements of accounts, after the dealings had stopped, is not a suit on an 'open, mutual and current account' within the meaning of Article 85 to Schedule I of the Limitation Act.

The question when an agency terminates must depend on the facts of each particular case.

Quære:—Whether after all dealings between a principal and agent have been closed, the agency continues till the latter accounts for money alleged to be due to the former.

The plaintiff agreed to supply agricultural produce to the defendant, who was to sell the same and pay over the proceeds to the plaintiff after deducting advances made to the plaintiff on the articles supplied. The dealings commenced in 1901 and stopped in 1906. There were periodical settlements of accounts, the plaintiff executing a promissory note at each settlement for the balance due. Plaintiff sued in 1912 for accounts between 1901 to 1906 and for recovery of the amount found due to him:

Held, (1) that this was not a case of open, mutual and current account within the meaning of Article 85 of the Limitation Act and the suit was consequently barred.

(2) that even on the basis of an agency the agency terminated in 1906 and the suit was barred under Article 89. **M. KAPPUSAMY AIYAR v. VEERAPPA CHETTIAR, 5 L. W. 375 875**

SCH. I, ART. 89 305, 875

LIMITATION ACT—1908—contd.

SCH. I, ARTS. 93, 120, 126—*Document impugned as forgery, whether should be set aside by suit—Unnecessary prayer for barred claim, joinder of, with other substantial reliefs not barred, effect of—Hindu widow—Suit to declare alienation void and a Will relied on by widow a forgery—Latter claim barred under Article 93—Dismissal of suit, legality of—Civil Procedure Code (Act V of 1908), O. II, rr. 1, 2 11*

Plaintiff, as next reversioner to a Hindu widow, sued for a declaration that an alienation made by her was void beyond her lifetime. In a previous suit by the widow against the plaintiff for partition, she had produced a Will under which she claimed as heiress of her husband. The plaintiff challenged it as a forgery, but a partition was ordered without any adjudication on the genuineness of the Will. The plaintiff in his present suit also claimed a formal declaration of the forgery of the Will. This portion of the claim was admittedly barred under Article 93 of the Limitation Act. The Trial Court dismissed the suit as barred:

Held, (1) that there was no obligation on plaintiff to set aside the Will;

(2) that the relief claimed in respect of the Will was unnecessary and did not affect plaintiff's rights to the other substantial reliefs into which the Court was bound to enquire. **M. VENKAMMA v. NARASIMHAM, (1916) 2 M. W. N. 325; 4 L. W. 441 642**

SCH. I, ART. 95—*Simple money, claim for—Usufructuary mortgagee, suit by—Fraud of mortgagor.* A usufructuary mortgage was executed in 1907, but possession was not delivered to the mortgagee. In 1912 it was ascertained that the mortgagor had no power to mortgage the property and had fraudulently concealed the fact from the mortgagee. In 1914 the mortgagee sued for recovery of money due to him with interest thereon by way of damages:

Held, that the suit was governed, by Article 95, Schedule I, of the Limitation Act and was not barred by time. **O. LACHMAN PRASAD v. RAMPHAL, 3 O. L. J. 593 351**

SCH. I, ART. 95 *Suit to set aside decree obtained by fraud—Limitation*

A suit to set aside a compromise decree alleged to have been obtained by fraud is governed by Article 95 of the Limitation Act Schedule I and must be brought within three years from the date of the knowledge of such fraudulent decree. **PAT MOHAMAD JAN v. COMMISSIONER OF PATNA 797**

SCH. I, ART. 97 505

SCH. I, ART. 110 83

SCH. I, ARTS. 116, 120, 132—*Mortgage to secure loan of paddy, suit for enforcement of.*

A suit to enforce a mortgage executed to secure a loan of paddy repayable with interest as paddy is not a suit to enforce payment of money charged on immoveable property to which Article 132 of the Limitation Act applies. The suit is governed either by Article 116 or 120. **C. RASH BIHARI DAS v. KUNJABIHARI PATRA, 24 C. L. J. 448 805**

SCH. I, ARTS. 116, 110—*Rent, suit for—Kanom, expiry of—Accrual of rent after expiry—Limitation.*

LIMITATION ACT—1908—contd.

A suit for rent on the expiry of a *kanom* is governed by Article 116 and not by Article 110 of the Limitation Act. A *kanom* tenure involving the taking of an account for the whole period of the *kanomdar's* occupation is not subject to the legal incidents of a lease in this respect. **M AMMOTTI v. SANKARAN ADIODI**, (1916 2 M. W. N. 117 83

— SCH. I, ART. 120 642, 895

— SCH. I, ARTS. 120, 132—*Moveable property—Mortgage decree, if moveable property—Mortgage of mortgage decree, suit on—Limitation—Mortgaged property, purchase of portion of, by mortgagee—Mortgage, extinguishment—Intention.*

A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property and a suit to enforce a hypothecation of such a decree is governed by Article 120 of the Limitation Act.

Where, however, the decree has been converted into immoveable property, the mortgagee of such decree is entitled not only to the benefit of the new security but also to the benefit of the larger period of limitation under Article 132 of the Limitation Act.

Where a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage does not thereby become *pro tanto* extinguished, unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred. **A JAMNADEI v. LALA RAM**, 14 A. L. J. 1025 4

— SCH. I, ART. 126 642

— SCH. I, ART. 132 4, 756, 805

— SCH. I, ART. 138—*Auction-purchaser, rights of—Suit for possession—Limitation.*

A purchaser under a sale held under the Chota Nagpur Tenancy Act is entitled to be put in possession of the property purchased by him under section 11 of the Bengal Rent Recovery Act. If he fails to obtain possession under that Act, his remedy to obtain possession by a civil suit is not barred, if the suit is brought within twelve years of the sale as required by Article 128 of the Limitation Act. **PAT MOHAMMAD LATIF KHAN v. BAJO KOIRI** 955

— SCH. I, ART. 142—*Possession, physical and constructive, nature of—Boundary pillars, erection of, whether amounts to possession—Trespasser, possession of, nature of—Land covered by water at certain intervals, effect of—Dispossession, what amounts to.*

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute of Limitation, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place.

The Limitation Act applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.

LIMITATION ACT—1908—contd.

A mere erection of boundary pillars on the extreme edge of a disputed area is not an act of physical possession

The rightful owner sued a trespasser for possession of a tract of land, which lay on a river-side, was exposed to the risk of temporary flooding, was covered with jungle, and was unhealthy and malarious. It could only be utilized for the purpose of grazing animals or for collection of forest produce. It contained heights as well as hollows, and when rain fell it settled in the hollows. When the river rose high portions of the land remained under water. During the rainy season people abandoned it and it could not be utilized; but it was not established that the land had ever during the period of the trespasser's possession been actually submerged under water or was permitted to remain derelict. The trespasser simply waited for the water to subside before he resumed his acts of ownership:

Held, that under the above circumstances the rightful owner could not be presumed to have been in constructive possession of the tract of land every rainy season when some portions of it were covered with water. **O HEARSEY v. KARAM SINGH**, 3 O. L. J. 595; 19 O. C. 374 715

— SCH. I, ART. 144—*Alienation by Hindu widow—Suit by reversioner—Intervention of daughter's estate—Possession, adverse to daughter, whether adverse to reversioner—Hindu Law—Reversioner, nature of rights of.*

Reversioners, under Hindu Law, are not persons claiming from or through a female heir so as to make possession adverse to her adverse to them. Adverse possession against reversioners begins only from the time when they become entitled to possession.

Adverse possession against the ultimate reversioner does not begin till he is entitled to possession.

J, a Hindu widow, sold properties of her husband. She died on 21st April 1865. Her daughter *S*, who succeeded her, died on 27th June 1901. Her reversioners instituted a suit on 7th December 1912 to recover the properties alienated by her. It was contended by the alienees that as the 12 years' period of limitation under Act IX of 1871 within which *S* could have sued for possession expired before the coming into force of Act XV of 1877, which enlarged the scope of Article 142 of the former Act, the present suit by the reversioners was barred:

Held, that as adverse possession commenced against the plaintiffs only on the death of *S*, the suit was not barred. **M NEELAKANTA RAO v. NARAYANA-SWAMI AYYAR**, 20 M. L. T. 526; 31 M. L. J. 847 733

— SCH. I, ART. 144, *applicability of.*

Quære.—Whether Article 144 of the Limitation Act applies to a suit for recovery of possession of part of an estate on declaration of title by a purchaser at the revenue sale from a person who has been in possession as a trespasser. **C JITENDRA KUMAR PAL CHOWDHURY v. MOHENDRA CHANDRA SARMA**, 24 C. L. J. 62

• LIMITATION ACT—1908—contd.

— SCH. I, ART. 144—*Custom—Alienation by male proprietor—Suit by reversioners—Adverse possession—Limitation.*

A collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father, but from or through the common ancestor who owned the land. Therefore, in cases governed by Article 144, Schedule I, of the Limitation Act, limitation does not begin to run against a collateral till the right to sue accrues to him.

One D. S. sold certain ancestral land to defendant on 10th August 1886. He died on 23rd February 1892, and plaintiff sued in 1914 to recover the land as his collateral. It was found that on the death of D. S. plaintiff's father was his nearest collateral entitled to sue. He died about five years before the institution of the suit:

Held, that limitation began to run as against the plaintiff on the death of his father and the suit was, therefore, within time. **P. ARUR SINGH v. SOLAKHAN SINGH**, 174 P. W. R. 1916 **412**

— SCH. I, ART. 164 **292**

— SCH. I, ART. 166 **827**

— SCH. I, ARTS. 181, 182 *Mortgage, suit for foreclosure of—Consent decree, whether preliminary decree—Final decree, application for—Limitation.*

A consent decree in a suit for foreclosure, which provides that unless payment is made before a certain date the mortgagor's right to redeem would be barred, is a preliminary decree to be followed under the provisions of the law by a final decree for foreclosure. Therefore, an application to obtain the final decree is governed by Article 181 and not by Article 182 of the Limitation Act. **C. SASHI BRUSHAN DAS v. PRATUR CHANDRA ROY** **802**

— SCH. I, ART. 182—*Decree—Appeal—Execution—Limitation, commencement of.*

Where an appeal is preferred against an entire decree, the limitation to execute it runs from the date of the final decree of the Appellate Court.

A mortgagee obtained a decree *nisi* on foot of his mortgage on 9th July 1902 against the mortgagor and some other persons interested in the mortgaged property. The mortgagor acquiesced in the decree, but the other defendants appealed against the entire decree and the dispute was finally settled by a decree of the Privy Council dated 17th January 1912. The mortgagee applied on 3rd May 1914 to have a final decree made in his favour, and accordingly the decree was made final on 31st March 1915:

Held, that inasmuch as an appeal was preferred against the entire decree, limitation began to run under Article 182 of the Limitation Act only from the date of the final decree, and the application was, therefore, within time. **PAT JAGAT MOHINI DAS v. MOHAMAD IBRAHIM HUSSAIN**, 1 P. L. W. 309 **883**

— SCH. I, ART. 182—*Civil Procedure Code (Act V of 1908), O. XXI, r. 17, sub-r. (1)—Execution, application for, rejected as not in accordance with law, whether saves limitation.*

An application for execution of a decree rejected

LIMITATION ACT—concld.

by a Court under Order XXI, rule 17, sub-rule (1), as not being an application in accordance with law, will not operate to save limitation under Article 182 of the Limitation Act. **C. JOYANUDDIN KHAN v. JAMIRUDDIN SARKAR** **916**

— SCH. I, ART. 182—*Execution of decree, application for—Last intervening application by hostile claimant—Prior applicant, whether representative of petitioner.*

An application for execution of a decree which is presented more than three years after a prior application by a person not entitled to execute the decree and claiming hostilely to the petitioner, is barred under Article 182 of the Limitation Act. The prior applicant cannot be treated as the representative of the petitioner to the prejudice of the judgment-debtor.

A mortgagee decree-holder having died in 1908, his widow, on 24th November 1910, made an application for execution of the decree, which was opposed by the alleged adopted son of the decree-holder. In 1912, the latter filed a suit to declare his adoption and it was upheld on 21st July 1913. He made the present application for execution more than three years after the application by the widow:

Held, that the application by the widow having been hostile to the petitioner, she could not be treated as the representative of the petitioner to the prejudice of the judgment-debtor and that the present application was, therefore, barred. **M. SAMINATHA ASARI v. GOPALAKRISHNA AIYENGAR**, 4 L. W. 291 **750**

— SCH. I, ART. 182—*Execution—Leave to bid, application for, whether step-in-aid of execution.*

Where a decree-holder applied for leave to bid at the sale, and on the very day the application was granted consented to its adjournment and on the day of sale, refrained from bidding although there were no bidders present:

Held, that under these circumstances, the application could not be treated as an application to the proper Court to take a step-in-aid of execution.

Quere.—Whether, under any conceivable circumstance, an application by a decree-holder for leave to bid may be deemed an application to the proper Court to take a step-in-aid of execution. **C. JOGENDRA PRASAD MITRA v. ASUTOSH GOSWAMI**, 24 C. L. J. 452 **738**

LUNACY ACT (IV OF 1912), S. 56, *order under—Land Acquisition Judge's power to disregard order—Jurisdiction.*

An order of the District Judge in his lunacy jurisdiction that a certain sum of money, which was in deposit with the Land Acquisition Judge to the credit of a lunatic, should be paid out to his natural guardian who was maintaining the lunatic and his family, is in accordance with section 56 of Act V of 1912, and the Land Acquisition Judge has no jurisdiction to refuse to pay out the particular sum as directed by the order. **C. SATYENDRA NATH DEY v. SECRETARY OF STATE**, 20 C. W. N. 975 **110**

MADRAS CITY CIVIL COURT ACT (VII MAD. OF. 1892), S. 12 **436**

MADRAS CIVIL RULES OF PRACTICE, R. 134 348

— RR. 179, '31—Application under r. 179 for payment of moneys standing to credit of different suits—Objection by decree-holder in latter suit—Order upholding objection, nature of Remedy of party aggrieved—Appeal—Revision 348

MADRAS ESTATES LAND ACT (I OF 1908), S. 3 (2) 306

— S. 6, CL. '6', scope of—Suit for rent—Land situated in zamindari—Ryoti land—Presumption—*Ijara* lease—Jurisdiction of Civil Court

Prima facie land situate within the ambit of a *zamindari* must be deemed to be *ryoti* land unless the *zamindar* shows it is private land.

A claim for rent in respect of land in an 'estate' is cognizable by the Revenue and not by the Civil Courts, unless the plaint sets forth particulars taking it out of the cognizance of the former.

A claim is not exempted from the jurisdiction of the Revenue Courts simply because it arises out of an *ijara* lease.

Clause 6 of section 6 of the Madras Estates Land Act applies only to the case of a middleman taking an *ijara* and not where a *ryot* himself claims an *ijara* of his holding. *M. GOPSETTI NARAYANA-WAMI NAIDU GARU v. GANGISSETTI BANGARAYYA*, (1916) 2 M. W. N. 240; 4 L. W. 31 394

— S. 6, CL. 6, EXPL. 1

— S. 8, CL. 1, S. 6, CL. 6, EXPL.—Occupancy *ryot*, subsequent acquisition of melvaram by—Rule of merger, whether applies—Appeal, second—Notice, insufficiency or invalidity of, if can be pleaded for first time in second appeal—Interpretation of Statutes—Estates Land Act explicit—Principles of general law, if applicable.

Section 8, clause (1), of the Madras Estates Land Act I of 1908, simply enunciates the general law of merger, and the same is subject to qualifications to be found in other portions of the Act.

Section 8, clause (2), is an application of the general rule in clause (1) to the particular case where one amongst several co-landholders subsequently acquires the occupancy-right.

But where one out of several *mirasidars* or *ryots* becomes entitled to the rights of a landholder in respect of the same land, it is the converse of section 8, clause (2), and is specifically provided for by the explanation to clause 6 of section 6.

Where one of two persons, jointly entitled to the occupancy-right in a certain estate, becomes entitled by purchase to the *zamindari* or *melvaram* right also:

Held, (1) that he does not thereby lose his occupancy right:

(2) that the restriction that such acquisition should be by inheritance or devise applies only to clause 6 of section 6 and not to the explanation to clause (6).

The Madras Estates Land Act is a comprehensive Tenancy Code and wherever it is explicit, a discussion of the general law is irrelevant.

In an ejectment suit where the defendants did not plead any want of notice in the first Court and there was no issue regarding it:

MADRAS ESTATES LAND ACT—concl'd.

Held, that the plea of insufficiency or invalidity of notice could not be allowed to be raised for the first time in second appeal. *M. MUTHU REDDI v. MUTHU VENKATAPATHI REDDI*, 4 L. W. 168; 3. M. L. J. 354; (1916) 2 M. W. N. 180 1

— Ss. 74, 75 (6), 75 (7)—Appraisement of produce—Apportionment of *varam*, jurisdiction as to—Disagreement with assessors—Award, when final.

The officer deputed to make an appraisement under Madras Act I of 1908 has jurisdiction to decide the rate of '*varam*' in cases of dispute.

Where the assessors accept the appraisement of the officer, but differ as to the rate of the '*varam*', the award is not final under section 75 (7) and the officer can record his opinion on the rate after hearing objections. *M. VEERAPPA CHETTIAR v. MOOTHU KARUPPAN* 379

— Ss. 75, 205—Appraisement proceedings—Co-sharer tenant under co-sharer landlord—Other co-sharers, whether necessary parties.

Where one co-sharer owns a third share of a village and pays rent to another co-sharer:

Held, that to a proceeding by the latter for appraisement of crops under section 75 of the Madras Estates Land Act there is no necessity to join all the share-holders as parties. *M. BAVAJI PATNAIK v. GOVINDA PATNAIK* 382

— S. 131—Tender to Divisional Officer, whether sufficient.

The deposit required by section 131 of the Madras Estates Land Act may be tendered to the Divisional Officer, who is bound to receive it. The amount need not be paid into the sub-treasury. *M. POTHA VENKATASAWMI v. TRUSTEE, VIZIANAGARAM ESTATE* 378

— S. 189 906

— S. 205 382

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), Ss. 13, 2—Service inam lands, suit for recovery of—Jurisdiction of Civil Court.

A claim for the recovery of lands which are the emoluments of a service *inam*, must be laid before the Collector when the defendants contest the plaintiff's right to the office and allege an independent right in themselves.

In all cases where it is necessary for the plaintiff to allege, for the maintenance of his suit, that the land claimed is an emolument of a service *inam*, the jurisdiction is with the Collector under section 13 of Madras Act III of 1895. Where, however, the claim is to dispossess a trespasser and no question of title is involved, or where the land is claimed as the plaintiff's private property, the jurisdiction of Civil Courts is not ousted. *M. DEVINENI PATAYYA v. KANDUKURI KOTIAH*, (1917) M. W. N. 7; 5 L. W. 191 918

— S. 21 928

MAGISTRATE, sweeping prohibitory order of—Closing burial place—Omission to record provision of law—*Ultra vires* 489

MADRAS HIGH COURT ORIGINAL SIDE RULES,

1912, R. 511—*High Courts Act, 1911, 21 & 25 Vic. O. 1914, ss. 2, 3, 11, 15—Letters Patent, (Civil), 1963, ss. 1, 2, 3, 7, 11—Vakils, Attorneys, right of audience of, on Original Side* Rule 511, whether ultra vires of Letters Patent Legal Practitioners Act (X III of 1871), s. 4, proviso, s. 27, construction of, whether contains a legislative prohibition of audience to Vakils.

Rule 513 of the Original Side Rules of the Madras High Court, 902, which gives the right of audience to Vakils and withhold it from the attorneys on the Original Side of the High Court is not ultra vires of the Letters Patent of 1866, and is binding on practitioners.

The proviso to section 4 of the Legal Practitioners Act (XVIII of 1871) cannot be construed as a variation by the Indian Legislature, under clause 4 of the Letters Patent of the rule giving to Vakils the rights of audience on the Original Side, or as, by implication, preventing a Vakil from appearing on the Original Side. The words in the proviso 'under this section' govern the whole section.

Nor can such a prohibition be inferred from the absence in section 27 of any reference to the fees payable to Vakils appearing on the Original Side.

Act XVIII of 1871, which was passed after the privilege of audience on the Original Side had been enjoyed by the Vakils for 14 years, cannot be construed as taking it away, unless it says so in plain terms or by necessary implication.

History of the legislation on the subject traced and reviewed. *M. NAMBERUMAL CHETTY v. ARASIMHACHARI*, 31 M. L. J. 694; (1916) 2 M. W. N. 529. 699

MALABAR LAW—*Kanom deed—Improvements, value of, stipulation for payment of, by jennni on redemption—Kanom, redemption of, by maliknamdar—Suit for value of improvements paid to kanomdar, maintainability of—Transfer of Property Act (IV of 1882), s. 74—Contract Act (IX of 1872), s. 61.*

Under the terms of a *kanom* deed, the *jennni* undertook to pay the value of improvements when he redeemed the *kanom*. A *maliknamdar*, who redeemed the *kanom* and who paid the *kanomdar* the value of repairs effected by him, sued the *jennni* for the same.

Held, that on the constructions of the *kanom* deed, the suit was maintainable. *M. ARACALATHUR SUBBARTO v. PANIGALATHI KUNH MUAD*, (1916) 2 M. W. N. 3. 664

— *Maintenance, family arrangement in lieu of, by karnavann, whether can be set aside by succeeding karnavans.*

Where the *karnavann* of a Malabar *tarwad*, by a family arrangement, grants *sondils* (suits) to the junior members of the *tarwad* in lieu of maintenance, the arrangement is binding on the succeeding *karnavans* and cannot be set aside unless for good cause.

A suit for recovery of possession of such land cannot be maintained by a succeeding *karnavann*, unless the latter seeks to set aside the arrangement and offers to make some other suitable arrangement for the junior members who are in possession of the land. *M. RAMASWAMPATTAR v. GOPALAN*, 32 M. L. J. 97. 659

MALABAR LAW—concl.

— *Private tarwad temple—Alienation by karnavann of temple properties—Suit by successor-in-office of alienor to cancel alienation—Compromise, binding nature of, on members Good faith—Necessity—Trusts Act (II of 1882), ss. 42, 43—Onus of proof Mortgage, modification of, by kaichit—Kaichit, whether requires registration—Transfer of Property Act (IV of 1882), s. 59—Contract Act (IX of 1872), ss. 62, 63.*

A document merely effecting a modification of a pre-existing mortgage whereby the mortgagee gives up some of the benefits and reciting that the latter document is in full force, is not a new mortgage and does not require registration. The case is one of remission under section 3 and not of novation under section 62 of the Contract Act.

The junior members of a Malabar *tarwad* to which a private temple belongs can bring a suit to protect the Devaswam against alienation by a *karnavann* trustee.

A compromise of a suit by the *karnavann* of a *tarwad* to set aside an alienation by his predecessor of the properties of a private Devaswam attached to the *tarwad* is not binding on the Devaswam, unless the compromise was entered into in good faith and for necessity and after due enquiries by the alienee. The decision as to good faith and necessity must be reached on a comprehensive survey of all the circumstances. It cannot be assumed that, because one party withdraws a large proportion of his original claim, the result is advantageous to the other, unless the prospects of the contest regarding the balance are considered and found unfavourable. The good faith and necessity for a compromise can, however, be upheld, though proof may be wanting that its terms represent those which would have been secured, had the matter been litigated fully.

The burden of proof regarding the propriety of the compromise is on the alienee.

Per *Sadasiva Aiyar, J.* Though the Indian Trusts Act does not apply to any public or private religious endowments, the principles embodied in section 43 apply to a trustee or trustees acting on behalf of a private religious trust. The powers of a trustee embodied in that section are enunciated primarily to protect him when acting *bona fide* against suits for damages by the *cestui que trust* for loss caused by the exercise of such powers. But the question whether property alienated to a third party by the trustee through an alleged breach of trust can be pursued successfully by the *cestui que trust* depends on very similar considerations, viz, whether the third party acted *bona fide* without notice of the breach and whether he was an alienee for valuable consideration.

The analogy between the case of a Hindu widow representing her husband's estate and the case of a trustee of a religious institution is rather remote.

It is necessary for Courts in India to scrutinise alienations by compromise and awards out of Court made in reference to properties relating to religious and charitable trusts with very great care before they are accepted as valid against the trust. *M. RAVI VARMA R. MA v. RAMASUBRAMANIA IATTAR*, (1916) 2 M. W. N. 312; 31 M. L. J. 733; 4 L. W. 576. 692

MALICIOUS PROSECUTION, suit for—Illegal distraint of cattle—Damage to reputation—Cattle Trespass Act (I of 1871), s. 20.

Per Curiam.—A suit for damages for malicious prosecution is not confined to criminal proceedings alone nor would such an action lie for all criminal prosecutions. The cases for which such a suit lies are those in which there is either (a) damage to a man's reputation or (b) danger to his liberty or (c) damage to his property.

Per Seshagiri Aiyar, J.—A suit for damages for malicious prosecution under section 20 of the Cattle Trespass Act may lie in some cases, for though in such an accusation there may not be either danger to the liberty or damage to the property of the accused, still there may be "damage to the reputation" of the person accused, considering his position in life and the motive and status in life of the accuser.

Per Napier, J.—A charge of illegal distraint of cattle does not come within the mischief of the principle of damage to the reputation of the accused and no suit for damages lies. The damage to a man's reputation must be something serious, as if the matter whereof he is accused be scandalous.

M SRIRAMULU NAIDU v. KOLANDAIVELU MUDALI, 10 M. L. T. 308; 31 M. L. J. 479; (1916) 2 M. W. N. 242; 4 L. W. 332 374

MASTER AND SERVANT—Incompetence, dismissal of servant for, before stipulated term of service—Wrongful dismissal, action for—Damages.

Where a person is employed who has not the requisite competency for the office, his dismissal before the stipulated term of service is not wrongful and no action lies for damages therefor.

There is no material difference between a servant who will not and a servant who cannot perform the duty for which he is hired. **M R. MASWAMI AIYAR v. MADRAS TIMES PRINTING AND PUBLISHING CO., LTD.** 655

MAXIMS—"Allegus contrarius non audiendus" 447

—"A man cannot take advantage of his own fraud," applicability of 945

—"Estoppel against estoppel setteth the matter at large 198

—"Ignorantia juris haud excusat.

The word *jus* used in the maxim "*ignorantia juris haud excusat*" denotes general law and not a private right. **P Musammatt AISHAN v. MUHAMMAD DIN** 119

MINES, minerals, right to—Grant—Severance of tenement—Ownership of sub-soil, vesting of, in grantor—Presumption—Sanad or deed of grant, loss of—Evidence of grantee's user of surface—Lost grant, presumption on basis of—Entry, grantor's right of, to work mines—Wrongful user of right, remedy for—Injunction—"Moghuli," meaning of.

In the absence of an express grant of the sub-soil, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights and the same are not vested in them.

Where, prior to the date of a grant of land, both the ownership and the right of property in the surface as well as the sub-soil were vested in the grantor, as one entire tenement, the presumption

MINES—conold.

is that, at the time of the grant, there was a severance of the surface rights from the property in the sub-soil. The surface rights with their incidents became vested in the grantee and the mines and minerals in the grantor as owner of the sub-soil as if there had been a reservation of them in his favour. The grantor's rights are the same as those of a fee simple freehold owner of land in England who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom.

By reason of the said presumption and of the severance of the tenement and the reservation that must be deemed to arise in favour of the grantor, the latter has the right by implication to enter on the land for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights.

The principles of the law governing freeholds and not copyholds should be applied to the case. It is only under the copyhold law where there is no reservation or custom proved that a deadlock occurs and neither landowner nor tenant can work the mines. Under the law applicable to free hold land, there can be no deadlock, for if the mines be excepted, the grantor has an implied right to work them as incidental to such exception; if there be no exception, then that right is with the grantee as the owner of the surface and sub-soil.

If, in working the mines and extracting the minerals, the grantor or his assignees cause damage to the owners of the surface, there is ample power in the Court to injunct them and prevent them from so doing.

The presumption of a grant in favour of a person in the nature of a lost grant, which means presuming a lawful origin to support long and continuous user and enjoyment of the property, can be made only on the basis of the actual user exercised and enjoyed by such person.

Where the original *sanad* or grant is lost or not produced, and the evidence establishes only user by the grantee as permanent tenure-holder of the surface rights of a *mouza* by cultivation of land, building of houses or excavation of tanks, no presumption can be made in his favour of a lost grant to exercise mineral rights in the *mouza*.

The term 'moghuli' appearing in a rent receipt is a word of doubtful meaning and at best imports no more than that the rent assessed represented a proportion of the Government revenue. **PAT NAWAGARH COAL CO., LTD. v. BEHARI LAL, 20 C. W. N. 1135; 1 P. L. J. 275** 450

MINOR, guardian ad litem of, confession of judgment by—Gross negligence—Minor, suit by, on attaining majority, to set aside decree.

Gross negligence on the part of the guardian ad litem of a minor in defending a suit gives the latter a cause of action to set aside the decree. **P**

MOHAN LAL v. NEKI, 117 P. L. R. 1916 195

—"Settlement by de facto guardian, validity of—Partnership—Relationship between heirs of deceased partner and surviving partners Right of deceased's heirs to claim profits—Settlement, if and when can be re-opened—Estoppel—Contract Act (IX of 1872), s. 241—Trusts Act (II of 1882), s. 88, ill. (f), construction of.

MINOR—contd.

In cases of urgent and imperative necessity, or where a transaction from its nature must necessarily be beneficial to a minor, a *de facto* guardian can alienate the property of the minor, whether moveable or immovable.

A settlement of accounts arrived at by the *de facto* guardian of a Muhammadan minor, as representing the amount due to him for his deceased father's share in a partnership, is binding on the minor if it is fair and is made *bona fide* and in the best interests of the minor and as the result of independent advice.

The minor is only entitled to either the stipulated or a fair rate of interest on the amount found to be due to him at the settlement.

A settlement once arrived at is final and in the absence of fraud or substantial errors the accounts cannot be re-opened or profits claimed on the ground that they were unduly large and the amount payable under the settlement or the interest thereon bore no proportion to it, especially where the settlement was long acted upon.

Plaintiff's father and the defendants, all belonging to the class of *Kutchi Memon* Muhammadans, were trading as partners till October 1907, when plaintiff's father died. In November, accounts were taken of the amount due to plaintiff, then a minor one year old, and a settlement arrived at that Rs 16,000 was due to him. This amount was left in the hands of defendants who were to pay interest at $7\frac{1}{2}$ per cent. The mother and maternal grandfather of plaintiff and two other respectable gentlemen were parties to the settlement, which was registered. The interest amounting to Rs. 100 a month was regularly paid by defendants to the plaintiff's maternal uncle, who now brought this suit as his next friend, for accounts and for a share of profits, since plaintiff's father's death. Mr. Justice Bakewell, on the Original Side, held that the settlement was void, as the plaintiff was properly represented, his mother not being his legal guardian, and decreed the suit, without even giving credit to sums regularly paid after the death of plaintiff's father. In appeal:

Held, reversing the decree of Mr. Justice Bakewell, that plaintiff was not entitled to maintain this suit and ask for an account.

Per *Seshagiri Aiyar, J.*—A minor who is entitled to claim the assets of his deceased father in a partnership is not entitled to claim as of right a share in the profits of the concern. There is nothing in the Indian Contract Act to that effect. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more.

It is always a very difficult process to find out to what exactly the profits earned in the trade are due, whether to the capital left by the deceased, or to the capital brought in by the other partners or to other things. Therefore, there are innumerable difficulties in the way of an account being taken. Discretion must be left in the Court in such matters to act on behalf of the minor.

Illustration (f) to section 88 of the Indian Trusts Act goes further than the operative portion of the section itself, and, if it is to be regarded as laying

MINOR—concl.

down that in every case where after the death of a partner the money is left outstanding in that partnership the legal representative of the deceased partner is entitled to a share of the profits, it is not sound law. *M. Siddick v. Mahomed Hussain*, (1916) 2 M. W. N. 34; + L. W. 521 728

MORTGAGE by certificated guardian without Court's sanction—Minor's right to avoid—Burden of proof—Interest on mortgage of minor's property 380

Charge, deed of, construction of—Redemption

A mortgagor borrowed a certain sum of money by way of further advance from his mortgagee and gave a bond for the loan in the following terms:

"The above debt will be a charge against the property above mortgaged. If I fail to pay the whole or a part of the above debt, I will have to pay it at the time of redeeming the above mortgage." In a suit for redemption by the mortgagor:

Held, that the deed constituted a mortgage of or at least a charge on the property and that the plaintiff could not redeem it without payment of the amount secured by the deed. *P. Hukam Chand v. Kadar Bux*, 100 P. W. R. 1916 166

consolidation of—Redemption, postponement of—Clog on equity of redemption.

Where a subsequent mortgage-deed does not create any charge on the property previously mortgaged but merely postpones the redemption of the previous mortgage till the redemption of the subsequent mortgage, such covenant as to postponement of redemption does not amount to a contract of consolidation so as to render one transaction irredeemable without the redemption of the other, and may amount to an unreasonable clog on the equity of redemption. *O. Rajendra Narain v. Deputy Commissioner, Bahraich*, 3 O. L. J. 643 438

by co-sharer—Mortgagor tenant of mortgagee—Sale of mortgaged property to third person—Consideration, portion of, left with vendee to pay off arrears of rent—Rent, suit for arrears of, by mortgagee—Proper parties—Jurisdiction of Civil and Revenue Courts.

A co-sharer in a village mortgaged his share with possession, and remained in cultivation of certain portions of the mortgaged land as tenant. Subsequently he sold his share, leaving a portion of the purchase-money with the vendee to pay up the arrears of rent due by him to the mortgagee and the *lambardar*. The vendee paid the whole money left with him to the *lambardar* alone. The mortgagee sued the *lambardar*, together with the vendor and the vendee, in the Civil Court, for his share of the money thus paid to the *lambardar*:

Held, that the mortgagee had no remedy of any kind against the vendee, but only as against the *lambardar*, and this too in a Rent Court. *O. Beni Madho v. Asghar Hussain*, 3 O. L. J. 515 65

Decree for foreclosure—Computation of time for payment—Appellate decree, effect of 779

MORTGAGE—contd.

—Foreclosure, decree nisi for, against mortgagor
 —Mortgagor, death of, before decree absolute—Heirs,
 one of several brought on record, effect of—Execution
 —Rule—Interest of other heirs, whether could be sold.

A Hindu widow, who was in possession of a certain share of her husband's property upon partition made among her sons and who lived jointly with one of the latter, mortgaged her share to pay off her husband's debt. The mortgagee obtained a decree nisi on the mortgage against the widow, but the latter died before the decree could be made absolute. The son, who had lived jointly with the widow, was alone brought on the record as her representative, and the property was brought to sale in execution of the decree and was purchased by plaintiffs, who sued all the heirs of the widow for possession.

Held, that the order absolute having been obtained against one out of several heirs of the widow, there was not in existence any decree under which the interests of the other heirs could be sold. **A KUNDAY SINGH v. SURJA KUAR**, 14 A. L. J. 989 103

—, modification of, by *kaichit*—*Kaichit*, whether requires registration 612

—Moveable property—Mortgage decree if moveable property—Mortgage of mortgage-decree, suit on—Limitation—Mortgaged property, purchase or portion of, by mortgagee—Mortgage, extinction—Intention.

A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property and a suit to enforce a hypothecation of such a decree is governed by Article 120 of the Limitation Act.

Where, however, the decree has been converted into immovable property, the mortgagee of such decree is entitled not only to the benefit of the new security but also to the benefit of the larger period of limitation under Article 132 of the Limitation Act.

Where a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage does not thereby become *pro tanto* extinguished, unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred. **A JANNADEI v. LALA RAM**, 4 A. L. J. 125 4

—Moveable property—Mortgage, how effected.

A mortgage of moveables can be as validly effected by parole as by a writing and the immediate effect of such a mortgage is to pass the property in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual possession of the chattels should be given. **B TEHLIL RAM GU DHARIDAS v. LONGIN D'AMELLO**, 18 Bom. L. R. 587 231

—Prior and puisne encumbrancers, decrees obtained by—Sale in execution of both decrees—Purchased by first mortgagee with symbolic possession—Actual possession on by purchaser at second mortgagee's sale—Conflict of titles—Right of first mortgagee purchaser—Suit for recovery of mortgage amount—Nature of claim—Position of parties—Equities—Relief—Transfer of Property Act (IV of 1882), s. 74, 75—Civil Procedure Code (Act V of 1908), O. XXXI, rr. 11, 12.

MORTGAGE—contd.

It is necessary, in a suit to enforce a mortgage security, that all necessary parties, including puisne and prior encumbrancers, should be impleaded.

Where, however, the rule is departed from and both prior and puisne mortgagees institute suits on their respective mortgages without impleading each other and obtain decrees, and in execution of such decrees the property is purchased by different persons in a suit to establish the priority of claim as between such purchasers in which the decree-holders and judgment-debtors are also impleaded, it is the duty of the Court to look to the real position of the parties and in awarding relief, work out the equities between them.

On 16th October 1903, M mortgaged a house to plaintiff's predecessor. In 1917, M effected a second mortgage of the same house to K. On 19th August 1910, the plaintiff sued on his mortgage without impleading M and obtained a decree after contest, in which the mortgagor was allowed the usual six months' time to redeem. The decree was made absolute in due course and the house was brought to sale and purchased by plaintiff on 30th July 1912. On 20th June 1911, K filed a suit on his mortgage without impleading the plaintiff. A consent decree was passed on 13th August 1911, in which the mortgagor was allowed only fifteen days to redeem. The house was sold again on 2th February 1912 and was purchased by B. Plaintiff was given formal possession and B got actual possession. Plaintiff brought the present suit against B and K for recovery of the amount due on his mortgage of 1903 and for possession of the house on default of payment.

Held, (1) that the suit was neither one for sale on plaintiff's mortgage nor a suit to foreclose that mortgage, but was based on plaintiff's failure to obtain actual possession of the property which he had purchased at the sale in execution of his decree;

(2) that B was entitled to nothing more than an opportunity of paying off the prior mortgage, and that on his declining to do so, he should surrender possession;

(3) that, as the right of sale possessed by each of the mortgagees had been exercised by them and exhausted, there was no need to put up the property again to sale or bring a second suit for sale and that what remained to be determined was the respective rights and liabilities of the rival auction-purchasers;

(4) that limitation for the suit commenced to run from the date of plaintiff's purchase.

Per *Lindsay, J.* The title of either party is immediately traceable to his purchase in execution and reference to their rights under the mortgages is only necessary for the purpose of ascertaining the equities existing between them. Each has an imperfect title acquired by purchase and the point for determination is which has the stronger equity in his favour. The plaintiff's omission to implead the puisne mortgagee rendered her title defective only to the extent that her title as owner is qualified by a right of redemption which was vested in the second mortgagee and which passed to the purchaser under the decree obtained on the second mortgage. The purchaser has no superior title merely.

MORTGAGE—contd.

on the ground that he purchased first and his title could only become absolute by a discharge of the prior encumbrance. *A B. BU LAL v. JALAKIA*, 14 A. L. J. 1146 **343**

— Prior and puisne encumbrances—Decree for sale in first mortgagee's suit and purchase by decree-holder—*Puisne mortgage, non-joinder of, in suit—Renewal of puisne usufructuary mortgage after first mortgagee's decree, effect of—Merg—Suit for possession by auction-purchaser, maintainability of*

A first mortgagee purchased the mortgaged properties in execution of the decree passed in the suit on his mortgage, to which a second usufructuary mortgage was not made a party. The latter got a renewal of his mortgage after the said decree. The first mortgagee decree-holder brought a suit for possession under Order XXI, rule 103, Civil Procedure Code, against the owner and the second usufructuary mortgage.

Held, that, in the absence of proof of any intention on the part of the usufructuary mortgagee to give up his security under the first deed, he must be presumed to have intended to keep it alive and he was entitled to rely on it against the plaintiff's decree and the sale thereunder.

Held, also, that, the defendant being in the position of a puisne mortgagee with possession and the plaintiff in that of a first mortgagee who had purchased the property in execution of the decree on his mortgage to which the puisne mortgagee was not a party, the plaintiff's suit for possession must fail.

The question whether previous incumbrances paid off or renewed are to be treated as still kept alive or as extinguished against mesne incumbrancers is one of intention of the parties to the transaction, and where there is no clear evidence of that intention from express declarations or attendant circumstances parties must be presumed to have intended what is for their benefit: the mere fact that the incumbrance has been paid off or renewed does not decide the question.

Where a subsequent incumbrancer alleges that a prior incumbrance has been extinguished by payment or renewal, it must be clearly established by cogent evidence, whether direct or inferential that the person making the payment or taking the renewed deed, deliberately and with the knowledge that it was to his benefit to keep the prior incumbrance alive, elected to extinguish it for all purposes; otherwise the presumption that a man intends what is to his benefit should be allowed to prevail.

The principle under which protection is granted to persons renewing prior incumbrances against intervening incumbrancers applies also to cases of intervening decrees under which property has been sold.

In a usufructuary mortgage possession is an essential part of the security and what is kept alive is not merely the security but the rights of the mortgagee on the property under the deed. *M. PRAYAG DOSS JEE VARU v. BAYUR CHENGAMA NAIDU*, 20 M. L. T. 295; (1916) 2 M. W. N. 288; 4 L. W. 477 **456**

MORTGAGE contd.

— prior to Transfer of Property Act—Redemption, clause in restraint of—Stipulation for absolute title on default of payment on specified date—Clog—Adverse possession, title by, whether can be set up in bar of right to enforce mortgage—Appropriation of rents due by mortgagee towards interest due by mortgagor, whether saves limitation—Transfer of Property Act (IV of 1882) s. 60—Limitation Act (IX of 1908), s. 20, Sch. I, Art. 132.

In the case of mortgages executed prior to the passing of the Transfer of Property Act, no agreement of the parties can operate *inso facto* to clog or restrain the equity of redemption, nor can an agreement affect the character of the mortgagee's possession so as to convert it from that of a mortgagor into that of a person prescribing for a full title.

The effect of the Transfer of Property Act is to preserve the equity of redemption unfettered, section 60 providing that only an independent act of the parties or an order of Court can operate to extinguish it.

Where the right to enforce a mortgage has become barred under Article 132 of the Limitation Act, it is not open to the mortgagee to set up his possession under an invalid stipulation in restraint of redemption in a suit for possession by the mortgagor and compel the mortgagor to redeem, and thus discharge a barred debt.

Per Ayling, J.—A payment under section 20 of the Limitation Act, in order to save limitation, must be a conscious act.

The mere appropriation of rents due by a mortgagee to the mortgagor towards the interest due by the latter will not save limitation, especially when the interest is payable not periodically but on a single date.

First plaintiff's father effected a *kanom* usufructuary mortgage with possession to defendants' ancestor on 14th November 87 for 30 years for Rs. 100. On 12th August 1875, he executed a simple mortgage on the same lands for Rs. 400. This latter mortgage contained a stipulation that if the principal and interest were not discharged by 1st August 1876, the mortgagees were to have *jezman* or absolute rights. In a suit for redemption of the first *kanom* mortgage, defendants pleaded the forfeiture clause in the second mortgage and their own adverse enjoyment in bar of plaintiffs' suit.

Held, (1) that the stipulation in the second mortgage was invalid as a clog on the equity of redemption.

(2) that the effect of the said stipulation was not to alter the character of defendants' possession from 12th August 1876 and to render it adverse to the title of the mortgagor, but that it still continued as the possession of the mortgagees.

(3) that plaintiffs were not bound to redeem the second mortgage after plaintiffs' rights thereunder had become extinguished under Article 132 of the Limitation Act.

(4) that, in the absence of a payment for interest in respect of the second mortgage, the appropriation by the defendants of rents due by them towards

MORTGAGE—contd.

interest did not operate to save the bar of limitation. **M. ATHAN KUTTI v. MATAVIL ILLOTH SATURJANAN**, (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 317

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—redeemable—Suit for declaration that certain conditions were not enforceable, maintainability of 374

—Right to receive dues at funerals, mortgage of, validity of—**Maha Brahmins, right of—Existing right—Transfer of Property Act (IV of 1882), s. 6.**

A mortgage by a Maha Brahmin of his rights to receive the dues and offerings at funerals of Hindus on particular days is not null and void.

Obiter dictum.—No Maha Brahmin can bring a suit to compel any person carrying out a funeral to employ him and in the absence of a special agreement a Maha Brahmin cannot bring a suit against another Maha Brahmin for fees received.

The right to receive the dues at funerals is an existing right. **A. SUKH LAL v. BISHAMBHAR**, 5 A. L. J. 41 661

—, simple—Suit by simple mortgagee, nature of—Adverse possession, title by, effect of, as against mortgagor and mortgagee—**Limitation Act (IX of 1908), s. 28 Transfer of Property Act (IV of 1882), s. 58.**

The enforcement of a title by adverse possession as against a person who has executed a simple mortgage of the property will not extinguish the right of the mortgagee to sue for his debt and realise his security within the time allowed by law.

Per **Sanderson, C. J.**—The term 'adverse possession' implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment the adverse possession begins.

Adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or, in other words, only the interest which the person having the right to immediate possession has in the property, when the adverse possession begins.

Where after a simple mortgage the mortgaged property is taken possession of by a third person, the latter takes possession only of what belonged to the mortgagor, viz., his equity of redemption, and, therefore, holds it subject to the liability of its being sold for the satisfaction of the mortgage debt.

Per **Mookerjee, J.**—A simple mortgagee is not entitled under the Transfer of Property Act to take possession of the mortgaged premises, he holds the property as security for the loan while the mortgagor continues in possession thereof.

A suit by a simple mortgagee for the sale of the mortgaged property is in no sense a suit for possession of an interest in immoveable property.

The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest therein subsequent to the mortgage.

MORTGAGE—concl'd.

The question whether a third party has by adverse possession for the statutory period acquired a title paramount to both the mortgagor and the mortgagee should not be litigated in a mortgage suit, and any person claiming such a title in a mortgage suit should be discharged from the suit.

The dispossession of the mortgagor, subsequent to the execution of a simple mortgage, though it may operate by lapse of time under section 28 of the Limitation Act to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee, as he is not entitled to possession of the mortgaged property either under the Statute or under the contract.

Section 28 of the Limitation Act, which prescribes a rule for the extinguishment of right to property, is expressly limited to suits for possession. In respect of debts, the provisions of the Limitation Act merely bar the remedy but do not extinguish the right. Therefore, when a mortgagor in possession is dispossessed and does not institute a suit against the trespasser within twelve years of the dispossession, his equity of redemption, and *prima facie* nothing more, becomes vested in the adverse possessor. The dispossession of the mortgagor in a simple mortgage does not extinguish the title of the mortgagee by lapse of time under section 28 of the Limitation Act.

Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. **C. PRIYA SAKHI DEBI v. BIRESHWAR SAMANTA**, 21 C. W. N. 177 277

—, suit for foreclosure of—Consent decree, whether preliminary decree—Final decree, application for—Limitation 802

—, suit on, against mortgagor and co-mortgagee—Mortgage-money paid to co-mortgagee who had authority to receive it—Decree, whether can be passed against co-mortgagee.

Where in a suit by a co-mortgagee against the mortgagor and the other co-mortgagee, a *pro forma* defendant, it was found that the mortgagor had paid up the full amount due on the mortgage to the *pro forma* defendant, who was entitled to receive the money on behalf of both the co-mortgagees, and the Court passed a simple money-decree in favour of the plaintiff against the *pro forma* defendant.

Held, that the suit must be dismissed and that the decree could not stand. **O. CHANDI DAYAL v. GANESH PRASAD**, 3 O. L. J. 628 449

MORTGAGE-DEED, interpretation of—Interest, covenant to pay, on default of payment of instalment.

Where under the terms of a mortgage-deed the mortgage-money was payable by certain specified instalments and the mortgagee was empowered to recover the entire money due to him with a certain rate of interest thereon if three instalments remained unpaid on the dates fixed therefor:

Held, that both the time and the amount formed the essence of the contract, and that if the payments of three instalments, consecutive or otherwise, were deficient in amount or were made beyond time, such

MORTGAGE—contd.

payments would be ineffective to prevent the mortgagee from enforcing the covenant, unless it was shown that he had waived the defaults. **O MANOHAR LAL v. SAKINA BEGAM**, 3 O. L. J. 623 **442**

— **DEED**, separate arrangement in contravention of terms of, whether can be proved—Lease executed by mortgagor, possession of mortgagee under, effect of—Interest.

In view of section 92 of the Evidence Act, proof of a separate arrangement in direct contravention of the terms of a mortgage-deed is inadmissible.

Where a mortgage-deed expressly states that no interest is to be charged for the mortgage-money and the mortgagee is put in possession of the mortgaged property under a lease executed simultaneously with the mortgage-deed, evidence cannot be admitted to show that the mortgagee was put in possession of the property to provide for interest on the principal amount. **O MUHAMMAD HUSAIN v. MUHAMMAD ASGHAR**, 3 O. L. J. 462; 19 O. C. 328 **23**

— **REDEMPTION**—Appeal—Lower Court's decree, failure to comply with, whether bars appeal—Mortgagee, failure of, to keep accounts of additions and repairs, effect of—Compensation.

Failure to deposit the redemption money in compliance with the decree of the lower Court does not necessarily bar the hearing of an appeal from that decree.

It is the duty of a mortgagee to keep accounts of expenditure on additions to and repairs of the mortgaged property, and if he fails to do so, all presumptions will be made in favour of the mortgagor, but such failure does not *ipso facto* defeat a claim for compensation which is proved in other ways. **P THAKUR DAS v. RADHA KISHAN**, 99 P. R. 1916 **125**

— **Compromise**—Time fixed by consent, whether can be extended by Court.

In a suit for redemption, where the parties have by compromise fixed a time for redemption, the Court has no power to extend the time without consent of parties. **L B MAUNG SAN LIN v. MAUNG SHWE THEIN** **672**

— **Interest**, covenant as to payment of, construction of.

A mortgage-deed provided that the mortgagee would remain in possession of the mortgaged property and would receive the profits thereof in lieu of interest, the mortgagor, being entitled to redeem the property on payment of the principal sum. In case of a deficiency of profits the mortgagor covenanted to make it up from his own pocket.

Held, that there being no covenant on the part of the mortgagor that the deficiency in the profits should be added to the principal or that it should be paid at the time of redemption, he was entitled to redeem the mortgaged property on payment of the principal sum only. **A ALI AHMAD v. KALKA PRASAD**, 14 A. L. J. 986 **95**

— **Payment of mortgage-debt**, whether extinguishes sub-mortgage—Notice.

A sub-mortgage is extinguished by the payment of the mortgage-debt by the mortgagor to the mortgagee, if the former has no notice or knowledge of the sub-mortgage, and acts in good faith. **M POOSARLA CHINNASWAMY v. KATTAMOORI VENKATA RAMAKRISHNAYYA**, 4 L. W. 502; (1917) M. W. N. 111 **778**

MORTGAGE—contd.

— **REDEMPTION**—Suit based on specific mortgage—Mortgage specified not proved—Plaintiff, whether can get decree on prior mortgages—Cause of action—Multifariousness—Civil Procedure Code (Act V of 1908), O. I, r. 3—Misjoinder.

The plaintiff brought a suit for redemption against two persons on the basis of a particular mortgage. The specific mortgage set up in the plaint was not proved.

Held, that the plaintiff was not entitled to a decree for redemption in that suit on the basis of prior mortgages in favour of the two defendants separately. **PAT GOVIND KANDU v. WAJID ALI** **976**

— **Suit by prior mortgagee**—Execution—Sale—Puisne mortgagee's right to redeem—Irregularities in execution proceedings, effect of.

Plaintiff-mortgagee obtained a decree on foot of his mortgage, and in execution thereof purchased the property in dispute, and obtained delivery of possession. Subsequently defendant, puisne mortgagee, obtained a decree against the same property, and in execution purchased it himself, and got registration of his name in the Collectorate register. Plaintiff sued for declaration of title and confirmation of possession, or in the alternative for recovery of possession. Defendant set up a right to redeem plaintiff's mortgage, and also alleged that he was not bound by the sale in execution of the latter's decree, as his name did not appear in the execution proceedings.

Held, (1) that defendant's right to redeem continued up to the confirmation of sale in plaintiff's favour;

(2) that the omission of defendant's name from proceedings in execution of plaintiff's decree did not render the sale a nullity and that the defendant was, therefore, bound by it. **PAT MUHAMMAD RAFI v. MUHAMMAD ASKARI**, 1 P. L. J. 261 **433**

— **Tagavi claims**, non-payment of—Sale of mortgaged property—Benami purchase—Mortgagee, liability of—Purchaser, not bona fide—Equity enforceable—Transfer of Property Act (IV of 1882), s. 76—Trusts Act (II of 1882), s. 90—Bombay Land Revenue Code (Bom. Act V of 1879), ss. 56, 153.

The defendant No. 1 was a *san*-mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1901 the plaintiff's mother for the benefit of those interested in the property took an advance by way of *tagavi* and gave a charge upon one of the survey numbers, viz., 311, as collateral security for payment of the loan. In 1903 the plaintiff's mother on behalf of herself and the plaintiff, her minor daughter, executed a mortgage-deed with possession in favour of the mortgagee and put him in possession of all the property previously charged under the *san*-mortgage including the survey No. 311. The survey No. 311 was sold in 1906 to satisfy the claim of Government in respect of the *tagavi* advance and was purchased by the defendant No. 2 *benami* for the defendant No. 1. Subsequently it was purchased by the defendant No. 3, who had a notice of everything that had occurred in connection with the property. The plaintiff sued to redeem the property in 1912, being entitled to the benefit of the Dekkhan Agriculturists' Relief Act;

MORTGAGE—*conold.*

Held, (1) that the *tagavi* advance granted to the mortgagor by the Government was of a "public nature" within the meaning of section 76 of the Transfer of Property Act and that inasmuch as the sale took place owing to the default of the mortgagee, section 90 of the Trusts Act applied and that the defendant No. 1 could not obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee;

(2) that section 56 of the Land Revenue Code did not apply, inasmuch as there was no forfeiture under section 153 of that Code;

(3) that the defendant No. 3 could not resist the suit; inasmuch as he was bound by the equities enforceable against the vendor by reason of his not being *bona fide* purchaser without notice. **B CHITTA BHULA v. BAI JAMNI**, 18 BOM. L. R. 438; 40 BOM. 433 295

MUHAMMADAN LAW—*Ahmadi, whether Muham-*

madans.
Members of the *Ahmadiya* sect of Qadian are Muhammadans **P KHALIL AHMAD v. ISRAFIL** 2 P. L. J. 109; 1 P. L. W. 284 392

Dower, whether can be claimed in suit for share of inheritance.

The claim of a widow for dower is, under the Muhammadan Law, a debt chargeable against the general estate of the deceased husband.

It is a clear principle of the Muhammadan Law, applicable alike to *Shias* and *Sunnis*, that the estate of a deceased Muhammadan is, before its distribution among the persons entitled as heirs, liable for the debts which were owing by the deceased at the time of his death. Therefore, the widow of a deceased Muhammadan is competent to put forward her claim for dower in a suit brought by one of the heirs of the deceased for a share in the estate, to which she is a party. **O BAQAR MIRZA v. MEHDI HASAN**, 19 O. C. 246 203

Hindu Law.—Kutchi Memons, law applicable to 728

Legitimacy—Acknowledgment of parentage—Treatment.

It is open to a Muhammadan to legitimatise an illegitimate child by acknowledgment of his paternity, but to establish such legitimization it is necessary to prove an intention evidenced by a formal and deliberate act.

Where in a case it was found on the facts that a Muhammadan had seduced a maid-servant, who had grown up in his household and was considerably loved by him, had begotten children from her, and had then repaired the wrong by marrying her; that he had given food and shelter to those children; and that in a Will subsequently executed by him he had referred to them simply as his daughters and provided for their maintenance, marriages and support:

Held, that from the above circumstances it could not be inferred that he had intended to legitimatise those children. **O ZAHIDA BIBI v. WALI MUHAMMAD**, 3 O. L. J. 654 926

Marriage—Muta—Nikah, before expiry of period of muta, validity of.

MUHAMMADAN LAW—*contd.*

A marriage by *nikah* with a *muta* wife during the subsistence of the period of *muta*, but after the surrender of the unexpired period, is valid. **O BAQAR MIRZA v. MEHDI HASAN**, 19 O. C. 246 203

Mosque, right to hold separate congregation in.

Every mosque is open to any Muhammadan, to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Muhammadans are not entitled to pray in every mosque as a separate congregation behind an *imam* chosen by themselves.

Per *Roe, J.—Semble*.—Where people deliberately come late to prayers they cannot be allowed to have a second service of their own. **PAT KHALIL AHMAD v. ISRAFIL**, 2 P. L. J. 108; 1 P. L. W. 284 302

Mujawar, eligibility of women for office of—Right to emoluments—Burden of proof—Custom.

Under Muhammadan Law, a woman can hold a religious office unless there are duties of a religious nature which she cannot perform in person or by deputy.

The onus is on those who seek to exclude women of proving that they are disqualified.

Where the duties of an office are not very distinctly defined, the safest course to follow is to be guided by the custom of the institution.

The rights of women to hold the office of *mujawar* should be upheld where there is a usage in the institution of getting the duties performed by proxy or deputy, and, in such a case, there is no legal obstacle to their sharing in the endowments of the office and getting their duties performed by proxy. **M IMAM BEE v. MOLLA KHASIM SAHIB**, 5 L. W. 226 889

SUCCESSION—Shia School—Widow's right of succession to landed property of her deceased husband—"Landed property," meaning of.

A childless *Shia* widow is not entitled to any share in the landed property of her deceased husband.

A right to receive a fixed annual sum of money in the nature of a rent charge is not 'landed property' within the meaning of the above rule, so as to exclude the widow from participation therein.

A grant of *muafi* land is a grant of the full proprietary interest in the land free of the revenue, and what the grantee takes under the grant is 'landed property' within the meaning of the above rule. **O BAQAR MIRZA v. MEHDI HASAN**, 19 O. C. 246 203

WAFQ—Dedication, partial, to religious and charitable objects—Charge on property—Annuity, claim of, under waqf instrument—Interest, right to.

The question whether a *waqf* is valid or not must depend on the circumstances existing at the date of the execution of the deed. The true test is whether, having regard to all the circumstances of the case, the dominating purpose and intention of the grantor was to provide for charitable and religious objects.

Where, under the terms of a *waqf*, a portion of the property was to go for religious and charitable objects, the main object of the settlor being to benefit his daughter and her successors:

• MUHAMMADAN LAW—concl'd.

Held, that the *waqf* was not valid as such, but the religious and charitable trusts constituted by it would be a valid charge on the property.

A person claiming an annuity under the terms of a document in the nature of a *waqf* is not entitled to interest. **C** KARIMUNNESSA *v.* EKIWA 904

— WILL, acceptance of terms of, effect of—*Estoppel*.

If a person entitled to succeed as an heir to a deceased Muhammadan who has left a Will, accepts the provisions of the Will and derives benefits thereunder, he is estopped from subsequently repudiating it and claiming the benefits of the Muhammadan Law of succession. **O** WALI MUHAMMAD *v.* DAULAT-UN-NISSA, 3 O. L. J. 647 921

— — — — —, interpretation of—Sunni sect—*Bequest, subject to condition, effect of*.

Among *Sunni* Muhammadans if a testator devises property subject to a condition, the devise must be treated as unconditional and as conferring a complete title upon the legatee. **O** BAKHTAWAR KHAN *v.* FAROOQ AHMAD, 3 O. L. J. 639; 19 O. C. 319 423

— — — — — Partition decree—Provision for payment of debts.

Under Muhammadan Law, the estate of a deceased person must be applied to the payment of his debts and funeral expenses before the heirs can make partition of it.

Where a Muhammadan has by his Will bequeathed certain properties for payment of *mahar* and dower debts and his heirs have filed a suit for partition, it is open to the Court, at the time of passing the final decree, to ascertain the debts due by the deceased and to provide for their payment out of the estate before partition is actually effected. **M** MAHAMAD MEERAN BIBI *v.* MAHAMAD ROWTHER, (1917) M. W. N. 98 879

MUNICIPALITY, powers of—Owner of land covered by drain, rights of—Injunction—Declaration 96

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), Ss. 22, 66—Hundi, payable sixty-one days after date—Presentation for acceptance, whether necessary—Presentation for payment, when to be made—Maturity.

In the case of a *hundi* payable sixty-one days after date, the payee or endorsee is not bound to present it for acceptance at once.

Every bill of exchange, which is not expressed to be payable on demand, at sight, or on presentment, is at maturity on the third day after the day on which it is expressed to be payable, and must be presented for payment at maturity.

Therefore, a *hundi* drawn on 7th May and payable sixty-one days after date, would be correctly presented for payment on July 10th. **A** GANGA PRASAD *v.* HIRA LAL, 14 A. L. J. 1166 656

— — — — — S. 32 644

— — — — — Ss. 32, 43—Bill of exchange—Consignment of goods—War, declaration of, effect of—Acceptance—Royal Proclamation (12th December 1914), whether retrospective.

A German resident in Hamburg drew a bill of exchange upon the defendants on the 24th June 1914

NEGOTIABLE INSTRUMENTS ACT—concl'd.

in favour of the plaintiffs for a certain amount payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods bearing a certain mark per s. s. *Lichtenfels*, a German steamer. It was presented with the shipping documents and accepted on the 20th July 1914 payable at the office of the plaintiffs in Bombay. The s. s. *Lichtenfels* reached Bombay just before the outbreak of the war and in order to evade capture left Bombay and took shelter in a neutral port. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. The plaintiffs brought this suit, alleging that the British Government had made arrangements by which consignees of cargo per s. s. *Lichtenfels* could obtain delivery and they averred their readiness and willingness to hand over the documents against payment of the amount due under the bill:

Held, that the plaintiffs were entitled to succeed, inasmuch as if the acceptance was unqualified the defendants were bound to pay on the due date, and if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation dated the 12th December 1914, whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports.

The Proclamation of the 12th December 1914 is not retrospectively operative for the purpose of validating a contract rendered invalid by the war but operates to permit performance, before it is too late, of the condition alleged. **B** MOTISHAW & Co. *v.* MERCANTILE BANK OF INDIA, LTD., 18 Bom. L. R. 521 258

— — — — — S. 43 258, 644

— — — — — S. 66 656

ODDH LAWS ACT (XVIII OF 1876), S. 5—Reasonable dower, matters to be considered in determining.

In considering a claim of dower under section 5 of the Oudh Laws Act, the first matter to be regarded is whether the sum actually agreed upon is excessive with reference to the means of the husband. If it is not found to be so, there is no occasion to discuss the status of the wife for the purpose of reducing the amount.

In considering whether the amount agreed upon is excessive with reference to the means of the husband in cases where the claim is made by a widow, regard must be had to the value of the husband's estate at the time of his death. The principal matters to be considered in deciding whether a certain sum is excessive or not, are the extent and nature of the claims of the various persons who as heirs are entitled to divide the estate. If it is made to appear that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for, such a sum would be considered excessive. **O** BAQAR MIRZA *v.* MENDI HASAN, 19 O. C. 246 203

— — — — — S. 9—Co-sharer—Pre-emption suit—Plaintiff one, debarred from instituting suit—Co-plaintiff, position of 188

OUDH LAWS ACT—concl'd.

S. 9—*Pre-emption in Oudh—Pre-emptors, rival, rights of, determination of.*

The general principles laid down by the Allahabad High Court regarding the law of pre-emption, which prevails in the province of Agra, cannot be applied so as to affect the scope of the Oudh Laws Act which regulates the law of pre-emption in Oudh.

Where rival pre-emptors, having the right to pre-empt, claim the same property in exercise of such right, the right to acquire the property must, under section 9 of the Oudh Laws Act, be decided by lot.

○ RAJ BAHADUR SINGH v. CHANDRAPAL, 19 O. C. 185 170

S. 10—*Pre-emption—Mortgage—Foreclosure—Decree for pre-emption obtained by one co-sharer without impleading others equally entitled, effect of—Transfer of pre-empted property by decree-holder during pendency of appeal, effect of—Bona fides—Suit carried on by money supplied by third person, whether liable to dismissal.*

A suit for pre-emption is not liable to dismissal merely because it is carried on with money supplied by a third person, it being open to the pre-emptor to sell his interest in the property obtained by pre-emption and pay the money to the vendee.

After a decree for pre-emption has been passed and payment made in pursuance of it, the right to pre-emption fructifies into a title to the property forming the subject of the claim, though that title may be subject to the result of an appeal which may be filed in the case by an unsuccessful party.

On foreclosure of certain property, one of several persons equally entitled to pre-empt the property obtained a decree for pre-emption in a suit to which others who were also equally entitled to pre-empt were not made parties. Subsequently one of these others brought a suit for pre-emption against the person who had obtained the previous decree for pre-emption without impleading the person who had obtained the original decree for foreclosure. His claim for pre-emption was decreed, but the unsuccessful party filed an appeal against it and during the pendency of the appeal the decree-holder transferred the property acquired by pre-emption to a third person, who was joined as a respondent:

Held, that the first decree for pre-emption furnished a cause of action to persons equally entitled along with the decree-holder, inasmuch as the latter obtained the property by pre-emption to the exclusion of others who had an equal right to pre-empt the same.

Held, further, that the omission to implead the person who had obtained the decree for foreclosure, in the subsequent suit for pre-emption, was not a fatal defect. ○ RAM SAHAY v. JAGDAMBA SINGH, 19 O. C. 153; 3 O. L. J. 683 163

OUDH RENT ACT (XXII of 1886), S. 108 462

S. 108 (5)—*Jurisdiction of Civil and Revenue Courts—Landlord, suit by, against mukhtar—Rent of shops—Bazar dues—Limitation.*

A suit by a landlord against his agent (*ziladar* and *mukhtar*) for the recovery principally of money collected as rent of shops, and of price of certain

OUDH RENT ACT—concl'd.

grain realised as *bazar dues*, lies in a Civil and not in a Rent Court, inasmuch as it does not fall within the purview of section 108 (5) of the Oudh Rent Act, and consequently it is not subject to the period of limitation prescribed by the said Act. ○ PIYABI v. JAGANNATH KUAR, 3 O. L. J. 539; 19 O. C. 314 84

Ss. 127, 108—*Tenant, position of, when ejected by trespasser—Trespasser, suit against, for assessment and recovery of rent.*

An ordinary tenant who has been wrongfully ejected from his holding (which was either under his own cultivation or under that of a sub-tenant) by a person other than his own landlord, can treat such person as his sub-tenant and sue him for assessment and recovery of rent under section 127 read with section 108 of the Oudh Rent Act. ○ SHEODAT SINGH v. KALI, 3 O. L. J. 630; 19 O. C. 370 462

PARTITION, suit for, of fraction of joint estate, maintainability of—*Co-sharer landlords.*

A suit for the partition of a very small portion of a joint estate, in which alone the parties are jointly interested as *putnidars* is maintainable. ○ RAMADA SUNDARI MANDAL v. SHYAMA KANTA 939

PARTNERSHIP—*Partners, rights and liabilities of, inter se.*

Persons entering into agreements of partnership cannot be said to buy anything at all from each other. The most that any partner can be said to buy by putting money into a business in consideration of a partnership share in it is the right upon a dispute to a partnership account and division of any of the assets ultimately found due.

T advanced to *V* a certain amount on the hypothecation of some press machines. Later on *D* entered into partnership with *V*. *V* thereafter again took a fresh advance from *T* on the hypothecation of the same press. On a suit by *T*, *D*, who had no notice of the transactions of *V* with *T*, resisted the suit on the ground that *T* could not proceed against his half share in the press:

Held, that *T* was entitled to bring all the property in suit to sale under his mortgages. ○ TEHLIRAM GIRDHARIDAS v. LONGIN D'MELLO, 18 Bom. L. R. 587 231

Relationship between heirs of deceased partner and surviving partners—*Right of deceased's heirs to claim profits—Settlement, if and when can be re-opened—Estoppel* 728

PENAL CODE (Act XLV of 1860), Ss. 100, 148, 325—*Right of private defence—Injury caused in self-defence.*

Four persons of the accused's party were digging a drain. They were attacked by the complainants. Partisans of the parties ran up and a free fight ensued. One of the accused's party was killed and the arm of one of the complainants' party was fractured. The accused were convicted of offences under sections 148 and 325, Indian Penal Code:

Held, that the accused must be acquitted, as there was no safe ground for holding that they acted otherwise than in self-defence either of themselves or of the deceased. ○ BEGA v. EMPEROR, 105 P. L. R. 1916; 18 Cr. L. J. 139 491

PENAL CODE—contd.

—S. 143—*Unlawful assembly—Crowd in threatening attitude—Disturbance of religious function.*

Where a large crowd of Hindus appeared in a village and threatened to take away the cows of the Muhammadans which they had collected for sacrifice on the occasion of *Bakr-id*:

Held, that an offence under section 143, Indian Penal Code, had been committed. **PAT EMPEROR v. SUBA SINGH**, 18 Cr. L. J. 110 **318**

—S. 148 **491**

—S. 182 **36**

—S. 186—*Obstructing Munsif to pass through accused's own property for making local inspection, whether offence.*

The accused, who were no parties to a suit in which a public right of way was claimed, did not allow a Munsif, in whose Court the suit was pending, to pass in a boat through a ditch which was their private property, when the Munsif wanted to pass through it for the purpose of making a local inspection in connection with the suit:

Held, that the accused did not commit any offence under section 186, Indian Penal Code. **C NISHI KANTA PAL v. EMPEROR**, 20 C. W. N. 857; 18 Cr. L. J. 62 **46**

—S. 193 **482**

—S. 193—*Perjury—Contradictory statements, when indictable* **496**

—S. 193—*Police, false statement to, whether offence.*

Obiter dictum.—It is no offence to make a false statement to the Police. **L B PO YIN v. EMPEROR**, 9 Bur. L. T. 203; 18 Cr. L. J. 98 **206**

—Ss. 209, 210 **487**

—S. 211 **36**

—S. 225B **469**

—S. 292—*'Obscene' publication—Medical journal, description of sexual disorders in—Offence.*

Disease is a thing to be combated, and descriptions of it, with cures suggested, printed in a paper intended to reach sufferers and doctors and not likely to come into the hands of others are not criminal. On the other hand, descriptions of defective sexual enjoyment, with advice for heightening and prolonging such enjoyment in the case of normal persons, should be kept out of public prints, as they amount to incentives to sensuality. **P EMPEROR v. THAKAR DATT**, 18 Cr. L. J. 126; 7 P. W. R. 1917 Cr. **478**

—S. 292—*Obscene publication—Obscenity, tests for determining—Intention, whether material.*

Where matter contained in a book is obscene, it is no justification of an offence under section 292 of the Indian Penal Code that the matter published was written by an eminent writer.

The term 'obscene' is not defined in the Indian Penal Code, but the test of obscenity is whether the matter charged as being obscene is likely to deprave and corrupt the minds of those who are

PENAL CODE—contd.

open to such immoral influences and into whose hands the publication of the sort may fall.

The question of intention of the writer is not germane to the consideration of an offence under section 292 of the Indian Penal Code, which can only be gathered from the character of the matter contained in the book, the publisher of which must be deemed to have intended the natural consequences of his act.

Where a publication is devoted to depicting the illicit passion of a libertine towards the married wife of another and is priced so low as to be within reach of the man in the street, it is an obscene publication, even though the intention of the publisher was to publish the classical composition of a standard author in the true interests of literature. **M PUBLIC PROSECUTOR v. MANTRIPRAGADA MARKONDEYULU**, 5 L. W. 237 **521**

—S. 302—*Murder—Sentence—Extenuating circumstances—Murder in the heat of passion.*

A sentence of death should ordinarily be passed for the crime of murder unless there are extenuating circumstances, and a mere absence of aggravating circumstances is not enough to justify a sentence of transportation for life.

The fact that a murder was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance. **L B EMPEROR v. NGA MYAT KAING**, 18 Cr. L. J. 113 **465**

—S. 317—*'Having the care of such child', meaning of—Person entrusted with custody of child for abandonment, whether 'has care' of child—Offence.*

Any person receiving an infant from its mother, on the distinct understanding that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she has transferred it to the care and custody of some other person or institution.

The shortness or temporary nature of the custody is immaterial and any exposure or abandonment by the person receiving the child is an offence under section 317, Indian Penal Code.

The mother is also guilty of an offence under sections 317 and 109, Indian Penal Code, if she hands over the child so that it might be abandoned. **B EMPEROR v. BLANCHE CONSTANT CRIPPS**, 18 Bom. L. R. 934; 18 Cr. L. J. 93; 41 B. 152 **306**

—S. 325 **491**

—S. 342—*Wrongful confinement* **315**

—S. 409 **145**

—S. 411 **320**

—S. 417—*Cheating proceedings for, quashed, as no prima facie case made out—Process, issue of, against accused—Revision by High Court—Criminal Procedure Code (Act V of 1898), s. 439.*

In a proceeding under section 107, Criminal Procedure Code, the Pleader of the 1st party having agreed to persuade his client to give an undertaking for the protection of the property in dispute in that proceeding, the opposite party withdrew from the property. The Pleader's client was willing to give the requisite undertaking but the opposite party

PENAL CODE—concl'd.

did not accept it and filed a complaint against the Pleader under section 417, Indian Penal Code. The Magistrate issued process against the Pleader:

Held, that no *prima facie* case of cheating was made out against the Pleader, and the proceedings against him should be quashed. **C NRISHINHA KUMAR MUKHERJEE v. KUMUDENDU MUKHERJEE**, 20 C. W. N. 1112; 18 Cr. L. J. 50 **34**

— S. 420

145

— S. 420—*Cheating, elements of—Inducement to execute document, whether offence—Charge, framing of—Practice.*

In a case of cheating it must be shown exactly how the complainant has, in the first instance, been misled and what loss he has suffered, or what attempt to obtain a benefit to his prejudice has been made by the accused.

A decree-holder in a certain suit in consideration of the judgment-debtor executing two bonds promised to get a postponement of the sale and the judgment-debtor accordingly executed the bonds which, to the knowledge of both were for fictitious amounts. The decree-holder failed to obtain the postponement and retained the bonds in his possession. He was charged by the judgment-debtor with the offence of cheating under section 420, Indian Penal Code:

Held, that the offence of cheating was not made out as the failure to get a postponement of the sale was only a breach of contract for which the decree-holder was liable in damages for any loss proved to have been caused to the judgment-debtor and the retention of the bonds was not an offence by itself.

It is not an offence to induce a person to execute a document, unless it is shown that the inducement was made by some false or fraudulent representation.

A charge of cheating was drawn up as "that you on.....cheated and induced him to execute two documents in favour of.....":

Held, that the frame-work of the charge showed no offence at all.

In a criminal trial there is less difficulty and less liability to error if the Court throughout the trial keeps before it the frame-work of the charge in order to see whether the evidence fits into it. **A MEGHRAJ v. EMPEROR**, 18 Cr. L. J. 131 **483**

— Ss. 441, 442—*Criminal trespass—Panatchut or outer verandah, whether part of dwelling-house.*

The *panatchut* or outer verandah where shoes are taken off is part of a Burmese dwelling-house and a person who commits criminal trespass on a *panatchut* under the circumstances set forth in section 441, Indian Penal Code, commits house-trespass, and it is an offence involving breach of the peace within the meaning of section 106, Criminal Procedure Code, where the object is to cause hurt to one of the persons in the house. **L B SIT HON v. EMPEROR**, 9 BUR. L. T. 204; 8 L. B. R. 463; 18 Cr. L. J. 81 **145**

— Ss. 457, 411—*Joint trial—Conviction of some accused under section 457 and of others under 411, legality of* **320**

PENALTY—*Interest, provision for, penal, whether relievable—Consent decree.*

An agreement to pay an enhanced rate of interest, not from the date of default but from that of the original obligation, is in the nature of a penalty and is unenforceable.

A penalty will be relieved against even where it is embodied in a decree passed by consent of parties **M KANDULA PEDA LINGA REDDI v. KAKUMANU HANUMAYYA** **764**

PLAINT, amendment of.

Where plaintiff sued to redeem a mortgage, but it was found that the document sued on was in effect a sale-deed with an option to re-purchase, and the plaintiff sought to be allowed to ask for specific performance of the agreement to re-sell:

Held, that, the facts and the relief sought being in effect the same, the plaintiff should be allowed to amend his plaint. **L B MA SHWE U v. MAUNG PO LU**, 9 BUR. L. T. 177 **91**

—, amendment of, grounds for—Limitation, commencement of **914**

—, amendment of—Pleadings **665**

PLEADINGS—*Fraud, allegations of—Proof.*

When the plaintiff sets up a charge of fraud against the defendant, the nature and particulars of the fraud should be specifically stated and the fraud so alleged must be established beyond doubt **C LALIT MOHUN NUNDY v. HARIDAS MUKHERJEE**, 24 C. L. J. 335 **707**

—, untenable, of one party, whether can be availed of by other party in support of his case.

A party cannot be allowed to extract from the other party's plea something in support of his own case when that plea in itself is a bad plea that cannot be admitted. **O MUHAMMAD HUSAIN v. MUHAMMAD ASGHAR**, 3 O. L. J. 462; 19 O. C. 323 **23**

PLEADINGS AND PROOF, variance between—Suit based on specific mortgage—Mortgage not proved—Plaintiff, whether can get decree on prior mortgages **976**

POSSESSION, physical and constructive, nature of—Boundary pillars, erection of, whether amounts to possession—Trespasser, possession of, nature of—Land covered by water at certain intervals, effect of—Dispossession, what amounts to **715**

— Suit by one *riaya* against another for possession of village land appurtenant to dwelling-house, maintainability of.

A *riaya* can maintain a suit for the recovery of possession of village land appurtenant to his dwelling-house against another *riaya* who has ousted him from it. **O RAM SARAN v. SAHEBDIN LAT**, 19 O. C. 169 **116**

POWER-OF-ATTORNEY, name of Pleader omitted from body of, effect of—Objection taken at late stage, effect of **103**

PRACTICE—*Finding of Judge, form of—Precision and definiteness—Civil Procedure Code (Act V of 1908), O. XX, rr. 4, 5.*

The findings of a Court should be specifically and precisely stated, whatever reasons therefor may be contained in the judgment. **A BALAK v. ALEY HASAN** **304**

PRE-EMPTION—Building, whether shop or residential—Test 843

— Compensation for pre-emptor remaining out of possession of pre-empted property.

Where a vendee by his act or omission deprives the pre-emptor both of the use of the pre-emption money and the pre-empted property, the pre-emptor is entitled to get reasonable interest for the time he is so deprived. **P SARDAR BEGAM v. JHANDA MAL**, 170 P. W. R. 1916 382

— Custom—Co-sharer, refusal of, to purchase, effect of—Waiver.

Where the custom is that a co-sharer wishing to sell his property should first offer it to the other co-sharers, such co-sharer, if he informs the other co-sharers of his intention to sell and they decline to purchase on the ground that they have not the means or any other similar ground the vendor, is at liberty, without violating the custom, to sell to an outsider. If, however, a co-sharer intimates that he is ready to buy the property at a price, in such a case it is the duty of the vendor to mention a price, and not to sell to any one else at a lesser price.

Where a Court of Wards, intending to sell the property of a ward, widely published its intention, and the plaintiff did not come forward to exercise his right of pre-emption till more than a year after the completion of the sale:

Held, that the plaintiff must be taken to have waived his right of pre-emption. **A NAUNIHAL SINGH v. RAM RATAN**, 14 A. L. J. 1138 511

— Decree based on compromise, compliance with 806

— Mortgage—Foreclosure—Decree absolute—Relinquishment by mortgagee in favour of mortgagor, effect of—Cause of action, extinguishment of, by subsequent acts of defendant.

Once a right of pre-emption has accrued it cannot be defeated by a re-sale to the vendor.

A mortgagee obtained a decree absolute for foreclosure, which gave rise to a right of pre-emption in favour of the plaintiff, but before the institution of a suit for pre-emption the mortgagee executed a deed of relinquishment of the property in favour of the ex-mortgagors:

Held, that the relinquishment could not extinguish the right of pre-emption which had already accrued to the plaintiff. **O MANNA SINGH v. BIHARI SINGH**, 19 O. C. 183; 3 O. L. J. 720 181

— Mortgage—Foreclosure—Decree for pre-emption obtained by one co-sharer without impleading others equally entitled, effect of—Transfer of pre-empted property by decree-holder during pendency of appeal, effect of—*Bona fides*—Suit carried on by money supplied by third person, whether liable to dismissal 163

— Price of property, decision as to—Market value—Income of property—Court, position of—Presumption—Bad faith.

A Court has a perfect right to decide on the facts whether property has been genuinely sold for a fancy price which has been paid to and enjoyed by the vendor, or whether the sale-price has been fixed fictitiously in order to defeat claims for pre-emption and has not been actually enjoyed by the vendor.

PRE-EMPTION—concl'd.

A Court has a right under the provisions of section 13, Act XVIII of 1876, to decide that the price was not fixed in good faith and to determine the amount to be paid in the suit for pre-emption upon the market value.

But in the absence of actual evidence to show that the price was fixed in bad faith, no legal presumption to that effect can arise from the fact that the price paid by the vendee, as well as even that offered by the pre-emptor, are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer. **O SHAMBHU DAT v. JAGANNATH**, 3 O. L. J. 543 173

— Sale sanctioned by Deputy Commissioner—Procedure 763

— —, suit for, on basis of being co-sharer—Possession—Proof—Re-purchase by vendor, whether defeats third person's right of pre-emption.

Possession may be sufficient title as against a trespasser, but something more than possession recently acquired must be shown as a basis for a claim to pre-empt as a co-sharer.

A person who sells property in respect of which another has a right of pre-emption, cannot defeat that other's claim to pre-empt by re-purchasing the property before the suit for pre-emption is brought. **O CHHATARPAL SINGH v. KUSHAR SINGH**, 19 O. C. 190 172

— Suit, decree in, under appeal—Government notification taking away right of pre-emption, effect of.

A Government notification taking away the right of pre-emption in respect of certain property would be fatal to the case of a plaintiff in whose favour no decree had been passed at the date of the notification, but it would not affect the rights of a plaintiff in whose favour a decree had been passed before the date of the notification, merely because that decree was under appeal at that date. **P NIAZ ALI v. MUHAMMAD RAMZAN**, 130 P. R. 1916 227

— suit—Plaintiff, one, debarred from instituting suit—Co-plaintiff, position of.

Where a father and his son, constituting a joint Hindu family, join in bringing a pre-emption suit, and it is found that the father cannot sue in his personal capacity by reason of the prohibition contained in section 55 of the U. P. Court of Wards Act, this fact does not stand in the way of the son's obtaining relief. **O LALTA SINGH v. CHHATTAR SINGH**, 3 O. L. J. 552; 19 O. C. 206 188

PRESIDENCY SMALL CAUSE COURTS ACT (XV of 1882), S. 41 436

— Ss. 46 to 49, 41—City Civil Courts Act (*Mad. Act VII of 1892*), s. 12—'Suit for trying title,' meaning of—Order in ejectment by Presidency Small Cause Court—Subsequent suit in City Civil Court for declaration of permanent occupancy right—Jurisdiction—Practice.

The order of a competent Court passed with jurisdiction cannot be interfered with except in the manner provided therefor by the Legislature, unless such order is vitiated by fraud.

PRESIDENCY SMALL CAUSE COURTS ACT—
concl'd.

In the case of an order passed under Chapter VII of the Presidency Small Cause Courts Act, the Legislature has provided the remedy by suit under sections 46 to 49 of the Act and except in the manner therein provided, no suit will lie in any Court to supersede such order. If possession has been delivered, section 46 (1) will apply and the resulting suit, which would necessarily be one for trying title must be filed in the High Court under section 49. The expression "suit for trying title" in section 49, clause (1), of the Act includes a suit in which any title, which the party aggrieved by the ejectment order alleges, whether as a full owner or as a holder of a limited right, has to be tried and decided. In both classes of suits, the High Court is the forum prescribed and the City Civil Court is substituted for the High Court by section 12 of the Madras City Civil Courts Act only under section 31 (a) of the Presidency Small Cause Courts Act dealing with execution against immoveables, but not under any other section.

Defendant applied for and obtained under section 41 of the Presidency Small Cause Courts Act an order to eject plaintiff from a piece of land upon which he had constructed a building. Plaintiff set up a right of permanent occupancy. The ejectment order was not carried into effect. Meanwhile the plaintiff filed a suit in the City Civil Court, Madras, to declare his right of permanent occupancy and got the proceedings stayed. The City Civil Judge held that he had no jurisdiction to set aside an order passed by the Presidency Court of Small Causes and returned the plaint for presentation to the proper Court:

Held, that the order was right.

Practice cannot confer jurisdiction, however long-continued it may be. **M. ABDUL RAHIM SAHIB v. GANGATHARA AIYAR**, 4 L. W. 402

— Ss. 47, 48, 49 436

PRESIDENCY TOWNS INSOLVENCY ACT (III of 1909), Ss. 8 (2), 12 (1) (a), 13, 25, 26, 27, 86—
"Person aggrieved by the decision", meaning of—
Benamdar of creditor, whether can prove debt in insolvency—Petitioning creditor's claim, whether can be questioned in insolvency.

It is open to an insolvent to question the right of a person, on whose petition as a creditor the adjudication in insolvency has been made, to claim in the insolvency as a creditor, and the Official Assignee, after the insolvency, is competent to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he must strike out his name from the list of creditors.

A benamdar for the real creditor is not competent to rank as a creditor in insolvency proceedings, but the person who really advanced the money should come forward and prove his claim.

Per *Mookerjee, J.*—Any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision is, if the decision goes against him, thereby a "person aggrieved by that decision" within the meaning of that expression in section 86 of the Presidency Towns Insolvency Act.

PRESIDENCY TOWNS INSOLVENCY ACT—
concl'd.

The term "creditor" in the Presidency Towns Insolvency Act does not include a benamdar of the creditor. **C. KETOKEY CHURAN v. SARAT KUMARI DABEE**, 20 C. W. N. 995

— Ss. 12, 13, 25, 26, 27

— S. 56

— S. 86

PRESS ACT (I of 1910), Ss. 3, 4, 17, 19, 20, 22—Deposit of security, order for—Order dispensing with security, cancellation of—High Court, interference by, under Press Act—Jurisdiction—Forfeiture of security—Interference by High Court, grounds for—Scope of ss. 3 and 4—Applicability to old Presses—Government of India Act, 1915, (5 & 6 Geo. 5, Ch. 61), s. 65—Press Act legislation, whether ultra vires in whole or part—Special Bench, jurisdiction of, to pronounce on legality of the Act—Procedure under the Act—Burden of proof—Intention of writer, when essential—'Government established by law', meaning of—'Exciting hatred and contempt', meaning of—Alien character of Government, criticism of, when privileged—Evidence—Articles, not the subject of proceedings, admissibility of, to prove general tone and policy of newspaper—Evidence—Home Rule or Self Government for India on Colonial lines, agitation for, whether lawful—Methods of advocacy—Legitimate discussion and propaganda, principles governing—Interpretation of Statute—Proviso.

Per *Curiam*.—The High Court has no jurisdiction sitting as a Special Tribunal under the Press Act, to consider any other matter, save whether certain words contained in a newspaper and specified in the order of forfeiture by Government under section 4 are or are not of the nature described in clause (1) of the section. Proceedings under section 3, i. e., the imposition of security or the cancellation of an order dispensing with security are not subject to the revisional jurisdiction of the High Court under sections 17 and 22 of the Act.

The provisions of the Press Act are applicable to all Printing Presses, even those which were in existence before the passing of the Act and for which fresh declaration is necessary under the Act under certain conditions.

The words 'Government established by law in British India' are not restricted to the supremacy of the King and the British connection, but include the composite body of persons that constitute the Government in India.

The language of section 4 (1) of the Press Act is very wide, wider than the corresponding provisions in sections 124A and 153, Indian Penal Code.

Articles which are not the subject of the proceedings before the Court are admissible to show the general policy of the paper.

Per *Abdur Rahim, Offg. C. J.*, and *Ayling, J.*—The language of the sub-clauses to section 4 of the Press Act is not so wide as to embrace within its scope writings that may even command approval, or writing attacking a degraded section of the public which lives on the misery and shame of others or unduly praising a class.

PRESS ACT—contd.

Per *Abdur Rahim, Offg. C. J.*, and *Seshagiri Aiyar, J.*—The question whether the Press Act or any portion of it is *ultra vires* of the powers of the Indian Legislature, as contravening the spirit of section 65 (2) of the Government of India Act, is not a matter which can be considered by the High Court sitting as a Special Tribunal under sections 18 and 19 of the Press Act.

Obiter.—A Magistrate has no jurisdiction under section 3 to impose security on a Printing Press after having previously dispensed with it under the proviso to the section, but the High Court has no jurisdiction under section 17 of the Press Act to determine the validity or otherwise of the proceedings of the Magistrate under section 3.

The onus is upon the person whose security has been forfeited to prove that the publications selected by the Government at their own discretion may not have the tendency described in the various sub-clauses to section 4 of the Press Act.

The advocacy of Home Rule for India or Self-Government on Colonial lines and suggestions for the carrying on of a propaganda to achieve the same are not *per se* obnoxious to the provisions of section 4 of the Press Act, but it is not permissible for a publicist discussing the Government's actions and failures to impute base and dishonourable motives to it.

Per *Abdur Rahim, Offg. C. J.*—A proviso to a section is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause.

The words 'any order' in the proviso to section 3 (1) cannot include the order dispensing with security.

The Press Act imposes no duty upon the Government to issue any warning or to ask for any explanation before taking action under section 4 and the absence of warning cannot be relied on to influence the decision of the High Court on the nature of the alleged offending articles.

Section 4 of the Act is so wide in its scope that even a loyal newspaper whose general policy is above all reproach can be brought within it, if any letters or writings are let in through carelessness which offend any of the sub-clauses of the section. The vesting of such unlimited powers in the Government is a serious encroachment on the freedom which the Press in India enjoyed before the passing of the Act.

Obiter.—There is a fundamental difference between the Legislative powers of the Imperial Parliament which, according to the theory of the English constitution, can enact any laws it chooses and the authority of the Indian Legislature which is purely derivative and subordinate. Any enactment of the latter in excess of its delegated powers or in violation of the limitations imposed by the Imperial Parliament is null and void. The 'unwritten laws' referred to in section 65 (2) of the Government of India Act, 1915, which, under the section cannot be violated by any enactment of the Governor-General in Legislative Council, are, generally speaking, the laws recognising the fundamental right of the subject to enjoyment of personal freedom and property of which he could not be deprived by a Court of Law.

PRESS ACT—contd.

The words, 'whether by inference, suggestion, etc.,' in section 4 are used merely by way of explanation and do not in any way enlarge the meaning of the words, 'which are likely or may have a tendency directly or indirectly.' By 'tendency' is meant the natural effect of the words used on the readers of the newspaper in question, and not the effect which they may produce on the minds of abnormally constituted persons, or persons whose acquaintance with the language is inadequate or those who might content themselves with reading certain passages or expressions apart from the context. All that has to be taken into account is the effect which the words are, by their nature, likely to produce on a normal average reader understanding them in their plain, natural meaning.

In applying section 4 (1), apart from explanation 2, the intention of the Editor or writer need not be considered, if it is not shown that the words, in their plain, ordinary meaning, may not tend to produce the objectionable effects mentioned in clauses (a) to (f).

The intention becomes relevant only under explanation 2. It means that comments on the measures and actions of the Government are exempted from the operation of section 4, provided the person making the comments does not excite or attempt to excite thereby hatred or contempt against the Government. But the protection afforded by this explanation is extended only to comments on Government's measures and actions and not to attacks on the Government itself, which have to be judged by light of section 4 without reference to the explanation.

The words 'hatred and contempt' in section 4 mean something more than mere disapproval or dislike.

The words 'Government established by law in British India' in section 4 denote an established authority entitled and able to administer the public affairs of the country. It is not identical with any particular individuals who may be administering the Government. The law does not prohibit criticisms of the Government as constituted in a particular form provided such criticisms do not bring it into hatred or contempt or excite disaffection against it.

The advocacy of any Home Rule propaganda for India cannot be regarded as illegal *per se*. It lies entirely with the Sovereign, that is, the King in Parliament to establish any Government he chooses for India or any other part of the British Empire. There can be nothing wrong, therefore, in a subject of the Crown urging the desirability of a change in the machinery of the Government in India. In certain stages of society, reforms in the constitution of the Government are a biological and political necessity. To say that such questions are not open to public discussion, supposing that the law is not violated by the manner and the methods adopted in such discussion, would be opposed to all sound maxims of constitutional law.

Per *Ayling, J.*—There is nothing in the Press Act which throws the onus on the applicant of proving that the words which are made the ground of forfeiture, do not fall within the scope of section 4.

PRESS ACT—contd.

Whether the words are likely or may have a tendency to produce certain results must be determined primarily by inference from their own nature. The words, themselves, form the main evidence in the case.

The language of section 4 leaves the question of the intention of the writer quite immaterial. The Court has to confine its attention to the natural effect of the words without reference to what the writer meant or wished to be understood. To this, there is an important exception in explanation II of the section. Here the element of intention is present. The words 'attempt to incite' presuppose a sentient being and one animated by a particular intention. Therefore, in the case of comments on the measures of Government, an intention to excite hatred, contempt or disaffection is necessary to bring them within the scope of clause (c) of section 4 (1). The intention is, of course, deducible from the words of the articles themselves.

The words 'Government established by law in British India' should be interpreted in the light of section 3 of the General Clauses Act (X of 1897), which governs the Press Act as regards definition of terms. So interpreted, it includes the Government of India and all Local Governments. The addition of the words 'established by law in British India' seems to be intended to emphasize the fact that it is the Government existing at the time that is sought to be protected from attacks.

The word 'disaffection' in section 4 means, in addition to hatred and contempt, enmity, dislike, hostility and every form of ill-will towards the Government. It should not be restricted to courses of action that lead to rebellion or forcible resistance.

It is open to any one to draw attention to the non-Indian elements in the Government of India, and to argue that these impair the efficiency of that Government, and that it would be to the public advantage, if they were replaced by Indian elements. That is legitimate criticism. But it is not legitimate to go further and to use the existence of the non-Indian elements of Government as a means of exciting hatred, contempt and disaffection against Government—as Strachey, J., puts it, to hold up the Government to hatred and contempt by dwelling adversely on its foreign character and origin. It all depends on the manner in which and the object with which the circumstance is used in argument.

It is not irrelevant to adduce in evidence articles in a newspaper which are not the subject of forfeiture in aid of the proof of the nature or tendency of the alleged offending articles, but it is most unsafe to judge of the intention of the writer in publishing the latter by reference to other articles previously published at long intervals of time, and mostly in other connections.

Per *Seshagiri Aiyar, J.*—A declaration under section 22 of the Press Act is notice to all persons that the Government have declared the forfeiture, but not that the forfeiture has been legally made.

Obiter.—Section 4 of the Press Act is not *ultra vires* of the powers of the Imperial Legislature, as the subject is not deprived of the right of showing that the forfeiture has not been incurred. Instead of taking the decision of the Court first and then

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declaring the forfeiture, the process has been reversed; such a procedure cannot be said to affect the allegiance of the subject.

It cannot be said that the intention of the writer is of no consequence in applying the provisions of the Press Act. While the operative portion deals purely with the language employed, divorced from considerations of motive or intention, explanation II furnishes a ground of exemption, if it can be shown that there was no intention to excite or to attempt to excite hatred, contempt or disaffection. It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed.

As the angle of vision has changed since previous pronouncements on the sections 124A and 153, Indian Penal Code, and political autonomy under certain conditions is declared legitimate, suggestions to the effect that an indigenous agency would be more suitable in certain departments of the administration and should be more largely employed, should not be regarded as exciting hatred or disaffection. Criticism attributing indifference to the welfare of the people would not always amount to sedition. If the criticism is couched in language which imports corrupt or malicious motives, the writer cannot escape. But if it aims to draw attention to a weak point in the administration in the hope that the criticism may lead to the redress of grievances or the removal of a disability, the writing cannot be condemned.

Any discussion about 'Home Rule' for India is not *per se* objectionable. Two essentials should be kept in mind in asking for changes in the machinery of Government. The allegiance to the throne and person of the Sovereign should be held as inviolate, and there should be no suggestion that the connection which makes India an integral part of the British Empire should be severed. Within these limits, it is permissible to ask that the details of the administrative machinery should be readjusted to meet the exigencies of the times.

The expression 'Government established by law in British India' means British rule and its representatives as such, the existing political system as distinguished from any particular set of administrators.

Clause (c) of section 4 is aimed at language which would render friendly co-operation between the different races living in India impossible. The language must be such as to lead to the breaking of the peace.

Articles evidencing the general policy of a Paper can be received in evidence and the right of adducing such evidence can be exercised by the Crown and the applicant, but there must be some connection between the subject-matter of the articles tendered and of the articles which are objected to.

[The Judges delivered varying opinions as to the nature of the various articles and how far they offended against section 4 of the Press Act.]

ANNIE BESANT v. GOVERNMENT OF MADRAS, (1916) 2 M. W. N. 385; 5 L. W. 1; 18 Cr. L. J. 157; 39 M. 1085

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—Ss. 3, 22—*Government of India Act, 1915* (5 and 6 Geo. V, C. 61), ss. 106, 107—*Criminal Procedure Code* (Act V of 1898), s. 435—Security, imposition of, after being dispensed with, legality of—Order of Magistrate, whether judicial or administrative—Interference by High Court, powers of—*Certiorari*, issue of—Nature of writ—Jurisdiction of High Court—Letters Patent—Revision.

Per *Curiam*.—It is not competent to a High Court to interfere with the order of a Magistrate under section 3 of the Press Act, requiring security from the owner of a Printing Press either in the first instance or in variance of an order dispensing with security, either under sections 106 and 107 of the Government of India Act or under section 435 of the Code of Criminal Procedure.

Per *Abdur Rahim, Offg. C. J.*, and *Seshagiri Aiyar, J.*—The words 'proceedings under the Act' in section 22 of the Press Act do not include orders passed by the Magistrate under section 3. Under the powers vested in it by the special provisions of the Press Act (sections 17 to 22, the High Court can call in question only orders of forfeiture though the general jurisdiction to issue writs of *certiorari* even in respect of orders passed under section 3 is not taken away by section 22.

A Magistrate has no jurisdiction to demand security from the keeper of a Printing Press under section 3 (1) after having dispensed with it in the first instance. The words 'may vary or alter any order', in the proviso to the sub-section, refer only to orders demanding security and not to orders dispensing with security.

The High Court, however, has no jurisdiction to issue a writ of *certiorari* to the Magistrate or to revise his proceedings under the Charter or under its powers under the Code of Criminal Procedure, as the orders under section 3 (1) of the Press Act are administrative and executive and not judicial.

The power to issue writs of *certiorari* to inferior Tribunals is not taken away from the High Court by the Press Act.

Per *Abdur Rahim, Offg. C. J.*—A High Court has jurisdiction to issue writs of *certiorari* in order to remove the proceedings of Courts or of persons entrusted with judicial functions out of the ordinary course of legal procedure for the purpose of quashing them.

The powers of revision and control are available only over the proceedings of ordinary Courts: while a writ of *certiorari* is issued not only to Courts but to Tribunals specially constituted and entrusted with duties of a judicial character.

Proceedings will not be removed into the superior Court by a writ unless they are capable of being determined there.

None of the provisions of the Press Act either singly or collectively have necessarily the effect of taking away the revisional jurisdiction of the High Court over the proceedings of the Magistrate if he is acting judicially. But having regard to the scheme of the Press Act and to the functions of the Magistrate under section 3 (1) and the large discretion vested in him, it follows that the proceedings under section 3 (1) are not of a judicial character, but of an Executive Officer entrusted with the performance of

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administrative functions. If an Executive or Administrative Officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court, whether by means of a writ of *certiorari* or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action.

Per *Ayling, J.*—The provision in section 3, requiring the record of special reasons, does not apply to an order cancelling or varying an order.

It is open to a Magistrate, on the right construction of the section, to alter or vary an order dispensing with security.

The term 'proviso' as applied to the second part of section 3 is a misnomer. The sub-section must be treated as a whole and the words 'any order' cover an order dispensing with security. The sub-section is intended to give the Magistrate fullest discretion both as regards requiring security and determining the amount, and this discretion is to be exercised not once for all, but may be revised from time to time.

The words 'no proceedings purporting to be taken under this Act' in section 22 of the Press Act include proceedings under section 3 (1).

The jurisdiction of a High Court to issue *certiorari* is taken away by the Press Act both in respect of proceedings taken with jurisdiction as well as in respect of proceedings purporting to be taken under the Act. The Press Act is self-contained and complete and, though it is open to any one to argue that it is unnecessary or impolitic, effect must be given to what seems to be its plain meaning, and, by reason of section 22 of the Act, it is not open to the High Court to interfere with the Magistrate's order by virtue of any power which it possesses outside the Act.

It is within the competence of the Legislature to take away from the High Court the power to issue a writ of *certiorari*. Whether the power is taken away absolutely or only in respect of proceedings with jurisdiction, must depend in each case on the wording of the Statute which takes the power away.

Dubitante. If it were necessary to decide the question, the proceedings of the Magistrate under section 3 (1) may be viewed as an executive act, and on that ground, even if the power of *certiorari* is not taken away by section 22 of the Press Act, the High Court will not interfere under sections 106 and 107 of the Government of India Act, the more so where the application is presented after long delay, relief under the said sections being discretionary with the Court.

Per *Seshagiri Aiyar, J.*—A High Court has the same powers over persons resident within the local limits of its ordinary original jurisdiction as are exercised by the Court of King's Bench in England.

The freedom of the Press is not a 'licensed calling' but a common law right inherent in the subject, subject to certain limitations, and this right is not affected by the Press Act.

It is not a condition precedent to the issue of a writ of *certiorari* that the Court issuing should be able to place itself in the position of the Court whose order is complained against. The writ may assume various forms. It is enough that in the

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exercise of its jurisdiction, it directs the lower Court to re-consider its order or judgment. The fact, therefore, that the High Court cannot place itself in the position of the Magistrate and itself fix the amount of the security is no bar to entertaining the application.

The fact that the power to issue the writ is recognized in legislative provisions is not an argument for holding that the power does not exist *aliunde*.

Unless the power to issue a writ of *certiorari* is expressly taken away, it inheres in the Court. There is nothing in the Press Act which can be said, expressly or even by implication, to take away this power from the High Court. All that can be said is that the Act does not provide for the order under section 3 being revised.

Even if the right is taken away, the High Court can interfere, if there has been a want of jurisdiction in the inferior Court. The reason of the rule is that the power *prima facie* exists in the High Court in all matters which are not within the cognizance of the inferior Court; and when this latter Court acts beyond its powers, it usurps jurisdiction which the High Court can control.

Even where jurisdiction to issue the writ has been expressly taken away, if fraud was practised, the writ can issue.

Prima facie an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. The officer need not be sitting as a Court to attach to himself judicial functions, nor is the fact that he may have to take evidence a test of his acting judicially. But the nature of the functions that a Magistrate has to perform under section 3 of the Press Act, which gives him an unfettered discretion in fixing the amount of the security without stating any reasons or taking evidence, shows that his proceedings thereunder are only ministerial.

The power to dispense with the security only qualifies the rule which imposes the security. The first part of the proviso to section 3 of the Press Act is a conditional avoidance of the antecedent clause to demand the security. It should be regarded as defeasance clause to the first part of the section. The second proviso naturally would govern the power to vary given in the second portion of the section. It is not reasonable to hold that an order which necessitated the record of reasons in its inception could be capriciously set at naught the next moment. A Magistrate has, therefore, no power to demand security after having dispensed with it at the time of the declaration.

A proviso may at times serve to introduce an exception. It is often in the nature of a condition precedent to the enforcement of the operative clause. It is doubtful whether it can ever add to the clause itself. The preponderance of authority is in favour of the view that a proviso annexed to a section should not be read as enlarging the scope of that section. *M. ANNIE BESANT v. EMPEROR*, (1916) 2 M. W. N. 497. 607

— Ss. 4, 17, 19, 20 . . .

— S. 22

PRINCIPAL AND AGENT—Accounts, agent, whether can demand.

Obiter dictum.—An agent cannot bring a suit for accounts against his principal, but only for the balance due upon an account. The agent alone is liable to render accounts, the principal is not. *N. GOPIKISAN v. PADAMBAR*, 12 N. L. R. 174. 510

—Accounts settled, re-opening of—Acknowledgment of liability—Release of agent from liability to account—Entries unstamped, admissibility of—Evidence—Settlement by compromise 984

—Accounts, suit on—Consignment for sale on commission—Advances to consignor—Settlement, periodical, of accounts—Action brought after stoppage of dealings—'Open, mutual and current account'—Agency, termination of 875

—Agent, authority of, scope of—Presumption—Waiver.

Where an agent has authority to receive money on behalf of his principal, it may be presumed that he has authority to do every lawful thing which is necessary in connection with that act, e. g., accepting money in payment of a particular instalment or waiving the default made in paying an overdue instalment. *O. MANOHAR LAL v. SAKINA BEGAM*, 3 O. L. J. 623. 442

—Power-of-attorney in general terms—Agency, whether terminates on collection of debts—Insolvency of agent—Release, execution of, in discharge of amounts owing to principal on eve of insolvency—Release found void—Presidency Towns Insolvency Act (III of 1909), s. 56—Claim by principal for amounts withheld by agent—Limitation Act (IX of 1908), Sch. I, Arts. 97, 59.

Where a power-of-attorney executed in favour of a person empowers him to manage all the affairs of the principal generally, the agency does not terminate on the collection of debts and outstandings due to the principal.

S. and R., two Muhammadan ladies, executed a general power-of-attorney in favour of E. on 14th November 1905, constituting him as their agent and authorising him to manage all their affairs and properties to the best advantage. E. collected money under the power on 12th October 1907. On 24th October 1910 he executed a release in favour of his principals of his rights in certain properties in satisfaction of the moneys collected and appropriated by him, avowing his inability to pay. On 27th October 1910 he was adjudicated insolvent. The release having been declared void under section 56 of Act III of 1909, S. and R. put in their claims before the Official Assignee, which the Insolvency Judge disallowed as barred, more than three years having elapsed from the date of collection by E., when, His Lordship held, the agency terminated:

Held, (1) that as the power-of-attorney was general in its terms, the agency did not terminate on the collection of debts by E., but on the execution of the release deed;

(2) that the claim was governed by Article 97 of the Limitation Act and was within three years from the date when the release was declared to have no effect in law, when the consideration for it should be taken to have failed.

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525, 607

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A statement by an agent that he finds it inconvenient or is unable to pay the debt due to his principal is not a 'refusal to pay' within the meaning of Article 89 of the Limitation Act. **M ROKHIA BI v. OFFICIAL ASSIGNEE, MADRAS, (1916) 2 M. W. N. 254; 4 L. W. 364** **505**

PRINCIPAL AND SURETY—*Limitation against surety where claim against principal debtor is barred.*

Quere.—Whether the liability of the surety is kept alive by reason of a charge upon his property for the satisfaction of the debt of the principal debtor where the latter's liability has been extinguished by limitation. **PAT JOWALA PRASAD v. PRATAP UDAI NATH SAHI DEO, 1 P. L. J. 497** **184**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 83—*Probate proceedings—Compromise, effect of—Form of decree—Will, necessity of proof of—Right of objector to withdraw from compromise.*

The main issue in a Probate case is whether or not the Will has been proved, and the only effect of a compromise in such a case is to reduce a contentious proceeding into one which is not contentious and a Court is not absolved from the task of either granting Probate or refusing it.

If a compromise has been made in a Probate case and the objector withdraws from the contest, a Court will grant Probate in common form; but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him.

Where during a Probate proceeding an objector has agreed to a compromise it is open to him to subsequently resile from it and insist upon the trial of the issue whether the Will was duly executed. **PAT Musammatt JANAKBATI THAKURAIN v. GAJANAND THAKUR, 20 C. W. N. 986; 1 P. L. J. 377; 1 P. L. W. 41** **12**

PROCEDURE—*Agreement to abide by oath of opposite party—Resiling from agreement subsequently, effect of.*

Where the defendant first offered to abide by the plaintiff's oath and then resiled from it:

Held, that the plaintiff was not entitled to a decree merely on that ground. **O RAM DAYAL v. RAM NEWAS, 19 O. C. 161** **75**

Practice—Protracted examination of witnesses and frequent lengthy adjournments in criminal trial, effect of—Adjournments, frequent, practice of granting, condemnation of—Court, inherent power of, to prevent abuse of its process **38**

PROFITS, *suit for share of—Village permanently settled—Revenue, enhancement of, for purpose of determining amount of cesses—Division of profits, method of.*

A taluka was permanently settled by way of reward for the talukdar's loyal services. Subsequently, a person was declared by the Privy Council to be entitled to a share of the profits of a village situated in the taluka. At the time of the recent Settlement the revenue of the village was enhanced, not

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for the purpose of subjecting the talukdar to any additional liability as to payment of revenue, but for the purpose of determining the amount of cesses:

Held, that in estimating the profits of the village the talukdar was not entitled to treat the new assessment of revenue as a real and substantial thing and to deduct the newly assessed amount of revenue from the gross income of the village before coming to any division of profits with the said person. **O SUBHADRA KUAR v. SHAMBHU PRASAD, 3 O. L. J. 634** **500**

PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 6

S. 16—*Adjudication—Suit for declaration by decree-holder, maintainability of.*

After a judgment-debtor has become an insolvent, the decree-holder has no longer the right to attach his property nor to sue for a declaration in respect of it without the leave of the adjudicating Court. **L B RAMAN CHETTY v. MA HMU** **803**

S. 16—*Appeal—Application for adjudication dismissed—Parties, proper—Practice—Insolvency Court, power of, to refuse application for adjudication—Adjudication, order for.*

In an appeal by a debtor against an order of an Insolvency Court dismissing his application for adjudication, notice of the appeal should be given to a substantial number of creditors to enable them to represent their interests as respondents.

An Insolvency Court has inherent power to refuse an application for adjudication by a debtor when it is satisfied that it will result in no benefit to anybody and is an abuse of the process of the Court.

Where there are considerable debts and also certain assets which can be administered and a dividend paid to all the creditors, it is contrary to the policy of the Provincial Insolvency Act to refuse adjudication.

The fact that a debtor, who is otherwise within the provisions of the Insolvency Act which renders an adjudication against him possible, is also a dishonest man, is not a reason for refusing an order of adjudication; but where fraudulent conduct is disclosed, such as that the debtor was carrying on a dishonest business to obtain some material benefit for himself through the machinery of the Insolvency Court, the Court must take it into serious account when the time arrives for him to apply for his discharge. **A CHIRUNJI LAL v. AJODHIA PRASAD** **391**

Ss. 16, 46, 6—*Creditor's decree against insolvent, execution of—Jurisdiction.*

A creditor who has obtained a decree and who has proved his debt in the insolvency proceedings, is at liberty to execute his decree against the property which he alleges to be the property of the insolvent upon his undertaking to hand over to the Receiver all moneys realised in execution for the benefit of the general body of creditors.

An insolvency Court has jurisdiction, and would exercise a wise discretion, in permitting an executing creditor at his own risk and at his own costs to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some benamidar or other person on behalf of the insolvent. **C KAILAS CHANDRA SARKAR v. KANTIRAM DAS BANIA** **993**

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— Ss. 16, 41, 42—*Insolvent's property abandoned by Receiver, transfer of, validity of—Vendee, rights of.* Where a Receiver of the estate of an insolvent abandons a particular item of property as worthless and the insolvent after getting his discharge transfers the same, the transfer is not bad and the vendee is entitled to enforce his rights under the transfer. **A** SHRONANDAN *v.* KASHI, 15 A. L. J. 79 **878**

— S. 22—*'Aggrieved person,' meaning of—Order directing Receiver to execute release deed on behalf of insolvent—Jurisdiction.*

A 'person aggrieved', within the meaning of section 22 of the Provincial Insolvency Act, means a person against whom a decision has been pronounced, which wrongfully deprives him of something or wrongfully refuses him something or wrongfully affects his title to something. The decision should be such as to affect the right claimed, not merely to impede the person concerned in his assertion of it.

A having been declared an insolvent, his property vested in the Official Receiver. On 24th May 1908, he executed a promissory note and an agreement in favour of B, his father, providing that in case the former was not discharged within a year, he would convey certain property to B. On 6th October 1913, B applied to the Court to give leave to the Receiver to execute a release deed. The Court passed the order as prayed for. In an appeal by C, the 10th creditor, who held a mortgage over this property but with notice of agreement to convey in favour of B made by A:

Held, (1) that the order was passed without jurisdiction, being unauthorized by section 22 or any other provision of the Provincial Insolvency Act, as the application to execute a release deed was made to the Court, and not to the Receiver in whom the insolvent's estate vested and who alone was competent to give him the conveyance he required;

(2) that B was not an "aggrieved person" within the meaning of section 22 of the Act, as the omission or failure of the Receiver to execute the release deed was in no way a binding adjudication on his right and did not affect his remedy by suit;

(3) that the order was not justified even under the Court's general powers of superintendence over the Receiver, as the Receiver was neither asked to explain nor to adduce evidence. **M** MUJULURI SIVARAMAYYA *v.* SINGUMAHANTI BHUJANGA RAO, 20 M. L. T. 486; (1917) M. W. N. 75; 5 L. W. 255 **773**

— Ss. 22, 46—*Appeal—Claim against insolvent's estate—Creditors, rights and duties of—Party, who can be—'Person aggrieved,' meaning of—Estate, representation of—Receiver, right of—Receiver not appointed—Procedure, proper.*

One creditor out of the general body of creditors has no *locus standi* in an application in the Insolvency Court made, against the estate of the insolvent represented by the Receiver, by a person claiming adversely to the insolvent's estate and has no right of appeal against a decision in such an application.

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Unless the Receiver has refused to move and so given a decision by which each of the general body of creditors has been aggrieved, a creditor cannot apply to the Insolvency Court for the attachment of any property as being the property of the insolvent. The proper course is to apply to the Receiver to set him in motion and if the Receiver declines to move, the creditor can apply to the Court under section 22 of the Provincial Insolvency Act against the act or decision of the Receiver.

The Receiver ought to be made a party to any proceedings under section 22 of the Provincial Insolvency Act, and all questions which arise between the insolvent and a person who is either a creditor or a stranger to the insolvency must be decided between such person and the Receiver as representing the estate.

Creditors have a right to prove for their own claims, a right to supply the Receiver with information relating to claims which the insolvent's estate may have against other persons, and a right to bring the Receiver's conduct and decisions before the Court if he declines to act or neglects his duties; but they have no legal interest in the insolvent's estate and no title to represent it. The proper course, if a creditor is desirous of starting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings or to obtain the permission of the Court to intervene as an *amicus curiae*.

No one of the creditors can intervene except through the Receiver. If he is not a proper party to an application, he clearly has no right of appeal except in the event of an order for costs being made against him which ought not to have been made. He is not a 'person aggrieved' within the meaning of section 46 of the Act.

The words 'a person aggrieved' do not mean a man who is disappointed of a benefit which he might have received if some other order had been made. He must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something.

Where no Receiver has been appointed and the Judge is acting as Receiver under the provisions of the Act, the better course in such a case, when a dispute arises, is for the Judge to make an order appointing a particular creditor to represent the interests of the general body of creditors. **A** JHABBA LAL *v.* SHIB CHARAN, 15 A. L. J. 1 **76**

— S. 36, proceedings under—*Transfer by insolvent, questions for determination in—Burden of proof—Dower debt, transfer in discharge of, whether made "before and in consideration of marriage"—Transfer of Property Act (IV of 1882), s. 53.*

A transfer of his property by an insolvent to his wife, in lieu of dower settled upon her at the marriage, long after the marriage, is not a transfer made "before and in consideration of marriage" within the meaning of section 36 of the Provincial Insolvency Act.

—contd.

ordinary debt and a transfer of dower payable to her for consideration. But when such a transfer is fraudulent and the Court holds it void under section 36 of the Provincial Insolvency Act, the following matters are relevant, (1) the nature of the debt, (2) the delay in its discharge, (3) the bona fides of the debtor, (4) the genuineness of the debt and good faith on the part of the parties, (5) the absence of the property transferred. The burden of proving the good faith of the transfer is upon him.

Section 36 of the Provincial Insolvency Act is wider in its scope than section 53 of the Transfer of Property Act. The intent to defeat or delay creditors which is required to be proved under section 53 of the latter Act is not necessary in proceedings under section 36 of the former Act. Under section 36 all that is required is that the transfer must be made within two years of the adjudication of the insolvency of the debtor. **A MUHAMMAD HABIBULLAH v. MUSH-TAQ HUSAIN, 14 A. L. J. 1183 684**

—S. 37—Companies Act (VI of 1882), s. 213—'Fraudulent preference,' meaning of—Plea of fraudulent preference, whether can be put forward by debtor to avoid liability.

In order to succeed on a plea of 'fraudulent preference' it must be shown that the substantial or dominant object in making a payment was to give preference to a particular creditor in order to prevent the rateable distribution of the property of the debtor among all his creditors.

It cannot be inferred where a creditor has been pressing for his debt and payment is made to avoid the pressure.

Fraudulent preference cannot be pleaded by a debtor in defence to a suit filed against him in order to avoid his own obligation and not for the benefit of the creditors generally. It can be pleaded, if at all, only in the Insolvency Court. **S. MOHANDAS THAKURDAS v. TIKAMDAS HOTCHAND, 10 S. L. R. 123 250**

—Ss. 41, 42 878

—S. 42—Assets, absence of, whether ground for annulling or refusing adjudication.

Absence of available assets is no ground either for refusing an order for adjudication of an insolvent or for annulling an adjudication once made. **P. SHEAR v. GANGA RAM, 171 P. W. R. 1916 214**

—Ss. 43, 46—Insolvent vexatiously refusing to produce books of account, whether can be punished before order of discharge.

A Court is not bound to defer punishment in respect of acts and omissions mentioned in section 43 of the Provincial Insolvency Act, until the insolvent applies for his order of discharge. **O. RAM BEHARY LAL v. JAGAN NATH, 19 O. C. 89; 18 G. R. L. J. 270 638**

—S. 43(2) 996

—S. 46 638, 993

—Ss. 46, 22—Appeal—Claim against insolvent's estate—Creditors, rights and duties of—Party, who can be—'Person aggrieved,' meaning of—Estate, representation of—Receiver, right of—Receiver, not appointed—Procedure, proper 76

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—Ss. 46 (2), 43 (2)—'Person aggrieved,' meaning of—Appeal—Offence, nature of.

A creditor brought to the notice of the Court allegations against an insolvent said to constitute an offence under section 43, sub-section (2), of the Provincial Insolvency Act. The Court decided that there was no case. On the creditor's appeal:—

Held, that the creditor was not an "aggrieved person" within the meaning of the words as used in section 46 (2) of the Act and was not, therefore, entitled to appeal.

The offences dealt with under section 43, sub-section (2), of the Provincial Insolvency Act are in the nature of disciplinary offences, that is to say, offences committed by the insolvent during the insolvency in the nature of breaches of duty to the Court and not offences against the general criminal law. **A. LADU RAM v. MAHABIR PRASAD, 15 A. L. J. 31 996**

—S. 47, scope of—Civil Procedure Code (Act V of 1908), O. XXI, r. 71, applicability of—Insolvent's estate, sale of, by Receiver—Purchaser failing to deposit one-fourth of purchase-money, liability of—Proceeding, meaning of.

Section 47 of the Provincial Insolvency Act does not operate so as to confer upon a District Judge all the powers and to impose upon him all the duties in connection with the sale of an insolvent's property by a Receiver, which are provided by Order XXI of the Code of Civil Procedure in connection with the execution of decrees of Civil Courts.

Where, therefore, the highest bidder at the auction of an insolvent's property sold by the Receiver fails to deposit the one-fourth of the purchase-money and the property is thereafter sold at a loss, the Receiver cannot realize the loss from the bidder under Order XXI, rule 71, of the Civil Procedure Code, 1908.

Per Walsh, J.—The word "proceeding" as used in the Provincial Insolvency Act means a proceeding in Court.

A sale by a Receiver is an act of the Receiver and not a proceeding. There is no proceeding under the Provincial Insolvency Act to enable an Insolvency Court to call upon a stranger to the bankruptcy to show cause why he should not pay a sum which may or may not be due from him. **A. CHEDA LAL v. LACHMAN PARSHAD, 15 A. L. J. 253 830**

PROVINCIAL SMALL CAUSE COURTS ACT (IX of 1887), S. 15, SCH. II, CL. (8)—Civil Procedure Code (Act V of 1908), s. 102—Rent, suit for, whether cognizable by Small Cause Court—Appeal, second.

A suit to recover arrears of rent of a holding is not cognizable by a Court of Small Causes and a second appeal in such a suit would not, therefore, be barred under section 102, Civil Procedure Code. **PAT. SADANAND TEWARI v. DEB NATH MANJHI 980**

—S. 25 129, 906

—S. 25—Specific Relief Act (I of 1877), s. 12—Suit for specific performance and damages for breach of contract, cognizance of, by Small Cause Court—Proper course—Plaint, amendment of—Pleadings.

Where a plaintiff asks for two alternative reliefs in the Small Cause Court, one of them not being

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cognizable by that Court, but on the face of it a relief which cannot be given in law, the proper course is to direct that the plaint be amended by striking out the clause demanding that relief. **PAT BHARAT MAHTO v. NISARALI**, 20 C. W. N. 1020 **665**

— **SCH. II, ART. 31** **671**

— **SCH. II, ART. 35 (j)** — *Jurisdiction—Suit by successful objector as regards property attached and then released but not restored—Costs.*

Where a successful objector to the attachment of crops placed in charge of a person sues for damages on the ground that the crops have not been restored to him, the suit does not lie on the small causes, but on the regular side.

Where, on a regular Court returning the plaint for presentation to the Small Cause Court, the plaint is so presented, but the latter Court dismisses the suit on the ground that it is not cognizable by it, it ought not to order the plaintiff to pay costs. **O RAMPHAL v. MUTHRA**, 3 O. L. J. 578; 19 O. C. 236 **169**

PUNJAB ALIENATION OF LAND ACT (XIII of 1900), Ss. 3 (2), 5 **763**

— **S. 6—Mortgage to pay off old debt owing to non-agriculturists, whether contravenes provisions of Act—Consideration.**

It is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power and if such a person can induce an agriculturist to pay off a debt due to him and to take a mortgage of land from his debtor as security for himself, there is nothing in this Act to prohibit such a course. It is immaterial whether the mortgagee pays in cash or gives his bond, nor has he anything to do with the correctness of the account or real amount due beyond what the debtor himself admits and asks the mortgagee to pay for him. **P. HAIDAR v. FATEH KHAN**, 119 P. L. R. 1916; 114 P. W. R. 1916 **193**

— **S. 21 (2)—Civil Courts, power of, to enquire into action taken by Deputy Commissioner—Jurisdiction.**

Section 21 (2) of the Alienation of Land Act debars a Civil Court from taking cognizance of the manner in which a Deputy Commissioner exercises his powers under the Act. **P. GANGA RAM v. BAJA RAM**, 124 P. R. 1916 **763**

PUNJAB COURTS ACT (III of 1914), S. 44—*Revision—Material irregularity—Failure to determine provision of law applicable.*

Failure to determine whether an application is governed by the provisions of the Limitation Act of 1877 or by those of the Act of 1908, amounts to a material irregularity and is a good ground for revision. **P. MANOHAR LAL v. SADIQA BEGAM**, 101 P. R. 1916 **292**

PUNJAB PRE-EMPTION ACT (I of 1913), S. 5 (a) —*Pre-emption—Building, whether shop or residential—Test.*

In order to determine whether a certain building is, for the purposes of pre-emption, a shop or a

PUNJAB PRE-

residential building, chief or most important building in question is devoted to.

Where it was found that the storey of a building was used been so used for over fifty years, storey was a *balakhana*:

Held, that the building was one and was a shop, the upper storey being auxiliary or appended to the lower. **P. J. v. JANKI DAS**

— **Ss. 9, 24—Pre-emption—Sale sanctioned by Deputy Commissioner—Punjab Alienation of Land Act (XIII of 1900), ss. 3 (2), 5.**

Section 9 of the Punjab Pre-emption Act, repeals by implication so much of section 5 of the Punjab Alienation of Land Act, 1900, as conflicts with itself and, therefore, no right of pre-emption exists in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the latter Act.

If a sale is opposed to the provisions of the Alienation of Land Act, a suit for pre-emption in respect of the sale must be dismissed under section 24 of the Pre-emption Act. **P. GANGA RAM v. BAJA RAM**, 124 P. R. 1916 **763**

— **S. 24—Sale opposed to provisions of Alienation of Land Act—Procedure.**

If a sale is opposed to the provisions of the Alienation of Land Act, a suit for pre-emption in respect of the sale must be dismissed under section 24 of the Pre-emption Act. **P. GANGA RAM v. BAJA RAM**, 124 P. R. 1916 **763**

PUNJAB TENANCY ACT (XVI of 1887), S. 5 (1) (c)—*Settlement "along with the founder" and "by the founder," distinction between—Presumption.*

Settlement along with the founder in section 5 (1) (c) of the Punjab Tenancy Act means settlement contemporaneously, or in association with the original founder during the initial stages of foundation and development of the village.

Settlement by the founder might take place after those stages had passed. There is a fair presumption, though it is rebuttable by adequate proof, that where a cultivator is shown to have commenced to reside in and to cultivate *shamilat* land in a village during the lifetime of a founder thereof, such founder being at the time *lambardar* or otherwise directly concerned with the management of the *shamilat*, the cultivator in question was settled in the village "by the founder thereof as a cultivator therein," and so far fulfils the requirements of section 5 (1) (c). **P. LAKHI v. AMAR SINGH**, 3 P. R. 1916 REV. **1006**

— **S. 77 (3), as amended by Punjab Act III of 1912, scope of—Revenue Court, question exclusively triable by—Procedure—Civil Courts, duty of.**

Where, in a case cognizable by a Civil Court, the question was whether defendants were occupancy tenants of the land in dispute:

Held, that the matter was one which could, under section 77 (3) of the Tenancy Act, be heard and determined only by a Revenue Court, and that the Civil Court trying the suit should have returned the plaint for presentation to the Collector in accordance with the provisions of Act III of 1912. **P. MIHAN SINGH v. BHAGWAN KAUR**, 111 P. R. 1916 **390**

PUNJAB TENANCY AMENDMENT ACT (III of 1922)—Revenue Courts, case triable exclusively by—Procedure 390

REGISTRATION—Consideration, receipt of—Presumption—Burden of proof 874

Memorandum of mortgage, when to be registered 117

REGISTRATION ACT (XVI of 1908), S. 17 822

S. 17—Interest in land, option to repurchase, whether is—Lease, agreement to—Registration.

An option to purchase is not an interest in land and a document creating an option to purchase does not require registration under section 17 of the Registration Act. **L B MA SHWE U v. MAUNG PO LU**, 9 BUR. L. T. 177 91

S. 17 (1) (b), (c)—Agreement to sell and acknowledgment of earnest money, whether require registration—Evidence Act (I of 1872), s. 91—Oral evidence to prove payment of earnest-money, admissibility of.

An agreement to sell land which begins with the words: "I have absolutely sold the land" and after acknowledging receipt of Rs. 600, earnest-money, proceeds: "I will take the remaining money at the time of the completion of the sale-deed. I shall get the sale-deed completed after going to the spot," is only a promise to sell by means of a regular deed plus an acknowledgment of receipt of earnest-money and does not require registration under section 17 (1) (b) of the Registration Act.

The receipt of the earnest-money, however, does require registration under section 17 (1) (c) of the Registration Act, but this does not affect the present case inasmuch as the portion of the document containing the receipt is separable from the agreement part and oral evidence of payment of the earnest money is admissible under section 91 of the Evidence Act. **P SHARAF ALI KHAN v. JAGANDAR SINGH**, 98 P. R. 1916 132

S. 17, EXCEP. CL. VI—Consent decree creating mortgage—Registration 764

Ss. 32, 33—Presentation of documents for registration by agent of executant or claimant—Agent, authority of—Registration, certificate of—Presumption.

The certificate of registration raises a strong presumption that a document was duly registered, but when on the face of the endorsement it is apparent that a different man presented it for registration from the person who signed the endorsement, the presumption that it was duly presented is very much weakened.

Although a person who can present a document for registration is present and acquiesces in the presentation yet if he is not the person who presents the document for registration, and it is presented by a person who has no authority to present it, the registration is invalid.

When a document is presented by an agent, it is for the principal to prove that such agent held a power-of-attorney duly authenticated by the Registrar within whose district the principal resides, or that the power-of-attorney was otherwise recognizable under section 33 of the Registration Act. **L B A. M. V. CHERRY FIRM v. SUBAYA**, 9 BUR. L. T. 197 26

S. 33 26

REGISTRATION ACT—concl'd.

S. 35 (3)—'Assign', whether donee of gift is—Execution, admission of, by donee after donor's death—Registration.

A donee under a gift deed is an 'assign' of the executant within the meaning of section 35 (3) of the Registration Act.

Section 35 of the Act authorises the registration of a deed of gift, after the death of its executant, if the donee appears before the Registering Officer and admits the execution. **C AKSHAY CHANDRA v. MANMATHA NATH**, 20 C. W. N. 1345 362

S. 47—Documents, registration of, at different times—Priority of title.

As soon as a *kabala* is registered, it operates from the date of its execution and, therefore, the title created by it will have priority over that created by a later *kabala* executed in favour of another person in respect of the same property, notwithstanding its prior registration and the delivery of possession to that person. **C RAJANI NATH DAS v. OFAJUDDI MULLAH** 817

Ss. 49, 17, applicability of s. 49, to suits for refund of earnest-money.

Section 49 of the Registration Act does not apply to a suit for the refund of earnest-money. Therefore, a document which requires registration under section 17 of the Act, but which is unregistered, would be admissible in evidence in such a suit to prove payment of the earnest-money. **P CHITTAN LAL v. MUL CHAND**, 18 P. R. 1917 822

S. 49—Evidence—Unregistered sale-deed, admissibility of.

An unregistered sale-deed cannot be used in evidence of a contract which in itself affects property. **PAT MADHUR SAH v. THAG SAH**, 1 P. L. J. 455 994

RELIGIOUS ENDOWMENTS ACT (XX of 1863), S. 14, scope of—Public trusts—Suit for removal of trustee of temple—Sanction, whether necessary 688

RENT, fixation of, proof as to—Land held without payment of rent—Occupation rent, whether can be charged—Landlord, position of—Oudh Rent Act (XXII of 1886).

Where entries of a very old date in the revenue papers assert that certain plots of land are held by ordinary tenants and, in some instances, that a certain rate of rent is payable by the tenants, such entries, in the absence of anything to show how they came to be made, are not evidence as to the fixing of rent either by a competent authority or by action of parties, nor do they raise a presumption to that effect.

Where it is found that certain persons were permitted to hold land without payment of rent and without there being any agreement to pay rent or a fixation of its amount, the landlord is not entitled to claim from them a fair occupation rent. **O SARABJIT SINGH v. RAMPUR MATHRA ESTATE**, 3 O. L. J. 468 27

Maft allowed to jeth raiyat, whether amounts to rent 670

RES JUDICATA. See CIVIL PROCEDURE CODE. SECTION 11.

REVENUE PAPERS, entries in, construction of—
Rent, fixation of, proof as to— Land held without
payment of rent— Occupation rent, whether can be
charged— Landlord, position of— Oudh Rent Act
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suit— Appeal— Jurisdiction 92

ROYAL PROCLAMATION (12TH DECEMBER 1914),
whether retrospective 258

SAMBALPUR CIVIL COURTS ACT (IV B. C. OF
1906)—Deputy Commissioner and District Judge,
positions of 115

SIND COURTS CRIMINAL CIRCULARS, CHAP. V,
R. 22—*Procedure—Practice—Protracted examination
of witnesses and frequent lengthy adjournments in
criminal trial, effect of—Adjournments, frequent,
practice of granting, condemnation of—Court, inherent
power of, to prevent abuse of its process.*

Protracted examinations of witnesses and frequent
lengthy adjournments merely for the convenience of
Counsel, causing inordinate delay of a criminal trial
may practically amount to a denial of justice, and
ought not to be permitted. Protracted examinations
of witnesses should be stopped by a strict regard to
the provisions of the Evidence Act and the rules of
procedure and, where necessary, by the exercise of
the inherent powers vested in every Magistrate to
prevent the abuse of the process, i.e., the proceedings
of his Court.

Granting of frequent and lengthy adjournments in
disregard of rule 22, Chapter V, of the Sind Courts
Criminal Circulars condemned. *S. JEHANGIR PEROZ-
SHAH v. GANGARAM NAUMAL*, 10 S. L. R. 148; 18 Cb.
L. J. 54 38

SMALL CAUSE COURT, jurisdiction of—Suit for
damages for use and occupation of land 909

— Suit by executor for possession of moveable
property belonging to the deceased—Jurisdiction 75

SPECIFIC RELIEF ACT (I of 1877), S. 9—*Posses-
sion, physical, whether necessary, for maintainability
of suit— Landlord, possession of, nature of.*

When a tenant quits land the landlord's possession
revives and he retains it till he passes it on to the
next tenant, and if during the interval he is dis-
possessed by a third person he can eject the latter
by means of a suit under section 9 of the Specific
Relief Act. *L. B. SAN HLA BAW v. HLA PAW*, 9 BUR.
L. T. 172 20

— S. 12 665

— S. 18 (a)—*Contract Act (IX of 1872), s. 56,
para. (2)—Agreement to reconvey land purchased in
Court auction after setting aside sale—Omission to
apply for cancellation of sale—Specific performance
—Contract, performance of, whether rendered im-
possible—Imperfect title subsequently perfected—
Damages, whether adequate relief.*

Defendant, a Court auction-purchaser, agreed to
convey the land he purchased to plaintiff, who
was the judgment-debtor, after applying to Court
for cancellation of the sale, on the plaintiff de-
positing Rs. 100 within a specified date, which
the defendant was to credit under Order XXI,
rule 89, Civil Procedure Code. Plaintiff duly deposi-
ted the amount, but defendant did not get the sale

SPECIFIC RELIEF ACT—contd.

set aside. In a suit for specific performance of
the contract:

Held, (1) that the contract did not become im-
possible of performance by reason of defendant's
conduct in not applying for cancellation of the
sale;

(2) that the transaction being, in substance, an
agreement to resell the property to which the
defendant had only an imperfect title pending
confirmation of the Court sale, the defendant was
compellable to make good the contract out of the
interest that he subsequently obtained;

(3) that money compensation was not an ade-
quate relief. *M. NATARAJA PADAYACHI v. NAGAMUTHU
PADAYACHI* 761

— S. 22—*Vendor and purchaser—Contract to
sell, specific performance of—Delay—Discretion of
Court—Purchaser, duty of—Contract Act (IX of
1872), s. 55.*

Defendant agreed to execute a sale-deed of some
lands to the plaintiff by 30th April 1908. On 1st
May 1908 plaintiff intimated to defendant that the
sale price was ready and asked defendant to go to a
specified place, execute the sale-deed and receive the
money. On May 7th, 1st defendant wrote to plaintiff
that he had been waiting for him and would wait
till 10th May 1908 to conclude the sale. The plaintiff
did nothing after receipt of this notice and the
defendant on 13th May 1908 intimated to the plaintiff
that the contract was rescinded. On 29th April 1911
plaintiff instituted the present suit for specific per-
formance:

Held, that, having regard to the lapse of time that
had occurred, specific performance should be refused.

Even where time is not of the essence of the con-
tract, it is for the purchaser to show that he was
ready and willing to perform the contract within a
reasonable time after the agreed date. *M. MARUDA-
NAYAGAM PILLAI v. MUNUSAMY PILLAI* 776

— S. 27—*Sale by unregistered deed—Subsequent
sale to another by registered deed—Suit to register
deed and for declaration that subsequent sale is void,
nature of—Specific performance.*

Plaintiff obtained an unregistered sale-deed of the
property in dispute from the first defendant, who
subsequently sold the same property to the second
defendant under a registered sale-deed. Plaintiff
thereupon instituted a suit against both defendants
asking (1) that defendant No. 1 should be ordered
either to register the unregistered sale-deed or to
execute and register a second sale-deed, and (2) for
declaration that the transaction between the de-
fendant No. 2 and defendant No. 1 was null and
void, and for possession of the property:

Held, that the suit was one for specific perform-
ance under section 27 of the Specific Relief Act.
PAT MADHUR SAH v. THAG SAH, 1 P. L. J. 455 994

— Ss. 39, 40, 42—*Declaration, suit for, that an
endorsement on a document is a forgery, nature of—
Endorsement, whether document.*

An endorsement on a document is by itself a docu-
ment and is similar to the several parts of a docu-
ment indicated in section 40 of the Specific Relief
Act.

SPECIFIC RELIEF ACT—conold.

A suit for a declaration that an endorsement on a mortgage-deed is a forgery is really a suit for cancellation of an instrument and is of the nature indicated in section 39 of the Specific Relief Act. Section 42 is not applicable to such a case. **A RAM CHANDAR v. GANGA SARAN**, 14 A. L. J. 980

— S. 40 89

— S. 42 89, 977

— S. 42—Declaration, suit for—Form of decree
—Decree awarding declaration but dismissing substantial claim, futility of 161

— S. 42—Declaration, suit for—Plaint, allegations in.

Before admitting a plaint for a mere declaratory decree a Court should take particular care to see that the plaint contains the allegation that the plaintiff is in possession of the property. **L B MATUNG BA THAUNG v. MA SHIN MIN** 15

— S. 42—Declaratory suit—Consequential relief claimable—Suit, whether competent—Mortgage, redeemable—Suit for declaration that certain conditions were not enforceable, maintainability of.

A declaratory suit is not maintainable when the plaintiff is entitled to claim consequential relief.

Where, therefore, a mortgagor, instead of claiming possession of the mortgaged property by redemption, sues for a declaration that certain conditions of the mortgage are not enforceable, his suit must be dismissed. **P SAIDU SHAH v. MALAWA RAM**, 115 P. L. R. 1916 374

— S. 42—Declaratory suit—Consequential relief—Mahant, suit for removal of, and declaration of plaintiff's right to nominate successor, maintainability of.

A suit lies for removal of a mahant and for a declaration that plaintiff has the right to nominate a new mahant, without asking any further relief. In such a suit the prayer for removal of the defendant from the office does not imply his physical dispossession, all that is sought being a decree which would enable the successor on appointment to enforce his own right to take possession of the property.

TILOK CHAND v. RAM CHAND 374
R. 1916

SPECIFIC

STAMP ACT (II of 1899), Ss. 5, 6

984

SCH. I, ARTS. 1, 55, Ss. 5, 6—Document, construction of—Principal and agent—Accounts settled, re-opening of—Acknowledgment of liability—Release of agent from liability to account—Entries unstamped, admissibility of—Evidence—Settlement by compromise.

Accounts between a principal and agent were settled and the agent signed an entry to the following effect: "Due to me Rs. . . ." It was followed by a statement by the principal to the following effect: (page 70). "The balance of the liability is made up of moneys advanced by my agent from time to time on my behalf. The above does not include interest due on them." On the next page (page 71) it continued: "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent from all claims to account against him by me . . . in respect of the said receipts and disbursements. I hereby acknowledge the correctness of every one of the items of expenditure".

Held, *per Curiam*, that the entries constituted something more than a mere endorsement vouching simply for the correctness of the entries, that they contained an acknowledgment of a debt within the meaning of Article 1 of Schedule I of the Stamp Act and should have been stamped with a one-anna stamp.

Per **Abdur R** to C. J.—The statement at page 71 is a receipt for an account from the agent in the name of section 5 of the Stamp Act. The acknowledgment of the principal agent for the proceeds of the sale is penal.

In one instance the principal provided part of the account.

The

STAMP ACT—concl'd.

where the duties chargeable are different. **M RAMASWAMI AIYAR v. GNANAMANI NACHIAR**, 31 M. L. J. 851; (1917) M. W. N. 121; 5 L. W. 279 **984**

— — — **SCH. I, ART. 5, CL. (c)**—*Hire-purchase contract*
—*Agreement to hire with option to purchase, stamp duty on.*

An agreement to hire machinery with an option on the part of the hirer to purchase is an agreement within the meaning of Article 5, clause (c), of Schedule I to the Stamp Act and is, therefore, liable to a stamp duty of eight annas only. **C LINOTYPE AND MACHINERY CO. AND WINDSOR PRESS, In re**, 24 C. L. J. 93; 20 C. W. N. 1252; 44 C. 72 **175**

— — — **SCH. I, ART. 55** **984**

SUIT carried on by money supplied by third person, whether liable to dismissal **163**

— — — *Obligation to set aside forged document.*

There is no obligation on a party, who challenges as a forgery a document purporting to confer rights to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on any one even before it is set aside. **M VENKAMMA v. NARASIMHAM**, (1916; 2 M. W. N. 325; 4 L. W. 441 **642**

— — — *Unnecessary prayer for barred claim, joinder of, with other substantial reliefs not barred, effect of.*

The joinder of an unnecessary prayer in a claim which is barred by the dismissal of the suit. The claim adjudicated against the claimant. **M VENKAMMA v. NARASIMHAM**, 4 L. W. 441 **642**

— — — *Law.*

Section 44 of the Transfer of Property Act does not override the Hindu Law in a case governed by that law. **M KOTA BALABHADRA PATRAO v. KHETRA Doss**, 4 L. W. 99, 31 M. L. J. 275; (1917) M. W. N. 149 **168**

— — — **S. 53** **684**

— — — **S. 54**—*Sale-deed, unregistered—Property of vendee, position of*

TRANSFER OF PROPERTY ACT—cont'd.

mesne profits. An objection was raised that the transfer of the right to recover mesne profits was invalid under section 6 (c) of the Transfer of Property Act:

Held, that the transfer was valid, the right of the original decree-holders being not a mere right to sue but a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits.

Held, further, that under the present Code of Civil Procedure proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution, so that the assignees ought to have applied to the Court for permission to continue the suit under Order XXII, rule 10, of the Civil Procedure Code; but their omission to do so, under the circumstances of the case, could not be held fatal to their right to continue the suit. **PAT HARI PRASAD MISSEER v. KODO MARYA**, 1 P. L. J. 427 **998**

— — — **S. 8**—*Right, reservation of, inference of—Construction of document—Ambiguity.*

Where property is transferred on execution of a document, unless there is an ambiguity in the document, an intention to reserve a certain right cannot be necessarily implied under section 8 of the Transfer of Property Act except from the terms of the document itself. If the document, however, is ambiguous, a Court can consider the object of the grantor and other circumstances attending its execution and the acts of the parties since the date of its execution. **C SURESH CHANDRA ROY v. SURENDRA CHANDRA ROY** **870**

— — — **S. 44**, if applicable to cases under Hindu Law.

Section 44 of the Transfer of Property Act does not override the Hindu Law in a case governed by that law. **M KOTA BALABHADRA PATRAO v. KHETRA Doss**, 4 L. W. 99, 31 M. L. J. 275; (1917) M. W. N. 149 **168**

— — — **S. 53** **684**

— — — **S. 54**—*Sale-deed, unregistered—Property of vendee, position of*

In an appeal on the ground that the Court had no jurisdiction to try the suit inasmuch as it was beyond the pecuniary jurisdiction of that Court, the appellant has to show, under section 11 of the Suits Valuation Act, not merely that there has been an incorrect valuation but that the trial of the suit has been prejudicially affected thereby.

Per Walsh, J.—In such a case an appellant ought to take the ground in the memorandum of appeal and to state how he has been prejudicially affected.
A NASRAT HUSAIN v. ADIA SARAN 851

TRANSFER OF PROPERTY ACT (IV OF 1882)—
Homestead lands, tenancy of, whether transferable before passing of Act.

Tenancies from year to year of homestead lands were not transferable except by custom previous to the passing of the Transfer of Property Act. **C**
RAMADA SUNDARI MANDAL v. SHYAMA KANTA 939
— — — S. 6 661

— — — S. 6 (e)—*Mesne profits, decree directing ascertainment of, whether can be transferred.*

Plaintiffs Nos. 1 and 2 obtained a decree (a) for possession of certain immoveable property, and (b) directing an enquiry as to mesne profits. They sold their right to recover mesne profits under the decree to plaintiffs Nos. 3 and 4. Subsequently all the four plaintiffs applied to the Court to ascertain the

value of less than Rs. 100.
Possession, title by delivery of, when dependent upon.

If in the case of a sale of tangible immoveable property of a value of less than Rs. 100, the transaction is evidenced by a document which is unregistered, the vendee may fall back upon his title by delivery of possession. **O. HRIDAY BIHARI v. RAM RANI KUNWAR, 3 O. L. J. 460 20**

— — — S. 55—*Sale—Part-payment of purchase-money—Transfer of possession—Subsequent purchase by registered deed, right of.*

Defendant contracted to purchase certain property from N, paid half of the purchase-money, and was put in possession of the property and the other half of the purchase-money was agreed to be paid after the sale-deed was passed. N subsequently sold the property by a registered deed to plaintiff, who purchased it with notice of the contract with defendant. On a suit by plaintiff for possession:

Held, that plaintiff could not profit by his conveyance and that his suit was not maintainable.

...nt, and ...
...necessary or might have
...dispensed with.
...the statements do not amount to a settlement by
...compromise.

A settlement by compromise is a case in which the parties agree not to ascertain the exact balance but agree to take a gross sum as the balance, and not where parties having accounts between them meet and agree to settle those accounts by the ascertainment of the exact balance.

A settled account may be opened where substantial error is shown in the account or where fiduciary relations exist and a less considerable number of errors are shown or where fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown.

Per *Phillips, J.*—The recital as to release relates only to the items in respect of which an acknowledgment is given and the two matters are not 'distinct' matters within the meaning of section 5 of the Stamp Act, and the document is an acknowledgment and, being unstamped, is inadmissible in evidence.

In order to bring a document within the terms of section 6 it must be read as a whole, and if as a whole it comes within two definitions in the Schedule, then it must be stamped with the stamp of highest value

P
... 95 P. R. 1916; 145 P. L.

105

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE,
suit for—Plaintiff, what to show—Tender.

In a suit for the specific performance of a contract the plaintiff has to show, *first*, that he has performed or has been ready and willing to perform the terms of the contract on his part to be then performed and *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done. A default on his part in either of these respects furnishes a ground upon which the action may be resisted.

A plaintiff who as purchaser brings a suit for the specific performance of a contract for sale, is not entitled to the assistance of the Court if he defaulted to tender the balance of the consideration on or before the date fixed for the completion of the contract, even though it is proved that such tender, if made, would never have been accepted by the defendant-vendor. *C MANIK CHANDRA v. ABHOY DHARAN GOPE*,
24 C. L. J. 90

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TRANSFER OF PROPERTY ACT—contd.

Held, also, that plaintiff could only stand in the shoes of *N* and receive the balance of the purchase-money due, on payment of which he would have to convey the property to the defendant.

Quære.—Whether a defendant who contracts to purchase a certain property and pays a portion of the purchase-money has no defence against a suit by his vendor for possession. **B** GANGARAM GANPATI v. LAXMAN GANOBA, 18 BOM. L. R. 455; 40 B. 498

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— S. 55 (4) (b)—*Vendor and purchaser—Direction to pay consideration to third party—Vendor's charge, whether lost—Contract to the contrary, inference of.*

A vendor of immoveable property does not lose his statutory charge for unpaid consideration by a direction to pay it to a third person. The charge is for the purchase-money and it is immaterial that it is not directly payable to the purchaser. Such a direction is not a 'contract to the contrary' within the meaning of section 55 (4) of the Transfer of Property Act.

Per *Seshagiri Aiyar, J.*—If the direction is communicated to the proposed payee a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. Where it is not shown that the third person looked to the vendee for payment and where the vendor has to pay the third party himself the lien attaches to the property to the extent of that payment.

There are three classes of charges known to English Law (a) equitable charge founded on contract, (b) equitable lien enforced by Courts of Equity and (c) the common law lien which enables the vendor to keep back possession until he is paid. The Legislature in India, in order to avoid these confusions, has enacted a simple rule of law in section 55 of the Transfer of Property Act and it would be introducing an element of uncertainty if the interpretation of this unambiguous section is made to depend upon the English decisions. **M** SIVASUBRAMANIA AIYAR v. SUBRAMANIA AIYAR, 31 M. L. J. 530; (1916) 2 M. W. N. 306; 20 M. L. T. 375; 4 L. W. 415; 39 M. 997

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— S. 58

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— S. 58 (c)—*Sale, conditional—Option to repurchase—Mortgage*

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— S. 59

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— S. 59, PARA. 3—*Mortgage by deposit of title-deeds—Registration—Memorandum, when to be registered.*

Where a memorandum creates a mortgage it comes under the operation of the Registration Act, but where there is a deposit of title-deeds independently of it, the deposit creates the mortgage, and the memorandum need not be registered. **C** E. I. E. MORDECAI v. MORTHU MULL, 25 C. L. J. 160

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— S. 60

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343, 664

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— S. 76

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TRANSFER OF PROPERTY ACT—contd.

— S. 76 (h), *applicability of—Possession of mortgagee not as such, effect of.*

Section 76 (h) of the Transfer of Property Act does not apply where it does not appear that the mortgagee is in possession of the mortgaged property *qua* mortgagee, although he pays no rent for its use. **O** MUHAMMAD HUSAIN v. MUHAMMAD ASGHAR, 3 O. L. J. 462; 19 O. C. 328

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— Ss. 83, 84—*Deposit of mortgage amount in Court—Withdrawal, while litigation pending as to rightful heirs of deceased mortgagee, effect of—Interest, cessation of, on deposit after suit—Civil Procedure Code (Act V of 1908), O. XXIV, r. 3—Deposit and tender, distinction between.*

A deposit made in Court under section 83 of the Transfer of Property Act, to be effective, must remain in Court until the mortgagee or his successor-in-interest has been enabled or is in a position to draw it.

Where the mortgagee is dead, and the mortgagor, not being sure of the person entitled to the mortgage money, deposits it in Court but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money, and is, therefore, not entitled to cessation of interest.

Where the amount is paid after the institution of a suit by the mortgagee, the amount deposited should be deducted from the principal and interest *all* only for the balance.

Per *Seshagiri Aiyar, J.*—There is no analogy between tender and deposit. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person. In the case of a tender the person to whom it is made can have no claim for interest and no grievance if it is refused. A deposit, on the other hand, is ordinarily made when the debtor is in doubt as to who is the rightful claimant, and leaves it to the Court to hand the money over to the true owner. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined. The term 'deposit' implies that the money is in the hands of the Court until it is paid to the creditor.

Per *Phillips, J.*—*Obiter*.—When notice of the deposit is sent to the mortgagee through Court, and he refuses to accept it, it amounts to a tender through Court and interest ceases to run just as in the case when a mortgagee refuses a tender out of Court. There is no provision in the Transfer of Property Act, whereby interest is again to run if the deposit is withdrawn after the mortgagee has refused to receive it. The cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered, and this penalty is not remitted because he changes his mind when it is too late. **M** THEVARAYA REDDY v. VENKATACHALA PANDITHAN, 31 M. L. J. 548; (1916) 2 M. W. N. 321; 20 M. L. T. 403; 4 L. W. 433

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— S. 99

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TRANSFER OF PROPERTY ACT—concl'd.

— S. 107, scope of—*Tenancy-at-will*—*Writing and registration, whether necessary*—*Agreement to pay specified annual rent, whether tenancy from year to year.*

The first paragraph of section 107 of the Transfer of Property Act is restricted in its terms only to the three specified classes of leases enumerated therein, viz., (1) a tenancy from year to year, (2) a lease for any term exceeding one year and (3), a lease reserving an annual rent. In these three cases registration is necessary.

An agreement to pay a specified rent every year is not conclusive proof that the tenancy is from year to year.

A tenancy-at-will can be created verbally and leases which do not come within the first paragraph of section 107 can be proved by oral evidence. **C** SARAT CHUNDRA DUTTA v. JADAB CHUNDRA GOSWAMI, 21 C. W. N. 206; 44 C. 214 **956**

— S. 111 (g) **935**

TRANSFER OF RIGHT to receive offerings made to temple, validity of—Public policy—*Estoppel*, whether can validate invalid transfer **960**

TRUST—*Voluntary management of property*—*Constructive trustee*—*Liability of manager to account.*

A volunteer acting in the management of another's property, without remuneration, becomes clothed with the character, position and capacity of a trustee and is deemed in law a constructive trustee, and, as such, undoubtedly liable and bound to account for the management of the property committed to him. Voluntary service is the foundation underlying all trusteeship and the law precludes a trustee from making a profit or acquiring a benefit from his office as trustee. The fact of the payment of a salary affords no test in determining the liability to account. **PAT** DILTOR KOER v. HARKHOO SINGH **367**

TRUSTS ACT (II OF 1882), Ss. 42, 43 **692**

— S. 88, ILL. (f), construction of.

Illustration (f) to section 88 of the Indian Trusts Act goes further than the operative portion of the section itself, and, if it is to be regarded as laying down that in every case where after the death of a partner the money is left outstanding in that partnership the legal representative of the deceased partner is entitled to a share of the profits, it is not sound law. **M** SIDDICK v. MAHOMED HUSAIN, (1916) 2 M. W. N. 341, 4 L. W. 521 **728**

— S. 90 **295**

U. P. COURT OF WARDS ACT (IV OF 1912), S. 3 (3)—“Proprietor,” meaning of **188**

— Ss. 55, 3 (3)—“Proprietor,” interpretation of—*Ward, disability of, extent of*—*Joint Hindu family, property managed by Court of Wards*—*Member of joint family, which to be considered as ward.*

The disability of a ward, as mentioned in section 55 of the U. P. Court of Wards Act, is not limited to such of his property as is managed on his behalf by the Court of Wards, but extends to every possible cause of action cognizable by a Civil Court.

U. P. COURT OF WARDS ACT—concl'd.

The word “proprietor,” as used in the latter portion of section 3 (3) of the U. P. Court of Wards Act, means the proprietor who has actually made an application under section 10 of the Act.

Therefore, a member of a joint Hindu family governed by the Mitakshara Law, who has neither been declared a disqualified proprietor nor has joined in the application made by the other members of the family under section 10 of the U. P. Court of Wards Act, is not a “ward” under the Act, so that the disability arising out of the provisions of section 55 of the Act does not affect him, and he can institute a pre-emption suit in his personal capacity, in spite of the fact that his interests in the joint family property are managed by the Court of Wards.

A member of a joint Hindu family holding a share in the joint family property is a co-sharer of the subdivision in which the property is situate within the meaning of section 9 of the Oudh Laws Act, even though his name does not appear in the *khowat*. **O** LALTA SINGH v. CHHATTAR SINGH, 3 O. L. J. 552; 19 O. C. 306 **183**

U. P. LAND REVENUE ACT (III OF 1901), S. 36 **1001**

VATAN PROPERTY—*Gordon Settlement*—*Holder of such property, liability of*—*Widow of last holder—Maintenance.*

If a property is held under a *sanad* under the Gordon Settlement, each successive male holder of such property substantially holds an estate of inheritance in tail male unburdened by any duties of service and such holder is liable for maintenance of the widow of the last holder. **B** BASANGAUDA CHANNAPPAGAVDA v. GANGA KUMANGAUDA, 18 Bom. L. R. 450 **291**

VENDOR AND PURCHASER—*Direction to pay consideration to third party*—*Vendor's charge, whether lost* **429**

WAKF. See MUHAMMADAN LAW.

—, validity of, when provisions not carried out by wakif's heirs.

The validity of a *wakf* is not in any way affected by the fact that, since the death of the *wakif* his heirs have not carried out the provisions of the *wakfnama* but have treated the property dedicated as their own. **C** ASNA BIBI v. JAIGUNNISSA BIBI, 21 C. W. N. 222 **887**

WILL, construction of **404**

—, construction of—*Devise of whole estate to one person coupled with devise of particular village to another*—*Repugnancy*—*Alienation, powers of, reservation of, by testator, effect of on devise.*

A testatrix described herself as the “sole owner and possessor” (*malik-o-qabiz*) of her deceased husband's entire estate and in possession of all proprietary powers under his Will, and bequeathed the entire estate to one F C subject to certain conditions, one of which was that she would continue to be in possession of the entire estate, having full powers of alienation, and another was a devise of a particular village to one G, who would be its “sole owner and possessor” (*malik-o-qabiz*) after the testatrix's death:

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Held, (1) that the words *malik-o-qabiz* signified a full ownership in property;

(2) that the devise in favour of *G* was an absolute devise of the village;

(3) that the reservation of powers of alienation by the testatrix in her own favour was a mere surplusage, and neither abated from nor fortified the completeness of her ownership and possession, and

(4) that inasmuch as the entire estate devised to *F C* was subject to conditions, an absolute gift of the village in question to *G* was an exception but not repugnant to the devise in favour of *F C*. **PC** *FATEH CHAND v. RUP CHAND*, 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567

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— Gift—Deeds executed simultaneously—Statement in Will as to revocability of gift, effect of 69

WORDS AND PHRASES—

MOGHULI, meaning of.

The term '*moghuli*' appearing in a rent receipt is a word of doubtful meaning and at best imports no more than that the rent assessed represented a proportion of the Government revenue. **PAT** *NAWAGARH COAL CO., LTD. v. BEHARI LAL*, 20 C. W. N. 1135, 1 P. L. J. 275

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